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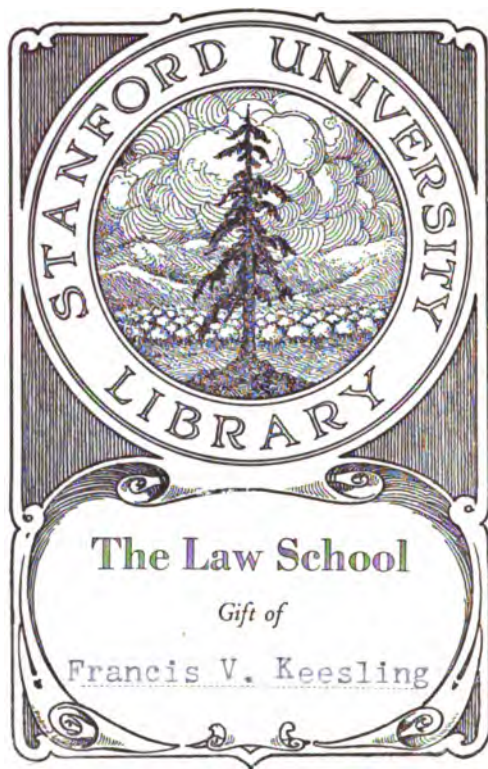
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# THE FEDERAL STATUTES

ANNOTATED

SUPPLEMENT 1912

Containing all the Laws of a Permanent and General Nature enacted  
by the second and third sessions of the Sixty-first Congress  
and by the Sixty-second Congress prior to Jan. 1, 1912

WITH

Supplemental Notes continuing the Annotation in the prior volumes

COMPILED UNDER THE EDITORIAL SUPERVISION OF

WILLIAM M. MCKINNEY

VOL. II

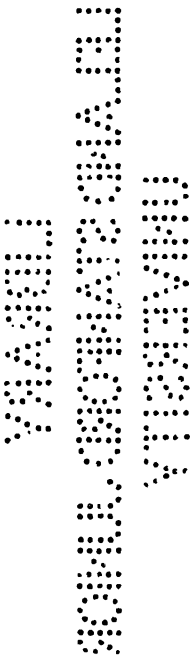
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# FEDERAL STATUTES, ANNOTATED.

## SUPPLEMENT.

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### CUBA.

#### Vol. II, p. 362.

Cuba, under the military governor, a foreign country. — In *U. S. v. Assia*, (1902) 118 Fed. 915, it was held that Cuba, under the military governor, was a foreign country, so

that one committing a crime on a vessel registered at a Cuban port was not subject to trial therefor in the courts of the United States.

#### Vol. II, p. 364, cl. IV.

Abolition of private franchise. — In *O'Reilly de Camara v. Brooke*, (1908) 209 U. S. 45, 28 S. Ct. 439, 52 U. S. (L. ed.) 676, affirming (1906) 142 Fed. 858, it appeared that the defendant, while governor of Cuba during its occupation by the United States, abolished a valuable franchise owned by plaintiff, who was a Spanish subject. On appeal the secretary of war of the United States confirmed the governor's order. Subsequently, by the so-called "Platt Amendment," incorporated in the treaty between the United States and the republic of Cuba, it was provided that

"all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected." It was held that such ratification was equivalent to an original authorization of defendant by the United States government to make the order in question and exempted defendant from any personal liability to plaintiff for depriving her of her property right in the franchise, and transferred such liability, if any, to the United States, or to the government of Cuba.

#### Vol. II, p. 364, cl. VI.

In *Pearcy v. Stranahan*, (1907) 205 U. S. 257, 27 S. Ct. 545, 51 U. S. (L. ed.) 793, it was held that the Isle of Pines must be regarded as at least *de facto* under the jurisdiction of the Republic of Cuba, and hence, as a "foreign country" within the meaning of the Dingley Tariff Act of July 24, 1897 (30 Stat. 151, ch. 11, 2 Fed. Stat. Annot. 391), since the United States has

never taken possession of such island as included in the territory ceded by Spain to the United States in the treaty of peace, but, instead, through its legislative and executive departments, has recognized the Cuban government as rightfully exercising sovereignty over the Isle of Pines as a *de facto* government until the *de jure* status shall be determined.

## CUSTOMS DUTIES.

### Vol. II, p. 391, sec. 1.

**Territory acquired by the United States by cession.**—*Lincoln v. U. S.*, (1905) 197 U. S. 419, 25 S. Ct. 455, 49 U. S. (L. ed.) 816, *following* *Fourteen Diamond Rings v. U. S.*, (1901) 183 U. S. 176, 22 S. Ct. 59, 46 U. S. (L. ed.) 138, set out in the original note.

The treaty with Spain by which Porto Rico was ceded to the United States, although signed December 10, 1898, and ratified by Spain (which was the last to ratify) on March 19, 1899, did not become effective for the purposes of the tariff laws until the exchange of ratifications, April 11, 1899, and all importations of merchandise arriving from Porto Rico at a port of entry of the United States prior to that date were subject to duty. *Armstrong v. Bidwell*, (1903) 124 Fed. 690. But merchandise arriving from Porto Rico at a port of entry of the United States at any time during said April 11th was not subject to duty. *Howell v. Bidwell*, (1903) 124 Fed. 688. Goods arriving at a port of entry of the United States from the Philippine ports after the treaty took effect were not subject to duty, although they were shipped prior to said April 11th. *American Sugar Refining Co. v. Bidwell*, (1903) 124 Fed. 677.

**Rule of classification.**—Where a tariff enumeration is descriptive of the use of imported merchandise, the chief or predominant use of an article should control in determining whether or not it comes within that enumeration. *U. S. v. Lehn*, (1901) 124 Fed. 87.

**Canal zone.**—Importations into the United

States from the Panama Canal zone, since the cession of such territory to the United States, are dutiable. *David Kaufman, etc., Co. v. Smith*, (1909) 175 Fed. 887.

**Isle of Pines.**—In *Pearcy v. Stranahan*, 205 U. S. 257, 27 S. Ct. 545, 51 U. S. (L. ed.) 793, decided in 1907, it was held that the Isle of Pines must be regarded as at least *de facto* under the jurisdiction of the Republic of Cuba, and hence as a "foreign country" within the meaning of the Dingley Tariff Act of July 24, 1897 (30 Stat. L. 151, ch. 11), since the United States has never taken possession of such island as included in the territory ceded by Spain to the United States in the treaty of peace, but, instead, through its legislative and executive departments, has recognized the Cuban government as rightfully exercising sovereignty over the Isle of Pines as a *de facto* government until the *de jure* status shall be determined.

**Schedule titles.**—The titles of the various schedules in tariff acts are not intended to be perfectly accurate, but furnish general information only of the articles enumerated in the paragraphs therein. *U. S. v. Brown*, (C. C. A. 1905) 136 Fed. 550.

**Time duties due.**—As soon as imported merchandise subject to duty has been entered into the country, duties become due on same, whether the entry is surreptitious or honest. *American Sugar Refining Co. v. Bidwell*, (1903) 124 Fed. 683; *Cuccio Di G. v. U. S.*, (1909) 172 Fed. 304; *U. S. v. Ehrigott*, (1910) 182 Fed. 267.

### Vol. II, p. 392, par. 1.

**Acetic acid anhydrid.**—The term "acetic acid" is not limited to the article scientifically known by that name, but is intended as a general commercial designation of a class of articles which are commercially so known, and includes the substance known as "acetic acid anhydrid." *Lueders v. U. S.*, (1905) 140 Fed. 970.

**Extract of nutgalls.**—This paragraph does not include extract of nutgalls, consisting of a mixture of powdered nutgalls and water, which contains some tannin, and from which tannic acid may be produced. *U. S. v. Proctor*, (C. C. A. 1906) 145 Fed. 126, *affirming* (1905) 139 Fed. 586.

**Mixture of boracic acid and borax.**—In *Levi v. U. S.*, (1903) 126 Fed. 420, it was held that a certain antiseptic preservative, consisting of an intimate mechanical mixture of boracic acid and borax, the former being the more valuable component, is an article not enumerated in the Tariff Act of July 24,

1897, either as "boracic acid," under this paragraph, as "chemical compounds," under paragraph 3, or as "borax," or "borate material," under paragraph 11, and is therefore subject to assessment at the same rate of duty as boracic acid, under this paragraph, by virtue of section 7, which prescribes that "on articles not enumerated, manufactures of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value."

**Oleic acid or red oil.**—Paragraph 568 does not include so-called "oleic acid," or red oil, which is fit for other uses, although commonly used as soap stock, but it is properly dutiable under paragraph 1. *Hill v. U. S.*, (1906) 151 Fed. 475, 81 C. C. A. 13, *affirming* 143 Fed. 361.

**Extract of nutgall.**—See under this title, vol. 2, p. 395, par. 20.

## Vol. II, p. 392, par. 2.

**"Compound."**—In paragraph 2, relating to alcoholic compounds, the word "compound" is not limited by any trade usage or technical adaptation, but is used in its common broad sense of being any union or mixture of elements, ingredients, or parts, as fine-cut herbs commingled with alcohol and constituting to some degree an infusion. *U. S. v. Stone, etc., Co.*, (C. C. A. 1909) 175 Fed. 33, *reversing* 171 Fed. 293.

**Mixture of fine cut herbs and alcohol.**—In paragraph 2, the term "alcoholic compounds" includes a mixture of fine-cut herbs

and alcohol, in which the alcohol mainly serves as a preservative in the importation of the leaves, but continues in use after importation, for the purpose of producing a tincture, although there might be no justification for holding that the purpose of using the alcohol as a mere preservative determines classification under this provision. *U. S. v. Stone, etc., Co.*, (C. C. A. 1909) 175 Fed. 33, *reversing* 171 Fed. 293.

**Herbs in alcohol.**—See under this title, vol. 2, p. 504, sec. 6.

## Vol. II, p. 392, par. 3.

**Bone-size substitute**, consisting of chemical starch, dextrin, magnesium chloride, and silica, which is used for stiffening the backs of fabrics, is not a preparation fit for use as starch, under paragraph 285, but is a chemical compound, under paragraph 3. *U. S. v. Ducas*, (1903) 149 Fed. 253.

**Borate of manganese.**—The enumeration in paragraph 11, of "other borate material," refers only to borate materials found in nature in a raw condition, such as the "borates of lime or soda" included in the same provision, and does not embrace borate of manganese, or bormangan, which is a manufactured article made from manganese and borates of lime or soda, and which is held to be dutiable as a chemical compound or salt under paragraph 2. *Hempstead v. Thomas*, (C. C. A. 1904) 129 Fed. 907, *reversing* (1903) 123 Fed. 346.

**Gadulol**, an extract of cod liver oil, which in the form in which imported is not prepared for the use of the apothecary or physician, and which is not dispensed in that form, is not a "medicinal preparation," under paragraph 67, but is dutiable as a chemical compound under paragraph 3. *U. S. v. Merck*, (1905) 136 Fed. 817, 69 C. C. A. 472, *affirming* (1903) 126 Fed. 438.

**Glycerophosphate of lime**, though occasionally dispensed medicinally, is almost always used in combination with other drugs in the preparation of elixirs. It has been held that it is not a "medicinal preparation," but a "chemical compound," within the meaning of paragraph 3. *Klipstein v. U. S.*, (C. C. A. 1909) 167 Fed. 535.

**Olein**, a distillate from wool grease, in the form of an oil, is not "wool grease," within the meaning of paragraph 279, but is dutiable as a "distilled oil," under paragraph 3. *Swan, etc., Co. v. U. S.*, (1909) 172 Fed. 173.

**Extract of nutgall.**—See under this title, vol. 2, p. 395, par. 20.

**Commercial carbonate of baryta.**—See under this title, vol. 2, par. 489.

**Lysol.**—See under this title, vol. 2, p. 393, par. 11.

**Muguet pomade.**—See under this title, vol. 2, p. 493, par. 626.

**Mixture of boracic acid and borax.**—See under this title, vol. 2, p. 392, par. 1.

**Niger-seed oil.**—See under this title, vol. 2, p. 490, par. 568.

**Nut oil.**—See under this title, vol. 2, p. 493, par. 626.

**Soluble cresote.**—See under this title, vol. 2, par. 524.

## Vol. II, p. 393, par. 10.

**Blood charcoal**, a substance which, like bone char, is composed chiefly of carbon, and is used for decolorizing sugar, is not dutiable under paragraph 97 as an article composed of carbon, but either under paragraph 10 as

bone char by similitude, or at the similar rate provided in section 6, for unenumerated manufactured articles. *U. S. v. Lueders*, (1906) 148 Fed. 398.

## Vol. II, p. 393, par. 11.

**Borate of manganese.**—See under this title, vol. 2, p. 392, par. 3.

**Mixture of boracic acid and borax.**—See under this title, vol. 2, p. 392, par. 1.

## Vol. II, p. 394, par. 12.

**Synthetic camphor.**—See under this title, vol. 2, p. 487, par. 515.

## Vol. II, p. 394, par. 13.

**Precipitated chalk.**—The article produced by the artificial precipitation of chalk, and bolting and packing it in bags, is not "manu-

factures" of chalk, within the meaning of paragraph 13, but is chalk itself, and is dutiable under the provision in the same

paragraph for "chalk artificially precipitated." *U. S. v. Anderson*, (1909) 175 Fed. 961, 99 C. C. A. 451. Compare *Lyon v. U. S.*, (1903) 121 Fed. 204.

"Prepared for toilet purposes."—While in the exception in this paragraph of chalk "prepared for toilet purposes" the preparation referred to is not, perhaps, such as is necessary to make a completed toilet article, there must be advancement toward use for toilet purposes, by the admixture of flavor-

ing or other ingredients, or otherwise; and chalk that has been merely precipitated artificially, bolted, and packed in bags is not within that provision. *U. S. v. Anderson*, (1909) 175 Fed. 961, 99 C. C. A. 451.

Talc in the form of cubes, which is used in making gas burners and insulators, is dutiable as French chalk, by similitude, under paragraph 13. *Kraemer v. U. S.*, (1910) 180 Fed. 638.

## Vol. II, p. 394, par. 15.

Bleachers' blue, which is not used as a color or dye, but solely as a bleaching mixture, has been held not to be within the provision in paragraph 15, for coal tar colors or dyes, but within the further provision in the same paragraph for coal tar products or preparations that are not colors or dyes. *De Ronde v. U. S.*, (1903) 148 Fed. 653.

Bromofluorescic acid is dutiable as a coal tar color or dye under paragraph 15. *U. S. v. Kuttroff*, (1906) 147 Fed. 758, *affirmed* (C. C. A. 1907) 154 Fed. 1004.

"Carbolineum" or "carbolineum avenarius."—The article known as "carbolineum" or "carbolineum avenarius," which consists of dead oil modified by the action of chlorine gas, is dutiable under the provision in paragraph 15, for "preparations of coal tar, not colors or dyes and not medicinal, not specially provided for," and is not dutiable under the provision for "chemical compounds," in paragraph 3, or free of duty as "dead or creosote oil," under paragraph 524. *Downing v. U. S.*, (1901) 123 Fed. 1000.

"Color or dye."—An article which contains all the essential elements and determining characteristics of a color or dye, needing only to have its coloring properties rendered accessible by dropping it into water containing an alkali, is a color or dye within the meaning of paragraph 15. *U. S. v. Kuttroff*, (1906) 147 Fed. 758, *affirming* (C. C. A. 1907) 154 Fed. 1004.

Lysol, a liquid substance in which coal tar in the origin of the elements that give it its determining characteristic, the chief use of the article being otherwise than as a medicine, though used as such to a limited and comparatively insignificant extent, is dutiable under the provision in paragraph 15, for "preparations of coal tar, . . . not medicinal," and not under paragraph 3, covering "chemical compounds." *U. S. v. Lehn*, (1901) 124 Fed. 87.

Phthalic anhydride and tetrachlorophthalic anhydride.—See under this title, p. 392, par. 1.

Soluble creosote.—See under this title, vol. 2, par. 524.

## Vol. II, p. 394, par. 17.

Ping-pong balls are not "toys," as provided for in paragraph 418, but are dutiable under paragraph 17 as articles of collodion. *U. S. v. Strauss*, (1905) 136 Fed. 185, 69 C. C. A. 201, *reversing* (1904) 128 Fed. 473; *U. S. v. Wanamaker*, (1905) 136 Fed. 266.

Pyroxylin rods partly finished are dutiable as partly finished "articles" of pyroxylin, under paragraph 17. *Rice v. U. S.*, (1909) 176 Fed. 581.

Cinematograph films.—See under this title, vol. 2, p. 469, par. 403.

Pyroxylin smokers' articles.—See under this title, p. 481, par. 459.

Toys made of celluloid.—See under this title, vol. 2, p. 472, par. 418.

Umbrella sticks with celluloid handles.—See under this title, p. 481, par. 426.

## Vol. II, p. 395, par. 20.

Articles used in dyeing or tanning are not "drugs," within the meaning of that expression as used in paragraph 20 and paragraph 548; that term being limited in its common acceptance to medicinal preparations, though broadly it may include all preparations used in the arts. *Leber v. U. S.*, (1904) 135 Fed. 243.

Chrysarobin is dutiable as a drug advanced in value, under paragraph 20, and not as a medicinal preparation, under paragraph 68. *Levi v. U. S.*, (1905) 140 Fed. 126.

Extract of nutgalls, an article which is made by grinding nutgalls, digesting the

powder in water, and filtering to remove impurities, a chemical being added as a preservative without working any chemical change, is not dutiable as tannin or tannic acid, under paragraph 1, nor as a chemical compound under paragraph 3, but either directly or by similitude as "drugs, such as . . . nutgalls, . . . advanced in value or condition," under paragraph 20. *Proctor v. U. S.*, (1905) 139 Fed. 586.

Powered opium is a "drug advanced in value or condition," within the meaning of paragraph 20, rather than opium crude or unmanufactured, under paragraph 43. *U. S.*

*v. McKesson*, (1906) 172 Fed. 168, *following* *Merck v. U. S.*, (1906) 151 Fed. 14, 80 C. C. A. 510.

Scammony resin, prepared from gum scammony, or scammony root, and used principally in compounding medicines, is dutiable as a drug advanced in value or condition, under paragraph 20, rather than as a medicinal preparation, under paragraph 67. *U. S. v. Martin*, (1907) 155 Fed. 264.

Balsam in capsules. — See under this title, vol. 2, p. 400, par. 68.

Capers pickled in vinegar. — See under this title, vol. 2, p. 431, par. 241.

Herbs in alcohol. — See under this title, vol. 2, p. 504, sec. 6.

Persian berry extract. — See under this title, vol. 2, p. 504, sec. 6.

Wai san. — See under this title, vol. 2, p. 433, par. 257.

## Vol. II, p. 395, par. 22.

Extract of mangrove bark. — See under this title, vol. 2, p. 488, par. 542.

## Vol. II, p. 396, par. 23.

Gelatin. — So-called "finings," an article consisting of gelatin containing considerable proportion of sulphurous acid or sulphite as a preservative, is dutiable as "gelatin," under paragraph 23, and not as a manufacture of gelatin, under paragraph 450, or as an un-

enumerated manufactured article, under section 6. *Sonoma Wine, etc., Co. v. U. S.*, (1900) 123 Fed. 999.

Bone size. — See under this title, vol. 2, p. 504, sec. 6.

## Vol. II, p. 396, sec. 32.

Soluble grease. — See under this title, vol. 2, p. 504, sec. 6.

## Vol. II, p. 397, par. 40.

Measurement. — The description of merchandise in an invoice as contained in "gallon" tins is not to be taken as conclusive against the importers, as fixing the amount contained in the tins for the assessment of duty. Such descriptions do not purport to indicate exactly the amount so contained, and it is the duty of government officers to ascertain as nearly as possible the quantity imported. *U. S. v. Zucca*, (1907) 154 Fed. 172.

Olive oil in large cans. — In *U. S. v. La Manna*, (1907) 154 Fed. 927, *affirmed* (C. C. A. 1908) 158 Fed. 1022, the court in construing paragraph 40, providing (1) for olive oil "in bottles, jars, tins, or similar packages," and (2) for "olive oil not specially provided for," held, that oil in five-gallon tins, in which form it is not sold to the consumer but to hotels and retail dealers, is not subject to the first provision, but to the latter.

## Vol. II, p. 397, par. 43.

Powdered opium. — See under this title, vol. 2, p. 395, par. 20.

## Vol. II, p. 398, par. 53.

Enamel paint. — See under this title, vol. 2, p. 399, par. 57.

## Vol. II, p. 398, par. 54.

Colors containing lead. — The provision for "colors . . . not containing quicksilver, but . . . containing lead," in paragraph 54, is a more specific enumeration of colors containing lead than the provision for "colors . . . not otherwise specially provided for," in paragraph 58. *U. S. v. Marsching*, (1909) 177 Fed. 593.

Lakes containing lead are more specifically provided for as "colors . . . containing lead," under paragraph 54, than as "lakes . . . not specially provided for," under paragraph 58. *U. S. v. G. Siegle Co.*, (1909) 175 Fed. 885.

## Vol. II, p. 399, par. 57.

Enamel paint. — In *Pomeroy v. U. S.*, (1903) 126 Fed. 583, it was held that certain so-called enamel paint, consisting of a white paint containing zinc, but not containing lead, ground in linseed oil, varnish being

added to give a gloss, but without affecting the character of the mixture as a paint, is more specifically enumerated under the provision in paragraph 57, for "white paint or pigment containing zinc, but not containing

lead," than under the provision in paragraph 53, for "varnishes," or that in paragraph 58, for "all paints, . . . whether crude or dry or mixed, or ground with water or oil or with solutions other than oil, not otherwise specially provided for." To the same effect see *U. S. v. Bird*, (1909) 167 Fed. 319, 92 C. C. A. 631.

**Lithofone.**—Where it was proved that lithofone, composed of 70 per cent. sulphite of barytes and 30 per cent. sulphide of zinc, was known as "lithofone," whether dry or ground in oil, and by commercial designation was known as "sulphide of zinc white," it was classifiable for duty as such under para-

graph 57, and not as a white paint or pigment containing zinc, but not containing lead. *Gabriel v. U. S.*, (C. C. A. 1903) 123 Fed. 296, *affirming* (1902) 114 Fed. 401, set out in the original note.

**Chlorophyll.**—See under this title, vol. 2, p. 504, sec. 6.

**Colors containing lead.**—See under this title, vol. 2, p. 398, par. 54.

**Enamel paint.**—See under this title, vol. 2, p. 399, par. 57.

**"Flitters."**—See under this title, vol. 2, p. 420, par. 175.

**Persian berry extract.**—See under this title, vol. 2, p. 504, sec. 6.

## Vol. II, p. 400, par. 67.

**Hyoscin hydrobromate**, shown to be a chemical salt of solely medicinal use, in the preparation of which alcohol is necessarily used, was dutiable under the Tariff Act of 1890, paragraph 74, as a medicinal preparation in the preparation of which alcohol is used, and not under paragraph 76 of that Act as a chemical compound or salt. *Schering v. U. S.*, (1900) 119 Fed. 472.

**"Medicinal preparations" defined.**—The expression "medicinal preparations," as used in the Tariff Act, means such articles as are of use, or believed by the prescriber or user fairly and honestly to be of use, in curing, or alleviating, or palliating, or preventing some disease or affection of the human frame. *Dodge v. U. S.*, (1891) 130 Fed. 624.

**Preparations in which alcohol may or may not be used.**—This paragraph applies to an import which is a medicinal preparation in the preparation of which alcohol is used,

though alcohol need not be, and sometimes is not, used in the preparation of the article. *U. S. v. Schering*, (C. C. A. 1903) 123 Fed. 65, *reversing* (1900) 119 Fed. 473, cited in the original note.

**Presumption.**—In the absence of evidence that alcohol was not used in the preparation of the import, it will be presumed, in support of the collector's assessment, that it was so used. *U. S. v. Schering*, (C. C. A. 1903) 123 Fed. 65, *reversing* (1900) 119 Fed. 472.

**Euquinine.**—See under this title, vol. 2, p. 496, par. 647.

**Gaduol.**—See under this title, vol. 2, p. 392, par. 3.

**Glycerophosphate of lime.**—See under this title, vol. 2, p. 392, par. 31.

**Scammony resin.**—See under this title, vol. 2, p. 395, par. 20.

## Vol. II, p. 400, par. 68.

**Adeps lanæ.**—The provision for "wool grease," in paragraph 279, does not include the refined and expensive products from wool grease, known as "adeps lanæ anhydrous" and "adeps lanæ cum aqua," and used medicinally, which are properly classified under paragraph 68. *Zinkeisen v. U. S.*, (1909) 167 Fed. 312, 92 C. C. A. 624.

**Balsam in capsules.**—Gelatin capsules containing balsam are dutiable as "medicinal preparations" under paragraph 68, and not dutiable under paragraph 20 relating to drugs such as "balsams . . . advanced in value or condition," or free under paragraph 548 for drugs, including "balsams . . . in a crude state and not advanced in value or condition." *U. S. v. Lehn*, (1909) 172 Fed. 171.

**Creolin-pearson** is not a medicinal preparation within the meaning of paragraph 68. *Merck v. U. S.*, (1903) 147 Fed. 896.

**Hexamethylenetetramin** is a medicinal preparation in the preparation of which alcohol is not used, within the meaning of paragraph 68. *Lehn v. U. S.*, (1906) 147 Fed. 640.

**Ichthyol sodium.**—Inasmuch as, technically and commercially, the term "ichthyol" includes no other ichthyol compounds than ichthyol ammonium, the unqualified enumera-

tion of "ichthyol" in paragraph 626 should not, in the absence of words indicating an intention to include such compounds, be held to include ichthyol sodium, which is properly classified under paragraph 68. *Merck v. U. S.*, (1910) 177 Fed. 482.

**Orange-flower water and rose water**, which are articles used to some extent medicinally, but chiefly for other purposes not mentioned in any enumerations of the tariff, were dutiable as "medicinal preparations" under the Tariff Act of March 3, 1883, ch. 121, Schedule A, 22 Stat. L. 494, and not according to the provisions of sections 2499 and 2513, R. S., as amended by section 6 of said Act, 22 Stat. L. 489, 491, 523, relating to articles not "enumerated" in said Act. *Dodge v. U. S.*, (1891) 130 Fed. 624.

**Paraldehyde**, though produced from aldehyde, which is a by-product in the distillation of alcohol, but contains no alcohol, is a medicinal preparation in the preparation of which alcohol is not used, within the meaning of paragraph 68. *Merck v. U. S.*, (1905) 147 Fed. 895.

**Salol**, being a medicinal preparation in the preparation of which alcohol may or may not be used, was dutiable under the Tariff Act 1890, paragraph 76, as a chemical com-



pound or salt, and not under paragraph 74 of that Act covering medicinal preparations in the making of which alcohol is used. *Scheering v. U. S.*, (1900) 119 Fed. 472.

"Anthrax vaccine" or "blacklegs." — See under this title, vol. 2, p. 499, par. 692.

Chrysarobin. — See under this title, vol. 2, p. 395, par. 20.

Floral waters. — See under this title, vol. 2, p. 504, sec. 6.

Guarana. — See under this title, vol. 2, p. 488, par. 648.

"Medicinal preparations" defined. — See under this title, vol. 2, p. 400, par. 67.

Medicated fruit juice. — See under this title, vol. 2, p. 441, par. 299.

## Vol. II, p. 401, par. 70.

Tooth soap. — See under this title, vol. 2, p. 401, par. 72.

## Vol. II, p. 401, par. 72.

Tooth soap. — The provision in paragraph 72, for "all descriptions of toilet soap," constitutes a more specific enumeration of tooth soap, used as an application to the teeth, than does the provision in paragraph 70, for

"preparations used as applications to the . . . teeth, . . . such as . . . dentifrices. . . . not specially provided for." *U. S. v. Park*, (1907) 155 Fed. 143.

## Vol. II, p. 402, par. 82.

Rubber sponges. — See under this title, vol. 2, p. 478, par. 449.

## Vol. II, p. 402, par. 87.

Magnesia brick. — *Fleming v. U. S.*, (1899) 124 Fed. 1014, following *Fleming Cement, etc.*, *Co. v. U. S.*, (1897) 84 Fed. 158, set out in the original note.

Retort settings (fire-brick) weighing more than ten pounds are dutiable by similitude as "fire-brick weighing not more than ten pounds each," under paragraph 87. *U. S. v. Behrend*, (1909) 167 Fed. 317, 92 C. C. A. 629.

Welsh quarry tiles. — So-called "Welsh quarries" are not dutiable as "tiles" under paragraph 88, but under paragraph 87 as "brick, other than fire brick," which they closely resemble in material, quality, texture, and the use to which they are put, within the meaning of the so-called "similitude clause" in section 7. *Traitel v. U. S.*, (1904) 131 Fed. 994.

## Vol. II, p. 402, par. 88.

Flint tiles. — Of the provision in paragraph 88, first, for "tiles, plain unglazed, one color, exceeding two square inches in size," and second, for tiles "semi-vitrified, flint," etc., the latter is more specific; and tiles em-

braced in both descriptions are dutiable under the latter. *Schroeder v. U. S.*, (1907) 156 Fed. 957, 84 C. C. A. 457.

Welsh quarry tiles. — See under this title, vol. 2, p. 402, par. 87.

## Vol. II, p. 403, par. 92.

Composition pumice stone. — The article known as "composition pumice stone," consisting of ground pumice stone mixed with clay, in the form of bricks or cakes, is not dutiable under the provision in paragraph 97, for "articles and wares composed wholly or in chief value of earthy or mineral substances

. . . not decorated," but, by virtue of the similitude clause in section 7 of said Act, is dutiable under paragraph 92, as being substantially similar in texture, material, and use to the "pumice stone, wholly or partially manufactured," therein enumerated. *Waddell v. U. S.*, (1900) 124 Fed. 301.

## Vol. II, p. 403, par. 93.

Allowance for moisture. — Under paragraph 93, making china clay dutiable by the ton, duty may properly be laid upon the actual weight of the clay and the moisture therein, if the moisture is not more than is ordinarily found; but duty should not be exacted on an abnormal amount of moisture. *Perkins v. U. S.*, (1908) 160 Fed. 272.

Asphaltum mastic, consisting of limestone rock asphalt, which, after having been reduced to a powder and had bitumen added to it, has been made into round cakes weighing about fifty-five pounds each, is dutiable under the provision in this paragraph for "asphaltum and bitumen, not specially provided for, . . . if dried or otherwise ad-

vanced in any manner," and not under the provision in the same paragraph for "limestone rock asphalt containing not more than fifteen per centum of bitumen." *Saacke v. U. S.*, (1900) 122 Fed. 895; *Gabriel v. U. S.*, (1900) 122 Fed. 896.

Trade custom. — Under paragraph 93, making china clay dutiable by the ton, the duty

on china clay in casks may properly be based on the actual weight of the importation, regardless of the custom of the trade to consider a cask as half a ton and to pay for it on that basis. *Perkins v. U. S.*, (1908) 160 Fed. 272.

Plastilina or modeling clay. — See under this title, vol. 2, p. 504, sec. 6.

## Vol. II, p. 403, par. 94.

Carmelite ware. — See under this title, vol. 2, p. 404, par. 95.

Sarreguemines ware. — See under this title, vol. 2, p. 404, par. 96.

## Vol. II, p. 404, par. 95.

Bottle stoppers of china or porcelain, on which there have been printed in various colors firm names, and trademarks indicated by various devices, such as a monogram, a star, a bird, a lion, etc., were held not to be ornamented or decorated, within the meaning of paragraphs 84, 85, Tariff Act Aug. 27, 1894, relating to various kinds of earthenware when "not changed in condition by superadded ornamentation or decoration" (paragraph 84), and when "printed or otherwise decorated in any manner" (paragraph 85), and were dutiable under the former, and

not the latter, of those provisions. *U. S. v. Borgfeldt*, (1900) 123 Fed. 196.

"Carmelite ware," consisting of earthen cooking ware of a dark brown color, some of the articles having a white lining and some no lining, is not within the provision for "common . . . brown . . . earthenware," in paragraph 94, but is within paragraph 95. *Thurnauer v. U. S.*, (1908) 165 Fed. 62.

Bath babies and position babies. — See under this title, vol. 2, p. 472, par. 418.

Plaster of paris statuettes. — See under this title, vol. 2, p. 479, par. 450.

## Vol. II, p. 404, par. 96.

Cooking dishes. — China cooking and serving dishes of which the sloping undersides are irregularly colored brown in order to conceal smoke and finger marks, and without decorative effect, are dutiable as undecorated china under paragraph 96. *Thurnauer v. U. S.*, (C. C. A. 1908) 159 Fed. 122, *reversing* (1907) 152 Fed. 660.

Earthenware with one color glaze. — Earthenware to which a single color glaze has been added is, under paragraph 96, not only "decorated," but may also be reasonably

concluded to be "stained," within the meaning of the paragraph. *U. S. v. Straus*, (1909) 168 Fed. 589.

Sarreguemines ware. — In the provision for "common yellow . . . earthenware," in paragraph 94, "common" is not a commercial, but a descriptive, term, and Sarreguemines ware, which is of a superior quality, is not within such provision, but is dutiable under paragraph 96. *U. S. v. Reugger*, (1908) 167 Fed. 142.

## Vol. II, p. 404, par. 97.

Articles made from jade. — Articles, such as tableware, ornaments, etc., manufactured from jade, are dutiable under this paragraph covering "articles and wares composed wholly or in chief value of . . . mineral substances," and are not within the provision in paragraph 435 for "precious stones," or that in section 6 for unenumerated articles. *Tiffany v. U. S.*, (1903) 126 Fed. 255.

Fire brick. — The rule that the provision in paragraph 97, for decorated and undecorated articles composed of mineral substances, does

not cover articles not susceptible of decoration, excludes from that paragraph fire brick, which can be, but never are, decorated. *U. S. v. Behrend*, (C. C. A. 1906) 167 Fed. 317.

Blood charcoal. — See under this title, vol. 2, p. 393, par. 10.

Composition pumice stone. — See under this title, vol. 2, p. 403, par. 92.

Jewels for bearings. — See under this title, vol. 2, p. 474, par. 435.

Monuments in sections. — See under this title, vol. 2, p. 409, par. 118.

## Vol. II, p. 404, par. 98.

Carbon sticks of various lengths, to be cut in required lengths and finished for electric lighting, are dutiable under paragraph 98, as being similar in quality and use to the articles mentioned in that paragraph. *U. S. v. Down-*

*ing*, (1906) 201 U. S. 354, 26 S. Ct. 476, 50 U. S. (L. ed.) 786, *reversing* (C. C. A. 1904) 129 Fed. 90, which *affirmed* (1903) 120 Fed. 1014.

## Vol. II, p. 405, par. 99.

**Bottle fittings.**—In imposing the *ad valorem* duty provided by paragraph 99, on filled bottles, there should be taken as the dutiable value of the bottles only the value of the bottles by themselves, exclusive of corks, capsules, labels, reed envelopes, wooden cases, cost of filling, etc., all of which should be attributed to the contents rather than to the bottles. *Hayes v. U. S.*, (C. C. A. 1906) 150 Fed. 63. *Contra*, *Leggett v. U. S.*, (1905) 138 Fed. 970.

**Filled bottles.**—Bottles are not provided for by the enumeration in paragraph 258, of "anchovies . . . in bottles," or by enactment in paragraph 276, that the dutiable weight of "fluid extract of meat . . . shall not include the weight of the package in which the same is imported," but when imported filled with articles dutiable under said provisions, are separately subject to the duty provided in paragraph 99, for glass bottles filled, "not otherwise specially provided for." *Smith v. U. S.*, (1903) 124 Fed. 291, *affirmed* (C. C. A. 1904) 130 Fed. 104.

Glass bottles filled with merchandise at

*ad valorem* rates, holding not more than a pint, were not subject to duty under Tariff Act 1894, paragraph 88, as vials holding not more than a pint and not less than a quarter of a pint, or as "all other glassware." *U. S. v. Austin*, (1903) 121 Fed. 729, 58 C. C. A. 149.

**Koch flasks — Wouff flasks.**—Certain bottle-like containers, of glass, used in chemical operations, and known as Koch flasks, and certain so-called Wouff flasks, shaped like bottles, but having two or three necks apiece, are "bottles" or "jars," within the meaning of paragraph 99. *Eimer v. U. S.*, (1903) 126 Fed. 439.

**Blown glass flasks for chemical laboratories.**—See under this title, vol. 2, p. 405, par. 100.

**Bottles with cut glass stoppers.**—See under this title, vol. 2, p. 405, par. 100.

**Bottles with mountings.**—See under this title, vol. 2, p. 423, par. 193.

**Ground glass bottles.**—See under this title, vol. 2, p. 405, par. 100.

## Vol. II, p. 405, par. 100.

**"Blown glassware"** includes articles blown in a mold as well as free-handed. *U. S. v. Heil Chemical Co.*, (1910) 178 Fed. 537, 102 C. C. A. 47.

**Blown glass flasks for chemical laboratories.**—The term "bottles," in paragraph 99, has a meaning that excludes blown glass flasks for chemical laboratories. Such articles are dutiable under paragraph 100, as "blown glassware." *Eimer v. U. S.*, (C. C. A. 1909) 168 Fed. 240.

**Bottles with cut glass stoppers.**—Filled bottles, with cut glass stoppers, the bottle neck and the stopper being ground to fit each other, and the stopper not being capable of use in any other bottle, are dutiable as entreties, rather than separately from the stoppers. *Park v. U. S.*, (1909) 174 Fed. 831, *following* *Utard v. U. S.*, (1904) 128 Fed. 422, 63 C. C. A. 164.

**Decorated glassware.**—Glassware ornamented with metal filigree work was held to be dutiable as "articles of glass, . . . ornamented, decorated," etc., under paragraph 100, regardless of whether glass or metal is the component of chief value. *Gallenkamp v. Rachman*, (1906) 147 Fed. 769.

**Etching not for ornamentation.**—The provision in paragraph 100, for "articles of glass, . . . etched, . . . or otherwise ornamented, decorated," etc., does not apply to articles that have been etched otherwise than for ornamentation or decoration. *Eimer v. U. S.*, (1903) 126 Fed. 439.

**Gauge glasses,** consisting of sections of glass tubes ready for mounting, made by a workman's inserting a hollow iron rod into a pot of molten glass, and blowing a bulb from the glass adhering to the rod, and again dipping the bulb into the pot to secure the adherence of enough more glass to draw out the

tube to the required length, is "blown glassware," within this paragraph, and taxable thereunder, and not under paragraph 112 as manufactures of glass not specially provided for. *Rogers v. U. S.*, (1903) 121 Fed. 546, 57 C. C. A. 608, *affirming* (1902) 115 Fed. 233.

**Glass eyes for dolls,** in which, in order to complete the resemblance to the human eye, the iris and the pupil have been skillfully painted or traced, are within the provision in this paragraph for "articles of glass, . . . painted . . . or otherwise ornamented, decorated," etc. *R. Hoehn Co. v. U. S.*, (1904) 139 Fed. 301, *affirmed* (C. C. A. 1906) 142 Fed. 1038.

**Ground glass bottles.**—Glass bottles having the words "Thos. McMullen & Co.'s White Label" ground thereon by means of the process of sand-blasting were held to be dutiable under the provision in paragraph 100, for "glass bottles, . . . ground," and not under paragraph 99, relating to "plain . . . glass bottles." *McMullen v. U. S.*, (1901) 123 Fed. 847.

**Microscope slides.**—In paragraph 100, providing for "vessels or articles of glass, . . . all the foregoing, filled or unfilled, and whether their contents be dutiable or free," the reference to the filling of such articles does not, in view of the history of the legislation, imply that only articles capable of being used as containers are covered by the paragraph; and microscope slides cannot for that reason be excluded. *Hempstead v. U. S.*, (1907) 158 Fed. 584, 86 C. C. A. 42.

**Re-agent bottles** should be admitted free of duty, or at most should be charged with duty as plain glass bottles under paragraph 99; the lettering upon the bottles being for utility and not for ornament. *Hempstead v. U. S.*, (1903) 122 Fed. 752.

Articles only part blown glass. — See under this title, vol. 2, p. 408, par. 112.

Cut glass thermometers. — See under this title, vol. 2, p. 408, par. 112.

Cut paste. — See under this title, vol. 2, p. 408, par. 112.

Glass blanks. — See under this title, vol. 2, p. 408, par. 112.

Thermometers and lactoscopes. — See under this title, vol. 2, p. 408, par. 112.

## Vol. II, p. 406, par. 102.

Polished cylinder glass, beveled. — See under this title, vol. 2, p. 407, par. 107.

## Vol. II, p. 407, par. 107.

Polished cylinder glass, beveled. — The provision in paragraph 107, for an additional duty of five per cent. *ad valorem* on "cylinder . . . glass, . . . when . . . beveled . . .

or otherwise ornamented or decorated," is applicable to the "cylinder . . . glass, polished," that is enumerated in paragraph 102. *Riegelman v. U. S.*, (1903) 127 Fed. 493.

## Vol. II, p. 407, par. 109.

Molded lenses. — It is necessary that lenses should be both ground and polished in order to be brought within the provision of paragraph 109 for "lenses . . . ground and polished to a spherical, cylindrical, or prismatic

form;" and where they have been brought to such form by molding they are not within that provision. *U. S. v. Robinson*, (1905) 140 Fed. 968.

## Vol. II, p. 408, par. 110.

"Prismatic form." — The provision in paragraph 110, for glass strips "ground or polished on one or both sides to a . . . prismatic form," does not require that the strips shall be in the form of a prism, nor that an entire side shall be in prismatic form; and

strips into one side of which parallel incisions have been ground or polished, producing prisms, are within that provision. *U. S. v. Ashcroft Mfg. Co.*, (1909) 172 Fed. 449, *affirmed* (1910) 176 Fed. 738, 100 C. C. A. 281.

## Vol. II, p. 408, par. 111.

Toy magic lanterns. — See under this title, vol. 2, p. 472, par. 418.

## Vol. II, p. 408, par. 112.

Articles only part blown glass. — Articles in chief value of blown glass, but in part of other glass or other material, are not within the provision for "blown glassware" in paragraph 100, but are dutiable as manufactures of glass under paragraph 112. *U. S. v. Heil Chemical Co.*, (1910) 178 Fed. 537, 102 C. C. A. 47.

Cut glass thermometers. — In *U. S. v. Hesse*, (1905) 141 Fed. 492, it was held as to certain cut glass thermometers, the cutting on which was not shown to ornament or decorate the articles, that they were not within the provision in paragraph 100 for "articles of glass, cut, . . . or otherwise ornamented, decorated, or ground," but were properly classified under paragraph 112 as "manufactures of glass."

Cut paste. — Congress in its tariff legislation having distinguished between glass and the form of glass known as paste, articles in chief value of paste, cut, are not within the provision in paragraph 100, for goods in chief value of cut "glass," but are dutiable as manufactures of "paste," under paragraph 112. *U. S. v. New York Merchandise Co.*,

(1909) 167 Fed. 684, *affirmed* (C. C. A. 1910) 174 Fed. 1022.

In *U. S. v. Durand*, (C. C. A. 1905) 137 Fed. 382, *affirming* (1903) 127 Fed. 624, it was held that crude, incomplete articles of glass, known as "blanks," produced by blowing glass into a mold, which are suitable only to be placed in the hands of glass cutters for further manufacture into finished articles, are not within the provision for "blown glassware" in paragraph 100, but are dutiable under the provision for "all glass or manufactures of glass," in paragraph 112.

Rhinestones. — Certain so-called rhinestones, articles composed of metal and paste, the latter being the more valuable component, which are merely used to decorate and ornament women's outer apparel, are dutiable as manufactures of paste, not specially provided for, under paragraph 112. They are excluded from the provision in paragraph 414, for buttons made of glass, because they are not strictly buttons, and because, though paste is a species of glass, it is differentiated therefrom elsewhere in the tariff as a separate substance. *Blumenthal v. U. S.*, (1904) 135

Fed. 254, *affirmed* (C. C. A. 1905) 144 Fed. 384.

**Rice paste.**—The provision in paragraph 112, for manufactures of "paste," includes only the form of paste which is a variety of glass, and does not embrace articles made from rice paste. *Morimura v. U. S.*, (1909) 169 Fed. 279, 94 C. C. A. 555.

**Spatulas and solid glass rods.**—Certain molded glass articles, consisting of spatulas and solid rods, are held to be dutiable under the provision in paragraph 112 for "manufactures . . . of which glass . . . is the

component material of chief value, not specially provided for." *Eimer v. U. S.*, (1903) 126 Fed. 439.

**Thermometers and lactoscopes**, composed chiefly of blown glass, but in part of other materials, are not dutiable under paragraph 100, for "blown glassware," but under paragraph 112, as "manufactures . . . of which glass . . . is the component material of chief value, not specially provided for." *Eimer v. U. S.*, (1903) 126 Fed. 439.

**Gauge glasses.**—See under this title, vol. 2, p. 405, par. 100.

## Vol. II, p. 409, par. 114.

**Mexican onyx** is dutiable as "onyx," rather than as "marble," under paragraph 114. *Blochman Banking Co. v. Blake*, (1909) 168 Fed. 572.

**Hauteville stone.**—See under this title, vol. 2, p. 409, par. 117.

## Vol. II, p. 409, par. 115.

**Agate bearings.**—Small pieces of agate, fitted for use as scale bearings by being cut, polished, and grooved, are dutiable as "manufactures of agate," under paragraph 115, and not as "precious stones," under paragraph 435. *Smith v. Computing Scale Co.*, (1906) 147 Fed. 890; *U. S. v. Lorsch*, (C. C. A. 1907) 158 Fed. 398, *reversing* 152 Fed. 591.

**Cut agate, garnet, etc., for jewelry settings.**—See under this title, vol. 2, p. 474, par. 435.

**Rock crystal intaglios.**—See under this title, vol. 2, p. 474, par. 435.

**Rock crystal rondelles.**—See under this title, vol. 2, p. 474, par. 435.

## Vol. II, p. 409, par. 117.

**Hauteville stone**, and various other stones of substantially the same character, which are susceptible of a high polish and are used as an interior decorative stone, are not the kind of limestone that is "marble," within

the meaning of paragraph 114, but are dutiable as "limestone," under paragraph 117. *Bockmann v. U. S.*, (C. C. A. 1908) 158 Fed. 807, *reversing* (1907) 154 Fed. 1000; *U. S. v. Jackson*, (1909) 175 Fed. 884.

## Vol. II, p. 409, par. 118.

**Monuments in sections**, consisting of pieces of dressed granite intended to be assembled and erected as monuments without further manipulation, were held dutiable as dressed granite, under paragraph 118, and not as articles composed of mineral substances,

under paragraph 97. *Baldwin v. U. S.*, (1906) 144 Fed. 702, *affirmed* (C. C. A.) 149 Fed. 1022; *Murphy v. U. S.*, (1908) 162 Fed. 871, 89 C. C. A. 561.

**Japanese garden lanterns of granite.**—See under this title, vol. 2, p. 504, sec. 6.

## Vol. II, p. 410, par. 121.

**Hematite iron ore** in a form in which it cannot be used as a pigment is not dutiable as "pigments," under paragraph 58, but as

"iron ore," under paragraph 121. *Hill v. Francklyn*, (1908) 162 Fed. 880, 89 C. C. A. 570.

## Vol. II, p. 410, par. 122.

**Ferroalloys.**—Certain alloys of iron and mineral substances known as ferrochrome, ferrotungsten, ferromolybdenum, and ferrovandium are not dutiable as "metals unwrought," under paragraph 183, but are dutiable at the rate applicable to the ferromanganese, enumerated in paragraph 122, which they resemble in quality and use, within the meaning of the so-called similitude clause in section 7. *U. S. v. Roessler, et al.*, Chemical

*Co.*, (1904) 131 Fed. 576, *following* *Dana v. U. S.*, (1899) 91 Fed. 522, set out in the original note; *U. S. v. Lavino*, (C. C. A. 1909) 175 Fed. 964, *affirming* 171 Fed. 245.

**Old fishplates**, which are so worn as to have lost their usefulness for railway purposes and are suitable for use only as scrap steel, are not dutiable under paragraph 130, as "railway fishplates," but under paragraph 122, as "scrap steel . . . fit only to be "remanufactured."

tured." *Ginsburg v. U. S.*, (1906) 147 Fed. 531.

**Scrap iron.**—This paragraph, which provides for "scrap iron," and defines it as "waste or refuse iron . . . fit only to be remanufactured," refers not only to pieces or scraps thrown off or discarded in the course of manufacture, but to completed articles worn out by use, such as old chains, in small pieces fit only for remanufacture. *Sheldon v.*

*U. S.*, (C. C. A. 1907) 159 Fed. 105, *affirming* 152 Fed. 318.

**Defective steel rails.**—See under this title, vol. 2, p. 412, par. 130.

**Ferromolybdenum.**—See under this paragraph, **FERROALLOYS**.

**Ferrotungsten.**—See under this paragraph, **FERROALLOYS**.

**Ferrovandian.**—See under this paragraph, **FERROALLOYS**.

## Vol. II, p. 410, par. 123.

**Muck bars**, produced by converting pig iron into wrought iron in the puddling furnace, and then rolling the wrought iron through a set of rolls, from which it comes in the form known as "muck bars," have been held to be dutiable under paragraph 123, as "bar iron," and not under paragraph 135, relating to "steel in all forms and shapes not specially

provided for," nor under the first proviso in paragraph 124, covering "iron in . . . forms less finished than iron in bars and more advanced than pig iron." *Moorhead v. U. S.*, (1904) 127 Fed. 779.

**Bronze hardener.**—See under this title, vol. 2, p. 421, par. 183.

## Vol. II, p. 410, par. 124.

**Iron sand.**—See under this title, vol. 2, p. 423, par. 193.

**Muck bars.**—See under this title, vol. 2, p. 410, par. 123.

**Steel strip.**—See under this title, vol. 2, p. 412, par. 135.

## Vol. II, p. 411, par. 125.

**Steel window sashes.**—See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 411, par. 126.

**Thin, checkered steel plates.**—See under this title, vol. 2, p. 412, par. 135.

**Steel plate slightly changed from usual form.**—See under this title, vol. 2, p. 412, par. 135.

## Vol. II, p. 411, par. 127.

**Machined forgings.**—See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 412, par. 130.

**Defective steel rails.**—Steel rails, which are new, but by reason of defects are depreciated in value, but which have not lost their character or identity as rails, are not within the provision in paragraph 122, for "scrap steel . . . fit only to be remanufactured,"

but are dutiable as "rails," under paragraph 130, even though they be intended to be used as scrap iron. *Illinois Cent. R. Co. v. McCall*, (1904) 147 Fed. 925.

**Old fishplates.**—See under this title, vol. 2, p. 410, par. 122.

## Vol. II, p. 412, par. 131.

**Welded sheets of iron and nickel.**—See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 412, par. 132.

**Welded sheets of iron and nickel.**—See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 412, par. 134.

**Small tin disks.**—The term "sheets . . . commercially known as tin plates," in paragraph 134, means rectangular sheets, and

does not include small disks. *Shallus v. U. S.*, (C. C. A. 1908) 162 Fed. 653, *reversing* (1907) 155 Fed. 213.



## Vol. II, p. 412, par. 135.

Cold-rolled sheet steel, in strips, as described in the original note, was held to be dutiable under paragraph 122 of the Act of 1894, corresponding to paragraph 135 of the Act of 1897, but not dutiable under paragraph 124 of the Act of 1894, corresponding to paragraph 137 of the Act of 1897. *Boker v. U. S.*, (C. C. A. 1903) 124 Fed. 59, *reversing* (1902) 116 Fed. 1015, of the original note.

Completed articles. — Paragraph 135, relating to steel shapes, does not include in that provision articles so far completed as to be practically ready for use. *U. S. v. Prosser*, (1910) 177 Fed. 569.

Monogram dies and plates for engraving. — The provision for steel plates in paragraph 135, while not covering all steel articles that are known as plates, includes so-called monogram dies and plates used in engraving, which, besides being called plates, are within the dictionary definitions of "plates." *U. S. v. Sellers*, (1908) 160 Fed. 518, *affirmed* (C. C. A. 1909) 166 Fed. 1022.

Steel plates slightly changed from usual form. — In *U. S. v. Vandegrift*, (C. C. A. 1905) 142 Fed. 448, *affirming* 139 Fed. 790, it was held, as to steel plates changed from the usual form by being cut at a slight variation from a right angle, for a special purpose and not for evasion, that they are provided for in paragraph 135, enumerating "sheared . . . shapes" of steel and "plates and steel in all forms and shapes not specially provided for," rather than in paragraph 126, enumerating "boiler, or other plate iron or steel . . . sheared or un-sheared."

Steel stampings for manufacturing ornaments. — Paragraph 135, relating to "pressed or stamped shapes," includes stampings which have been pressed or stamped into an open-

work or raised pattern and are used in manufacturing ornaments, etc. *U. S. v. Veith*, (1909) 169 Fed. 665.

Steel strips. — Coils of thin steel, from fifty to two hundred feet long, and from less than one inch to about six inches wide, which are not produced from sheets, were not within the provision for "sheet steel in strips" in Tariff Act Aug. 27, 1894, ch. 349, sec. 1, Schedule C, par. 124, 28 Stat. L. 517, and in Tariff Act July 24, 1897, ch. 11, sec. 1, Schedule C, par. 137, 30 Stat. L. 161. The term "sheet" does not include shapes of such dimensions. This article is dutiable under paragraph 135 as "steel in all forms and shapes not specially provided for." *Boker v. U. S.*, (1907) 154 Fed. 174, *affirmed* (C. C. A.) 158 Fed. 396.

Thin, checkered steel plates, about twelve by five feet, specially adapted for use in the construction of floors for boiler rooms, are dutiable as steel "plates," under paragraph 135, rather than as "plate . . . steel," under paragraph 126. *Hill v. Wood*, (1908) 163 Fed. 51, 89 C. C. A. 635.

"Wortles" or "draw bars," so called, consisting respectively of bars and blocks with holes for wire drawings, are not dutiable as steel "plates" under paragraph 135, that term being, in the absence of evidence of a contrary commercial usage, limited to articles in the form of sheets. *Newman v. U. S.*, (C. C. A. 1907) 159 Fed. 123, *reversing* 152 Fed. 488.

Engraved steel table. — See under this title, vol. 2, p. 423, par. 193.

Horseshoe calks. — See under this title, vol. 2, p. 423, par. 193.

Muck bars. — See under this title, vol. 2, p. 410, par. 123.

Plates resembling circular saw plates. — See under this title, vol. 2, p. 415, par. 141.

## Vol. II, p. 414, par. 137.

Articles made from coated steel wire. — This paragraph imposes a duty on steel wire smaller than No. 16 wire gauge of two cents per pound, with an additional duty of one and one-quarter cents per pound on articles manufactured from such wire, "and on iron or steel wire coated with zinc, tin, or any other metal, two-tenths of one cent per pound in addition to the rate imposed on the wire from which it is made." In 1900 the treasury department rules that articles manufactured from steel wire coated were subject to all three of such duties, but shortly thereafter, and in the same year, formally reversed such ruling, and has since uniformly ruled that the additional duty of two-tenths of one cent was not to be imposed on articles manufactured from coated steel wire. It was held that in view of the uncertainty of the language of the statute such uniform ruling by the executive department, continued for five years, would be treated as practical construction of the Act, and would not be reversed by the courts. *Burditt, etc., Co. v. U. S.*, (C. C. A. 1907) 153 Fed. 67.

Construction of second proviso — "article." A cable used for making connections with a telephone switch board, consisting of sixty-four wires bound together, which, both individually and in the group, are covered with various materials for insulating and waterproofing purposes, is an "article," within the meaning of the second proviso in paragraph 137, relating to "articles manufactured from . . . copper wire," and is not dutiable under the provision in the same paragraph for "wire not specially provided for, . . . whether uncovered or covered," nor under paragraph 193, as a manufacture of metal not specially provided for. *Salt v. U. S.*, (1903) 127 Fed. 890, *affirmed* (C. C. A. 1904) 134 Fed. 1021.

Nickel-coated wire. — The provision for wire "coated with . . . metal" includes an article produced by pushing a steel or iron rod through a nickel tube and then wire-drawing the whole, thus bring it down to the required diameter, and welding the nickel to the core. It makes no difference whether the coating referred to is affixed by welding,

dipping, electrolysis, or otherwise. *U. S. v. Boker*, (1910) 176 Fed. 730, 100 C. C. A. 276, *affirming* (1909) 168 Fed. 464.

**Steel wool.**—In paragraph 137 the provision for "articles manufactured from . . . wire" cannot be restricted to manufactured articles which contain the round wire in its integrity; and "steel wool," consisting of filaments shaved from steel wire, and consti-

tuting a finished commercial article, is embraced in said provision. *Buehne Steel Wool Co. v. U. S.*, (C. C. A. 1907) 159 Fed. 107, *reversing* 154 Fed. 93. *Compare Buehne v. U. S.*, (1905) 140 Fed. 772, *affirmed* (C. C. A. 1906) 145 Fed. 1021.

**Cold rolled sheet steel, in strips.**—See under this title, vol. 2, p. 412, par. 135.

## Vol. II, p. 415, par. 140.

**Small tin disks.**—See under this title, vol. 2, p. 412, par. 134, and p. 423, par. 193.

## Vol. II, p. 415, par. 141.

**Wire screw rods.**—Under this paragraph it was held that wire screw rods which have been cold drawn after being hot rolled are subject to additional duty regardless of the fact that such articles are specially enumerated in another paragraph as "wire screw rods" and that cold drawing is a necessary part of the process of making such rods. *U. S. v. Nash*, (C. C. A. 1907) 158 Fed. 401, *reversing* 152 Fed. 573.

**Plates resembling circular saw plates.**—The provision in this paragraph for "steel circular saw plates" includes plates that resemble circular saw plates in size, shape, general finish, and general quality of steel, though imported for other uses. *Boker v. U. S.*, (1909) 168 Fed. 573.

**Polished steel.**—The provision in this paragraph relating to steel strips "cold rolled, . . . brightened . . . or polished by any process to such perfected surface finish or polish better than the grade of cold rolled, smoothed only," do not include strips whose only polish or brightening is incidentally acquired during the cold-rolling, and which

were not included in similar former provisions. *U. S. v. Crucible Steel Co.*, (1906) 147 Fed. 537, *affirmed* (C. C. A. 1907) 154 Fed. 1005.

**Sheet steel in strips.**—The provision in paragraph 141 for steel strips brought to a "perfected surface finish or polish better than the grade of cold-rolled, smoothed only," does not require that such "better" finish or polish must be produced by some process other than cold-rolling; but it does not include certain steel strips of a thickness of 13/1000 of one inch, which have been subjected to no other process than the cold-rolling (with incidental annealing, pickling, etc.) necessary to produce so small a gauge; for a precisely similar provision in the Tariff Act of 1890 having received the same construction, it is presumed that Congress, by re-enacting it, intended it to have the same effect, especially in the absence of proof of a general, well-recognized meaning for the words quoted that would include such articles. *U. S. v. Crucible Steel Co.*, (C. C. A. 1905) 137 Fed. 384.

## Vol. II, p. 415, sec. 146.

**Card-clothing packed separately from machine.**—See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 416, par. 148.

**Finished castings.**—See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 416, par. 152.

**Gas cylinders.**—The provision in paragraph 152 for "steel tubes, finished," includes bottle-shaped vessels of steel, which are used in the transportation of gas and are about four feet long and eight inches in diameter, with one end permanently closed and the other tapered to a neck, which are not dutiable under paragraph 193. *U. S. v. Liquid Carbonic Co.*, (1908) 160 Fed. 455, 87 C. C. A. 671.

**Purves ribbed boiler flues.**—The provision for "furnaces," in paragraph 152, does not include so-called arched Purves furnaces, consisting simply of corrugated steel cylinders or tubes, which are not furnaces in fact, but are intended to be used in the manufacture

of furnaces. Such articles are dutiable under the provision in the same paragraph for boiler tubes or flues. *Thomas v. Vandegrift*, (C. C. A. 1908) 162 Fed. 645, *affirming* (1907) 153 Fed. 591.

**Steel gas holders.**—Steel cylinders, severally nineteen feet in length and four feet in diameter, and thirty-five feet in length and eight feet in diameter, used as storage tanks for illuminating gas, are "tubes finished," within the meaning of paragraph 152. *U. S. v. Knauth*, (C. C. A. 1909) 168 Fed. 539, *following U. S. v. Downing*, (1900) 105 Fed. 1005, 44 C. C. A. 686, and *U. S. v. Liquid Carbonic Co.*, (1908) 160 Fed. 455, 87 C. C. A. 671.

## Vol. II, p. 416, par. 153.

**Diminutive penknives with odd-shaped handles.**—The real test of whether an article is a toy is its use by children as a plaything; and diminutive penknives with odd-shaped handles, which, though they cannot be effectively used for most of the pur-

poses for which an ordinary pocketknife is used, are not in fact used as playthings, are less properly classed as "toys," under paragraph 418, than as "penknives," under paragraph 153. *Kastor v. U. S.*, (1909) 167 Fed. 893.

## Vol. II, p. 417, par. 154.

**Bone swords.**—See under this title, vol. 2, p. 478, par. 449.

## Vol. II, p. 418, par. 157.

**Rough-bored rifle barrels.**—The provision in paragraph 157, for "parts" of rifles, is not limited to such as are in a finished condition, but embraces also parts, such as

rough-bored rifle barrels, that have been advanced to a condition unfitting them for any other use than in connection with rifles. *U. S. v. Riga*, (1909) 171 Fed. 783.

## Vol. II, p. 418, par. 158.

**Rubber recoil pads.**—See under this title, vol. 2, p. 478, par. 449.

## Vol. II, p. 418, par. 159.

**Paintings on copper.**—See under this title, vol. 2, p. 479, par. 454.

## Vol. II, p. 420, par. 175.

**"Flitters."**—See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 420, par. 176.

**Copper plates.**—Small copper plates, completely finished for engravers' use, are not within the provision for copper "sheets," in

paragraph 176. *U. S. v. Drakenfeld*, (1910) 178 Fed. 258, 101 C. C. A. 618, *reversing* (1909) 172 Fed. 296.

## Vol. II, p. 420, par. 179.

**Articles in chief value of metal threads.**—Fabrics in the piece, composed chiefly of metal thread, but in part of silk, are more specifically enumerated in paragraph 179, as "articles . . . in chief value of . . . metal threads," than under paragraph 387, as "woven fabrics in the piece, not specially provided for, . . . weighing not less than one and one-third ounces per square yard and not more than eight ounces per square yard, . . . dyed in the thread or yarn, and containing not more than thirty per centum in weight of silk, . . . if other than black." *Hirsch v. U. S.*, (C. C. A. 1909) 167 Fed. 309.

in the shape of rings, stars, etc., which, while they may amuse or entertain children when hung on a Christmas tree, are not suitable to be played with, and, besides being used as Christmas tree ornaments, are employed in shop decorations, and properly classified under paragraph 179. *Thanhauser v. U. S.*, (1908) 159 Fed. 228.

**Fabrics in the piece.**—The principle of *ejusdem generis* does not operate to exclude metal thread fabrics in the piece from the provision in paragraph 179 for "articles made wholly or in chief value of . . . metal threads," following the enumeration of metal thread laces, embroideries, trimmings, and narrow fabrics of various descriptions. *Jules v. U. S.*, (1905) 141 Fed. 379; *Hirsch v. U. S.*, (C. C. A. 1909) 167 Fed. 309.

**Christmas tree ornaments.**—The provision for "toys" in paragraph 418 was held not to include fragile, flimsy articles of tinsel,

## Vol. II, p. 420, par. 181.

**Refund on lead lost in smelting.**—Duty paid under paragraph 181 upon lead contained in certain imported copper ores, which lead entirely disappeared in the smelting of the ore, cannot be refunded. (1909) 27 Op. Atty.-Gen. 354.

**Copper matte.**—See under this title, vol. 2, p. 488, par. 534.

**Zinc ores.**—See under this title, vol. 2, p. 487, par. 514.

## Vol. II, p. 421, par. 182.

**Lead bullion — assay.** — While paragraph 181, which imposes a duty on imported lead ores, contemplates the determination of the quantity of metal in the ore by assay, by paragraph 182 of that Act the determination of the quantity of metal contained in im-

ported lead bullion is to be by official weighing only, and the application of assay to lead bullion under the current treasury regulations for bonded smelters and refiners is without warrant of law. (1902) 24 Op. Atty.-Gen. 45; (1903) 24 Op. Atty.-Gen. 569.

## Vol. II, p. 421, par. 183.

**Bronze hardener.** — An alloy in the form of pigs, which is used chiefly in hardening manganese bronze, and which, in order to produce that effect, must be melted and mixed with other metals, was held to come within paragraph 183, relating to "metallic mineral substances in a crude state, and metals unwrought," rather than paragraph 193, relating to articles composed of metal, or paragraph 122, by similitude to the "ferro-manganese" there enumerated. *Thomas v. William Cramp, etc., Ship, etc., Bldg. Co.*, (C. C. A. 1906) 142 Fed. 734, *affirming* (1905) 139 Fed. 303.

**Ferroalloys.** — The provision in paragraph 183, for "metals unwrought," does not include ferroalloys, which, though capable of being wrought into different forms and shapes, are not to any extent shown to be imported to be themselves wrought into useful articles, but are generally used for imparting certain qualities to steel in the process of its manufacture. *U. S. v. Lavino*,

(C. C. A. 1909) 175 Fed. 964, *affirming* 171 Fed. 245. See also under this title, vol. 2, p. 410, par. 122.

**"Metals unwrought."** — In construing the provision in paragraph 183, for "metals unwrought," the court held that "unwrought" implies a metal which is capable of being wrought, and not a substance fit only to be used with other ingredients to produce an entirely different and distinct product, and that ferrochrome, ferromolybdenum, ferrotungsten, and ferrovanadium, used only in imparting certain qualities to steel, and incapable of being themselves wrought into any useful article, are not within said provision. *U. S. v. Roessler, etc., Chemical Co.*, (C. C. A. 1905) 137 Fed. 770, *affirming* (1904) 131 Fed. 576.

**Tungsten ore.** — See under this title, vol. 2, p. 492, par. 614.

**Zinc dust.** — See under this title, vol. 2, p. 484, par. 482.

## Vol. II, p. 421, par. 185.

**Nickel anodes.** — See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 422, par. 187.

**Fountain pens without the pen points.** — See under this title, vol. 2, p. 479, par. 450.

## Vol. II, p. 422, par. 190.

**Broken stereotype plates.** — The provision for "types, old," in paragraph 690, does not include an alloy, containing approximately eighty-five per cent. of lead, twelve per cent. of antimony, and three per cent. of tin and copper, made from the dross of type metal refined and melted with fifteen to twenty

per cent. of old movable types, and cast in the form of stereotype plates, which were never used as such, but broken into pieces and packed in barrels for importation. Such material is dutiable as "type metal," under paragraph 190. *Sapery v. U. S.*, (1905) 135 Fed. 332, 68 C. C. A. 140.

## Vol. II, p. 422, par. 191.

**Certain incomplete watch movements, adjusted so as to run, the only parts lacking being the dial, or the dial, the various hands, and the minute wheel, are dutiable as "watch movements," and not as "parts of watches, . . . not otherwise provided for."** *Hipp v. U. S.*, (1901) 123 Fed. 998.

**Time detectors, used for registering the movements of watchmen, which have a clock mechanism or time indicator, are dutiable under the provision in paragraph 191, for "watch movements, whether imported in cases or not."** *Hensel v. U. S.*, (1904) 135 Fed. 255.

## Vol. II, p. 423, par. 192.

**Zinc sheets, when nickel-plated.** — See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 423, par. 193.

**Automobile with tires unattached.**—When an automobile is imported without tires attached, but tires are contained in the same crate as the car, such tires are not dutiable separately from the car; but the whole is dutiable as an entirety, though before use other tires may be substituted for those imported with the car. *U. S. v. Auto Import Co.*, (C. C. A. 1909) 168 Fed. 242.

**Bottles with mountings.**—The provision in paragraph 99, for "plain" glass bottles, has been held not to include fancy bottles with metal mountings. *Mark Cross Co. v. U. S.*, (1906) 150 Fed. 610.

**Bronze ornaments**—Act of 1894.—Bronze ornaments, being manufactured articles and advanced beyond the condition of "old copper," "clipping," and "composition metal," enumerated in paragraph 452, *Tariff Act Aug. 27, 1894*, 28 Stat. L. 539, were not subject to that provision, but were dutiable as manufactures of metal under paragraph 117 of said Act, which corresponds to par. 193 of the Act of 1897. *Tiffany v. U. S.*, (1896) 142 Fed. 282.

**Card-clothing packed separately from machine.**—In *U. S. v. Leigh*, (1908) 159 Fed. 314, it appeared that in an importation of carding machines some of the clothing was packed separately; this clothing was so made as to fit the different parts of the machines, except that a certain amount of cutting, stretching, etc., would be necessary in the final adjustment; it would have been impracticable to import the machines with all the clothing attached, and it was customary to pack this part of the clothing separately. It was held that this clothing was not dutiable separately from the rest of the machines under paragraph 146, but that the whole apparatus was dutiable as an entirety at the same rate under paragraph 193.

**"Coin swords."**—So-called "coin swords," which consist of copper coins corded together and securely fastened around an iron bar or rod covered by metal foil, and are used for ornamental purposes, are not within the provision for "coins," in paragraph 530, but are dutiable under paragraph 193. *Soy Kee v. U. S.*, (1910) 177 Fed. 601.

**Engraved steel table.**—The provision in paragraph 135, for "plates and steel in all forms and shapes," does not include plates that have been manufactured into some other completed commercial article, such as a so-called engraved steel table, consisting of a rectangular slab incised with a pattern to be impressed upon plate glass, which is properly classifiable under paragraph 193. *Morris v. U. S.*, (1909) 169 Fed. 666, *affirmed* (C. C. A.) 174 Fed. 656; *contra Morris v. U. S.*, (1903) 140 Fed. 774.

**Figures of animals used as mantel ornaments.**—The provision for toys in paragraph 418 does not include figures of animals, single or groups, which are known in trade as metal novelties, and are generally used as mantel or cabinet ornaments, but they are dutiable under paragraph 193. *Samstag, etc., Co. v. U. S.*, (1907) 154 Fed. 756.

**Finished castings.**—The term "castings" in paragraph 148 does not include articles which have been advanced in condition by work bestowed on them after they were cast. *Lehigh Mfg. Co. v. U. S.*, (1907) 153 Fed. 596; *Bromley v. U. S.*, (1907) 154 Fed. 399, *affirmed* 156 Fed. 958, 84 C. C. A. 458.

**Flitters.**—The article commercially known as "flitters," produced from the thin sheets which constitute the composition metal of commerce, by a process of manufacture that makes it no longer available for the uses to which composition metal of trade is put, but adapts it for other uses, is not free of duty as "composition metal," under paragraph 553, but is dutiable as manufactures of metal under paragraph 193. *U. S. v. Meier*, (1905) 136 Fed. 764, 69 C. C. A. 421, *affirming* (1904) 128 Fed. 472.

Neither is such article dutiable as bronze powder, under paragraph 175, nor as a color or pigment, under paragraph 58. *Baer v. U. S.*, (1903) 130 Fed. 391.

**Horseshoe calks.**—The provision for "steel in all forms and shapes," in paragraph 135, does not include completed articles, such as horseshoe calks and ball bearings, to which nothing needs to be done to fit them for immediate use. *Maldonado v. U. S.*, (1910) 176 Fed. 737, 100 C. C. A. 282, *affirming* (1909) 172 Fed. 170.

**"Iron-sand,"** a completed article produced by a series of manufacturing processes from cast iron and steel scrap, is not within the provision for "all iron in . . . forms less finished than iron in bars, and more advanced than pig iron," in paragraph 124, but is dutiable as "iron manufactured," under paragraph 193. *Harrison Supply Co. v. U. S.*, (1908) 164 Fed. 155; *Harrison Supply Co. v. U. S.*, (1909) 171 Fed. 406, 96 C. C. A. 362.

**Machined forgings.**—In paragraph 127, relating to forgings of whatever "degree or stage of manufacture," the words quoted relate only to different stages of the forging process, not extending beyond the completion of that process; and forms that, after being subjected to the final forging process, are further advanced into completed articles practically ready for use, such as axles, piston rods, etc., are removed from said provision into that for manufactured metal in paragraph 193. *U. S. v. Prosser*, (1910) 177 Fed. 569.

**"Manufacture."**—An article which has been advanced through one or more processes into a completed commercial article, known and recognized in trade by a specific and distinctive name other than the name of the material from which it is made, and is put into a completed shape, designed and adapted for a particular use to which the material in its original form is not adapted, is to be deemed a manufacture, although its component materials are unchanged. *U. S. v. Meier*, (1905) 136 Fed. 764, 69 C. C. A. 421, *affirming* (1904) 128 Fed. 472.

"Manufacture" implies addition to, and not subtraction from, and an article cannot

be said to have been manufactured which results from a process that reduces its value. *Shallus v. U. S.*, (C. C. A. 1908) 162 Fed. 653, *reversing* (1907) 155 Fed. 213.

**Metal beads temporarily strung on cotton cords or string** for the purpose of facilitating transportation are not dutiable under paragraph 408, at thirty-five cents *ad valorem* as loose beads, but are subject to the forty-five cent *ad valorem* duty prescribed by paragraph 193 for articles or wares not specially provided for in the Act, composed wholly or in part of metal whether wholly or partly manufactured. *Henry E. Frankenberg Co. v. U. S.*, (1907) 206 U. S. 224, 27 S. Ct. 628, 51 U. S. (L. ed.) 1034, *affirming* (C. C. A. 1906) 146 Fed. 63, which *affirmed* (1905) 144 Fed. 704.

**Millinery articles containing feathers and wire.**—Millinery articles made almost wholly of feathers, but containing a small quantity of wire, which is an important feature of their construction, are dutiable as "articles in part of metal," under paragraph 193, rather than as "feathers advanced or manufactured," under paragraph 425. *U. S. v. Berlinger*, (C. C. A. 1909) 167 Fed. 800.

**Miniature frames of precious metal set with diamonds.**—The provision in paragraph 434, for "articles commonly known as jewelry," does not include miniature frames composed of precious metals set with diamonds and pearls, which are not used as articles of personal adornment but for utility, but they are dutiable under paragraph 193. *U. S. v. Knoedler*, (1907) 154 Fed. 928.

**Nickel anodes.**—In construing paragraph 185, relating to nickel, nickel oxide, nickel alloy, "pigs, ingots, bars, or sheets," it was held (1) that only nickel in one of the forms enumerated is included; (2) that the provision for "sheets," therefore, does not include anodes consisting of nickel plates about twelve inches long, six and one-half inches wide, and less than a half inch thick, a "sheet" being broad, thin, and expanded, and (3) that such anodes are dutiable as manufactures of nickel under paragraph 193. *Boker v. U. S.*, (1907) 152 Fed. 589, *affirmed* (C. C. A.) 157 Fed. 1003.

**Old cannon, made of composition metal, and useless as artillery, but salable as relics and souvenirs,** are dutiable under paragraph 193, as manufactures of metal, and are not free of duty as "old brass," within paragraph 505, or as "composition metal," within paragraph 533. *Downing v. U. S.*, (1903) 122 Fed. 445, 58 C. C. A. 427, *affirming* (1902) 116 Fed. 779, set out in the original note.

**Ornamental slipper buckles.**—In *Bailey v. U. S.*, (1905) 135 Fed. 917, it was held that certain slides or buckles, made of steel or a base metal, some ornamented with rhinestones and some colored in imitation of precious metals, and used in ornamenting slippers, were not within the provision in paragraph 434, for "articles commonly known as jewelry," but are dutiable as manufactures of metal, not specially provided for, under paragraph 193.

**Silver hand bags.**—Women's silver hand bags or purses, used for holding money, arti-

cles of wearing apparel, etc., are not within the provision in paragraph 434, for "articles commonly known as jewelry," but are dutiable as articles of silver under paragraph 193. *Tiffany v. U. S.*, (1904) 131 Fed. 398.

**Small tin disks.**—Small disks produced in the manufacture of tin cans, being a by-product in the process of cutting an aperture for filling, and being of much less value than the tin from which they were cut, are not articles "wholly or partly manufactured from tin plate," under paragraph 140, nor as "waste" under paragraph 463, but are dutiable as articles of metal, "whether partly or wholly manufactured," under paragraph 193. *Shallus v. U. S.*, (C. C. A. 1908) 162 Fed. 653, *reversing* (1907) 155 Fed. 213.

**Steel window sashes.**—Where steel parts have been assembled and united into complete window sashes, they have been too far advanced in manufacture to permit their inclusion within paragraph 125, relating to "structural shapes of iron or steel . . . fitted for use," but are properly classified under paragraph 193. *Ackerson v. U. S.*, (1909) 172 Fed. 303, *affirmed* (C. C. A. 1910) 178 Fed. 1003, 101 C. C. A. 416.

**Welded sheets of iron and nickel.**—Sheets consisting of a plate of iron or steel with a sheet of nickel welded thereto, the material being rolled to the desired thickness after welding, are not sheets "coated with . . . metals," within the meaning of paragraph 132, nor "sheets of iron or steel, common or black," within the meaning of paragraph 131, but are dutiable under paragraph 193. *Boker v. U. S.*, (1910) 180 Fed. 959.

**Zinc sheets, when nickel-plated,** do not fall within the provision in paragraph 192, for "zinc . . . in sheets," but are dutiable under paragraph 193. *Victor v. U. S.*, (1904) 128 Fed. 472.

Nickel-plated zinc sheets are not dutiable as "zinc . . . in sheets," under paragraph 192, but as "articles or wares not specially provided for, . . . composed wholly or in part of . . . nickel, . . . zinc, . . . or other metal," under paragraph 193. *Eckstein v. U. S.*, (1905) 140 Fed. 94, *affirmed* (C. C. A. 1906) 145 Fed. 1021.

**Button shanks.**—See under this title, vol. 2, p. 471, par. 414.

**Bronze hardener.**—See under this title, vol. 2, p. 421, par. 183.

**Construction of second proviso—"article."**—See under this title, vol. 2, p. 414, par. 137.

**Dragees.**—See under this title, vol. 2, p. 428, par. 212.

**Furnished needle cases.**—See under this title, vol. 2, p. 630, sec. 19.

**Gas cylinders.**—See under this title, vol. 2, p. 416, par. 152.

**Monogram dies and plates for engraving.**—See under this title, vol. 2, p. 412, par. 135.

**Rough bored rifle barrels.**—See under this title, vol. 2, p. 418, par. 157.

**Steel gas holders.**—See under this title, vol. 2, p. 416, par. 152.

**Steel table.**—See under this title, vol. 2, p. 412, par. 135.



Steel wool.—See under this title, vol. 2, p. 414, par. 187.

Tea caddies.—See under this title, vol. 2, p. 630, sec. 19.

## Vol. II, p. 425, par. 194.

Round timber in rough condition.—In *Perfection Pile-Preserving Co. v. U. S.*, (1905) 147 Fed. 922, it was held that any round sticks which in their shape as imported are used for any of the purposes specified in

Wreaths and crosses mounted on wire frames.—See under this title, vol. 2, p. 473, par. 425.

paragraphs 194 and 196, either in the rough or finished, are subject to classification under those paragraphs, rather than under paragraph 699.

## Vol. II, p. 425, par. 195.

Fireproofed lumber.—Lumber which has been subjected to a fireproofing process that largely increases its value, but which can still be applied to the ordinary uses of sawed lumber, is not dutiable as manufactures of

wood, not specially provided for, under paragraph 208, but as "sawed lumber," under paragraph 195. *Myers v. U. S.*, (C. C. A. 1906) 147 Fed. 204, *reversing* (1905) 139 Fed. 344.

## Vol. II, p. 425, par. 196.

Round timber in rough condition.—See under this title, vol. 2, p. 425, par. 194.

## Vol. II, p. 425, par. 198.

Cabinet wood.—In *Williams v. U. S.*, (1903) 126 Fed. 838, it was held that certain cabinet wood, sawed lengthwise on two or more sides, was not free of duty, under the provisions in paragraph 700, for "all forms of cabinet woods, in the log, rough, or hewn only," but was dutiable under paragraph 198, covering "cabinet woods not further manufactured than sawed."

Wood veneers with paper backing.—In *American Trading Co. v. U. S.*, (1904) 142 Fed. 214, it was held, as to veneers of wood

of exceeding thinness, pasted on paper for the purpose of keeping them in shape, the paper being in some instances the component material of chief value, that they are within the provision in paragraph 198.

Bamboo dyers' sticks.—See under this title, vol. 2, p. 500, par. 700.

Manicure sticks.—See under this title, vol. 2, p. 426, par. 208.

Sandalwood.—See under this title, vol. 2, p. 500, par. 699.

## Vol. II, p. 426, par. 200.

"Blocks or sticks, rough-hewn, sawed."—In construing paragraph 200, relating to "blocks or sticks, rough-hewn, sawed," etc., it was held that the hewing contemplated is a new shaping, and that the sawing is something more than merely sawing the

blocks or sticks off from longer pieces. *U. S. v. Pierce*, (1905) 140 Fed. 962, *affirmed* (C. C. A. 1906) 147 Fed. 199.

Manicure sticks.—See under this title, vol. 2, p. 426, par. 208.

## Vol. II, p. 426, par. 205.

Fruit boxes.—In showing that fruit boxes are entitled to classification under paragraph 205, as being made from reimported shooks, it is not enough to establish a probability that many of the boxes were of such origin. There

must be definite evidence as to the quantity in each importation entitled to such classification. *Westervelt v. U. S.*, (1900) 150 Fed. 378.

## Vol. II, p. 426, par. 206.

Baskets made from willow chip.—Under paragraph 206, relating to "willow prepared for basket makers' use," . . . manufactures of . . . willow," it was the intention for the final clause to cover completed manufactures from the "prepared" willow enumerated in the preceding clause; and baskets made from willow chip would be dutiable thereunder

rather than as "manufactures of chip" under paragraph 449. *Olleshaemer v. U. S.*, (1907) 158 Fed. 977, 86 C. C. A. 181, *affirming* 154 Fed. 167.

Rattan reeds, from which the outside has been removed, are not "in the rough," within the meaning of Tariff Act Oct. 1, 1890, ch. 1244, sec. 2, Free List, par. 756, 26 Stat. L.

611, but are "reeds wrought or manufactured from rattans," within the meaning of section 1, Schedule D, par. 229, of that Act, which corresponds to paragraph 206 of the Act of 1897. *Foppes v. U. S.*, (1894) 154 Fed. 866.

## Vol. II, p. 426, par. 208.

**Magnesite brick.**—The phrase "fire brick," in paragraph 87, is a well-known commercial designation, which means brick made from fire clay, and therefore does not include magnesite brick, which is properly dutiable under paragraph 208. *U. S. v. Hempstead*, (1907) 153 Fed. 483.

**Manicure sticks**, being completed articles of wood, several inches long, pointed at one end and beveled off at the other to form a cutting edge, are "manufactures of wood," and dutiable as such under paragraph 208. *Estes v. U. S.*, (1909) 176 Fed. 932.

**Upholstered furniture with wooden frames** is dutiable under paragraph 208, as "furniture of wood," though silk, and not wood, is the chief component in the completed articles. *U. S. v. Woodruff*, (1909) 175 Fed. 776, 99 C. C. A. 348, *affirming* 168 Fed. 452.

**Wood flour.**—The provision for "house or cabinet furniture, of wood, wholly or partly finished, and manufactures of wood," in paragraph 208, is intended to cover all finished manufactured wooden articles, however different they may be in nature or appearance

**Shida baskets**, composed of vegetable fibre derived from ferns, are not dutiable by similitude as manufactures of grass, etc., under paragraph 449, but are dutiable under paragraph 206. *Butler v. U. S.*, (1910) 181 Fed. 402.

from "house or cabinet furniture;" and wood flour, a completed product, already prepared for use, is therefore not to be excluded under the rule of *ejusdem generis*. *Nairn Linoleum Co. v. U. S.*, (1907) 151 Fed. 955.

**Wood furniture decorated with metal.**—In paragraph 208, providing for "furniture of wood, . . . and manufactures of wood, or of which wood is the component material of chief value," the last clause as to chief value does not relate to the provision for furniture; and furniture whose framework and principal bulk are of wood is furniture "of wood," within the meaning of the paragraph, though decorative metal may be the component of chief value. *Hempstead v. U. S.*, (1909) 168 Fed. 450, *affirmed* (1910) 175 Fed. 966, 99 C. C. A. 356.

**Fireproofed lumber.**—See under this title, vol. 2, p. 425, par. 195.

**Kinoki baskets.**—See under this title, vol. 2, p. 478, par. 449.

**Smokers' articles.**—See under this title, vol. 2, p. 481, par. 459.

## Vol. II, p. 427, par. 209.

**Beet sugar.**—In *Franklin Sugar Refining Co. v. U. S.*, (1907) 153 Fed. 653, the court in construing paragraph 209, relating to "sugar above number sixteen Dutch standard in color, and . . . sugar which has gone through a process of refining," held that it was not necessary that, in order to come within the first clause of this provision, sugar should be capable of being used commercially, without refining, as cane sugar, and therefore beet sugar, which is not so capable, is included therein.

**Fraction of degree.**—In determining whether sugar drainings should be classed under a tariff act as "not above fifty-six degrees," by the polariscope, or as "fifty-six degrees and above," it was held that the rule of *de minimis non curat lex* does not apply to drainings testing 56.025, so as to require their classification under the former provision as testing fifty-six, by disregarding the fraction of a degree. *U. S. v. Lueder*, (C. C. A. 1907) 154 Fed. 1, *reversing* (1906) 146 Fed. 149.

**Polariscopic test.**—The expressions therein, "testing by the polariscope" and "shown by the polariscopic test," are not used with any special trade meaning that would confine them to a particular method of conducting

such test, but import an intention on the part of Congress that the method adopted should be the one best calculated to make a scientific determination; therefore under the general power of the secretary of the treasury to make customs regulations not inconsistent with law, granted by section 251, Rev. Stat., 7 Fed. Stat. Annot. 369, it is competent for that officer to prescribe the method of "testing by the polariscope" the sugars dutiable according to such test under paragraph 209, and so long as he acts in good faith and it does not appear that his regulations operate to make the polariscope test less accurate than when Congress adopted it, the courts should not interfere with the administrative details confined to him. *U. S. v. Bartram*, (C. C. A. 1904) 131 Fed. 833, *reversing* (1903) 123 Fed. 327.

**Settlement test.**—Where no official polariscopic test has been made of imported sugar, it is proper to classify the sugar in accordance with the settlement test, especially where the importers have agreed to accept such tests, and the secretary of the treasury has authorized their use. *American Sugar Refining Co. v. U. S.*, (1909) 175 Fed. 893.

## Vol. II, p. 428, par. 212.

**Dragees**, which are small spherical or spheroidal objects, with a sugar coating and a sweet taste, and which are used by bakers for decorating cakes and to some extent by confectioners, are "confectionery" within the

meaning of this paragraph. *U. S. v. La Manna*, (C. C. A. 1908) 166 Fed. 751, *reversing* (1907) 154 Fed. 955.

**Wafers and biscuits.**—See under this title, vol. 2, p. 504, sec. 6.

## Vol. II, p. 429, par. 214.

**Sweepings.**—See under this title, vol. 2, p. 429, par. 215.

## Vol. II, p. 429, par. 215.

**Sweepings.**—Tobacco suitable for neither wrappers nor fillers, but which may be used as a filler in the manufacture of a very small

size of tobacco cigars, is not leaf tobacco, and is properly dutiable under paragraph 215. *Dominguez v. U. S.*, (1903) 122 Fed. 556.

## Vol. II, p. 431, par. 231.

**Oatmeal feed.**—A by-product in the manufacture of oatmeal, which consists merely of the broken hulls of the oats, and is known as

"oatmeal feed," is dutiable as "oat hulls," under paragraph 231. *U. S. v. McGettrick*, (1905) 139 Fed. 304.

## Vol. II, p. 431, par. 232.

**Deterioration in size of rice due to handling.**—The fact that age and repeated handling of broken rice may have caused an infinitesimal increase in the percentage of the material that will pass through the standard sieve, is not a sufficient reason for rejecting a test based on samples of such rice, especially where the failure to make a proper test at the time of importation was due to no fault of the importer. *Seattle Brewing, etc., Co. v. U. S.*, (1910) 176 Fed. 125.

**Size of wire in sieve.**—Under this paragraph, relating to broken rice that will pass through what is "known commercially as No. 12 wire sieve," it appearing that there are several sieves so known commercially, the secretary of the treasury is authorized, in order to secure uniformity, to specify which of them should be used by customs officers. *Wakem v. U. S.*, (1906) 147 Fed. 874; *Seattle Brewing, etc., Co. v. U. S.*, (1910) 176 Fed. 125.

## Vol. II, p. 431, par. 236.

"Ghee" is within the provision for "butter, and substitutes therefor," in this paragraph. *Sahadi v. U. S.*, (1906) 152 Fed. 486.

## Vol. II, p. 431, par. 241.

**Capers pickled in vinegar**, which are used as a condiment and in flavoring sauces, are dutiable under this paragraph, relating to "pickles and sauces of all kinds." *S. S. Pierce Co. v. U. S.*, (1910) 176 Fed. 440.

**Dried mushrooms in cans.**—Mushrooms dried in order to preserve them, and placed in hermetically sealed tins holding from thirty to forty-five pounds, are within the provision in this paragraph, rather than paragraph 257 relating to "vegetables in their natural state." *Choy Chong Woh v. U. S.*, (1907) 153 Fed. 879, 82 C. C. A. 608.

**Salted cabbage.**—Hanks and balls of dried and salted cabbage, the salting and manipulation of which were done as a preparation fitting the cabbage for cooking purposes, and intended to be permanent, are dutiable as vegetables "prepared or preserved," under this paragraph, and not as vegetables in their "natural state," under paragraph 257. *Sun Kwong On v. U. S.*, (1909) 177 Fed. 595.

**Substances with medicinal properties.**—Articles are not to be removed from a provision for pickles and sauces, and placed in a provision for drugs, simply because a medicinal or therapeutic property may be extracted from them. *S. S. Pierce Co. v. U. S.*, (1910) 176 Fed. 440.

**Truffles in tins** are dutiable as "mushrooms in tins," by similitude, under this paragraph. *Von Bremen v. U. S.*, (1909) 168 Fed. 889, 94 C. C. A. 301.

**Use, not botanical classification, controlling.**—Articles are not to be excluded from the provision in paragraph 241, for "vegetables . . . including pickles and sauces of all kinds," on the ground that they are not palatable or desirable as a distinct and separate eatable, or are not known as garden vegetables. The use, rather than strict botanical classification, is the determinative factor; and therefore capers, which are flower buds, but are used as pickles or as a sauce, are included in said provision. *S. S. Pierce Co. v. U. S.*, (1910) 176 Fed. 440.

**"Vegetables."**—In paragraph 241, the term "vegetables" is used in accordance with the ordinary understanding, vegetables usually served at dinner, and does not include truffles, which are used only as a condiment in cooking. *Von Bremen v. U. S.*, (1909) 168 Fed. 889, 94 C. C. A. 301.

**An edible fungus.**—See under this title, vol. 2, p. 433, par. 257.

**Cauliflowers in brine.**—See under this title, vol. 2, p. 433, par. 257.

**Dried mushrooms.**—See under this title, vol. 2, p. 433, par. 257.

**Dried mushrooms, sliced.**—See under this title, vol. 2, p. 433, par. 257.

**Pickled walnuts.**—See under this title, vol. 2, p. 504, sec. 6.

**Thick Soy.**—See under this title, p. 504, sec. 6.

## Vol. II, p. 431, par. 244.

Ducks' eggs.—Paragraph 549, relating to "eggs of birds," does not include eggs of the domesticated duck, which are dutiable under

paragraph 244 as "eggs, not specially provided for." *Sun Kwong On v. U. S.*, (C. C. A. 1906) 143 Fed. 115.

## Vol. II, p. 432, par. 245.

Albumen.—See under this title, vol. 2, p. 482, par. 468.

## Vol. II, p. 432, par. 249.

"Bushel."—In passing paragraph 249, Congress must be assumed to have known the practice of the treasury department to consider fifty-seven pounds as a bushel and to

have intended to accept that as a standard. *Hills Bros. Co. v. U. S.*, (1906) 151 Fed. 476, 81 C. C. A. 14, *affirming* 143 Fed. 695.

## Vol. II, p. 432, par. 251.

Lily buds, imported in condition to open in full bloom immediately upon arrival at their destination in this country, are dutiable as "lilies," under this paragraph, and are not free of duty under paragraph 617, as "vegetable substances, crude or unmanufactured, not otherwise specially provided for." *Vandergrift v. U. S.*, (1901) 123 Fed. 1002.

Lily of the valley roots.—Act of 1894.—In construing the provision in Tariff Act August 27, 1894, ch. 349, sec. 1, Schedule G, par. 234½, 28 Stat. L. 525, for "lily of the valley . . . plants used for forcing," it was

held that lily of the valley roots, sprouted, which are imported for forcing, were dutiable thereunder, being included within the term "plants," in a popular sense, though not technically. *McAllister v. U. S.*, (1896) 147 Fed. 773.

Statice wreaths, which have all the appearance of "natural flowers . . . preserved," are dutiable under the enumeration of such articles in paragraph 251. *Bayersdorfer v. U. S.*, (1909) 171 Fed. 286.

Prepared palm leaves.—See under this title, vol. 2, p. 473, par. 425.

## Vol. II, p. 432, par. 252.

Rooted rose cuttings.—Under this paragraph, relating first to "rose plants," and second to "cuttings" of "shrubs" and of "plants," rooted rose cuttings that have been placed in sand to facilitate handling, but have never been in soil, fall within the latter provision as cuttings of shrubs or plants. *U. S. v. American Express Co.*, (1908) 158 Fed. 808, 86 C. C. A. 68.

Seedlings of rhododendrons and laurels.—In this paragraph the provision for "evergreen seedlings" is not restricted to such

evergreen plants as the conifers and box, but extends to those that retain their verdure or greenness throughout the year; and seedlings of rhododendrons and laurels, that remain green constantly, are included in said provision. *U. S. v. Ouwkerk*, (1907) 153 Fed. 916, *affirmed* (C. C. A. 1908) 166 Fed. 1622.

The word "seedlings" includes all trees or plants grown from seed, irrespective of their age. *U. S. v. American Express Co.*, (1908) 158 Fed. 808, 86 C. C. A. 68.

## Vol. II, p. 432, par. 254.

Canary seed.—See *Nordlinger v. U. S.*, (C. C. A. 1904) 127 Fed. 683, *affirming* (1902) 119 Fed. 478, set out in the original note.

## Vol. II, p. 433, par. 257.

An edible fungus, that grows on the bark of trees and has been merely dried and packed loose, bears a greater similitude to vegetables in their natural state, enumerated in this paragraph, than to mushrooms prepared, enumerated in paragraph 241, and is therefore dutiable under this paragraph 257. *Sun Kwong On v. U. S.*, (1908) 176 Fed. 930.

Cauliflowers in brine.—Cauliflowers that have been trimmed, washed, and packed in brine for preservation during transportation, and to keep them in their natural state, and that when taken out of the brine and washed

are still in their natural state, are dutiable under this paragraph as "vegetables in their natural state," rather than under paragraph 241, as "vegetables prepared or preserved." *U. S. v. Strohmeyer, etc., Co.*, (C. C. A. 1909) 167 Fed. 533.

Dried mushrooms.—The provision in paragraph 241 for mushrooms "prepared or preserved," does not include mushrooms dried merely by evaporation, which are dutiable under paragraph 257 as "vegetables in their natural state." *Kraut v. U. S.*, (1905) 139 Fed. 94.

**Dried mushrooms sliced.**—The slicing of vegetables solely to facilitate the natural drying operation is not sufficient to remove them from their natural state; and mushrooms cleaned, sliced, and dried in the sun are dutiable as "vegetables in their natural state," under this paragraph, rather than as "vegetables prepared or preserved," under paragraph 241. *Zanmati v. U. S.*, (1907) 153 Fed. 880, 82 C. C. A. 626.

## Vol. II, p. 433, par. 258.

**Fish in small packages.**—In this paragraph, relating to fish "in packages containing less than one-half barrel," classification should be determined by the size of the container in which the merchandise is packed for transportation and wholesale trade, rather than of the container in which it is packed for retail trade; and fish in boxes of a capacity of not less than one-half barrel, but filled with one pound paper packages for retail, is not dutiable under said provision. *U. S. v. Yamashita*, (1910) 175 Fed. 1018.

**Fish packed in round tin boxes holding "appetit-sild."**—Herring called *appetit-sild* or *appetit-herring*, in tins, but not "known or labeled as anchovies, sardines, sprats, brislings, sardels, or sardellen, packed in . . . tin boxes or cans," are not dutiable under such enumeration in paragraph 258, but are within the provision in the same paragraph for "all other fish . . . in tin packages." *Benson v. U. S.*, (1907) 159 Fed. 118, 86 C. C. A. 308, *distinguishing* *Reiss v. U. S.*, (1902) 113 Fed. 1001, set out in the original note, on the ground that the opinion in that case expressly rests its adoption of a classification upon the appraiser's finding that "the contents of the boxes is 'fish known as anchovies,' with no evidence in the case one way or the other to contradict this finding."

**Fish roe, or caviar, in tin packages,** is, by virtue of the similitude clause in section 7, dutiable at the rate applicable to fish in tin packages, enumerated in this paragraph, which article it resembles in quality, texture, and use, especially use, within the meaning of said section. *Menzel v. U. S.*, (1904) 135 Fed. 918, *affirmed* (1906) 142 Fed. 1038.

**Frozen fish imported in packages containing less than one-half barrel** are dutiable un-

**Wai san**, an edible root used by the Chinese as a vegetable, is, because edible, removed from the provision for "drugs," in paragraph 20, and is dutiable as "vegetables," under paragraph 257. *Wing On Wo v. U. S.*, (1909) 175 Fed. 891.

**Dried mushrooms in cans.**—See under this title, vol. 2, p. 431, par. 241.

**Salted cabbage.**—See under this title, vol. 2, p. 431, par. 241.

der the provision in this paragraph, for "fish in packages containing less than one-half barrel, and not specially provided for," rather than under that in paragraph 261, for "fish, fresh, . . . frozen, packed in ice, or otherwise prepared for preservation, not specially provided for." *Loggie v. U. S.*, (C. C. A. 1905) 137 Fed. 813.

**Herring in tins**, which have been pickled, salted, skinned, or boned, are dutiable as "fish . . . in tin packages," under this paragraph, rather than as "herrings pickled or salted," or as "fish, skinned or boned," under paragraphs 260, 261. The fact of importation in tins controls over the other conditions set forth in the two latter paragraphs. *Benson v. U. S.*, (1907) 159 Fed. 118, 86 C. C. A. 308.

**Measurement.**—In applying the provision in paragraph 258 for fish in tins "containing" various quantities, the actual capacity of the tins should be considered, rather than the quantity of fish found in them. *Gandolfi v. U. S.*, (1907) 152 Fed. 656.

**Sardines in large tins.**—In this paragraph, relating to sardines "in bottles, jars, tin boxes or cans" of various small sizes not exceeding seventy cubic inches, also "in other packages," the doctrine of *nosctitur a sociis* is not to be so applied as to limit the latter phrase to packages of a retail size, and thus exclude sardines in large tins dealt in at wholesale. *Strohmeyer, etc., Co. v. U. S.*, (1910) 178 Fed. 268, 101 C. C. A. 400, *affirming* (1909) 172 Fed. 295.

**"Cream of codfish."**—See under this title, vol. 2, p. 434, par. 261.

**Filled bottles.**—See under this title, vol. 2, p. 405, par. 99.

**Salted fish in wooden packages.**—See under this title, vol. 2, p. 506, sec. 7.

## Vol. II, p. 434, par. 260.

**Allowance for salt, etc.**—In *Lincoln v. U. S.*, (1910) 178 Fed. 599, it appeared that salted herring are dealt in by the barrel, that in wholesale trade a "barrel" means 200 pounds of net fish, that it is usual to deliver 228 pounds of fish as taken from the hold of a vessel, in accordance with a long-standing custom to allow for salt, scale, and dirt, and that at no time does this extra twenty-eight pounds enter into the marketable weight of the merchandise. It was held that

in assessing duty on the weight of such fish under paragraph 260, a like allowance should be made.

**Smoked herring**, though salted before being smoked, are not dutiable as "herrings, pickled or salted," under paragraph 260, being a commodity distinct therefrom both commercially and in common speech. *Mattlage v. U. S.*, (1904) 139 Fed. 704.

**Herring in tins.**—See under this title, vol. 2, p. 433, par. 258.

## Vol. II, p. 434, par. 261.

**Cream of codfish.**—So-called cream of codfish, consisting of codfish skinned and boned, and subjected to the further process of cutting or shredding, is dutiable as "fish, skinned or boned," under this paragraph, and not as fish "in packages less than one-half barrel, and not specially provided for," under paragraph 258. *Teed v. U. S.*, (1903) 126 Fed. 447.

**Fresh salmon packed in ice.**—Under this paragraph, relating (1) to "fish, fresh, . . . frozen, packed in ice, or otherwise prepared for preservation, not specially provided for," and (2) to "salmon, fresh," salmon packed

in ice for preservation are dutiable under the first provision; for Congress by enumerating fish packed in ice separately from fish fresh, indicated an intention to exclude the former class from the provision for the latter. *U. S. v. Perry*, (1909) 171 Fed. 303.

**Frozen fish imported in packages containing less than one-half barrel.**—See under this title, vol. 2, p. 433, par. 258.

**Herring in tins.**—See under this title, vol. 2, p. 433, par. 258.

**Salted fish in wooden packages.**—See under this title, vol. 2, p. 506, sec. 7.

## Vol. II, p. 434, par. 262.

**Cherries**, which have been washed, pitted, and packed in salt water to preserve them in transit, are not dutiable as "fruits preserved . . . in their own juices," under paragraph 263, but as "edible fruits . . . prepared in any manner," under paragraph 262. *Causse Mfg. Co. v. U. S.*, (C. C. A. 1906) 151 Fed. 4.

**Fox berries.**—In *Boak v. U. S.*, (1903) 125 Fed. 599, 60 C. C. A. 335, it was held that the expression "berries, edible, in their natural condition," in this paragraph, means berries which are in their natural condition as imported, and are edible either in that state or after cooking, and that fox berries imported in barrels filled with water are in their natural condition, and are included within said provision and not within paragraph 559, relating to "berries, green, ripe, or dried, . . . not specially provided for."

**Fruits "green or ripe."**—The first part of this paragraph, imposing a duty per bushel on cherries and other fruits, "green or ripe," applies to those fruits, ripe or unripe, when imported in their natural condition. *Causse Mfg. Co. v. U. S.*, (C. C. A. 1906) 151 Fed. 4, *modifying* 143 Fed. 690.

**Fruits prepared.**—Fruit preserved in hermetically sealed bottles, surrounded by a light syrup containing no juice and an insignificant amount of alcohol, the preservation being due to the sealing, is not "fruits preserved in sugar, . . . spirits, or in their

own juices," within the meaning of paragraph 263, but is dutiable under paragraph 262, as "fruits . . . prepared." In providing for fruit preserved in "sugar," Congress contemplated sugar which causes or materially contributes to the preservation of the fruit. *U. S. v. Reiss*, (C. C. A. 1909) 166 Fed. 746, *affirming* (1908) 163 Fed. 65.

**"Prepared in any manner."**—Under this paragraph relating to fruits "dried, desiccated, evaporated, or prepared in any manner," the scope of the expression "prepared in any manner" is not by the rule of *noscitur a sociis* to be so limited as to embrace only fruits prepared by a drying process. *Causse Mfg. Co. v. U. S.*, (C. C. A. 1906) 151 Fed. 4, *modifying* 143 Fed. 690.

**"Quart."**—In *U. S. v. Boak Fish Co.*, (1906) 146 Fed. 104, it was held, as to foxberries in barrels, with water added to act as a cushion, so as to prevent crushing, that, in assessing the duty "per quart," provided in this paragraph, the dutiable quantity should be ascertained by the use of the dry quart and not the liquid quart.

**Berry jams.**—See under this title, vol. 2, p. 434, par. 263.

**Chutney.**—See under this title, vol. 2, p. 434, par. 263.

**"Preservation" and "preparation" distinguished.**—See under this title, vol. 2, p. 434, par. 263.

## Vol. II, p. 434, par. 263.

**Berry jams** are dutiable under this paragraph, as sweetmeats or preserved fruits, rather than as "jelly" under the same paragraph, or as "edible fruits prepared," under paragraph 262. *Bogle v. U. S.*, (1909) 175 Fed. 889.

**Cherries in alcohol.**—Certain cherries imported in casks, in a surrounding fluid containing alcohol added for the purpose of resisting fermentation and decay, the cherries being an inedible variety, intended to be used in the manufacture of cherry juice, are specially provided for in this paragraph as "fruits preserved in . . . spirits," and are not dutiable under paragraph 269, either as "cherry juice" or as an unenumerated article

similar thereto, "either in material, quality, texture, or the use to which it may be applied," under section 7 of said act. *Voight v. Mihalovitch*, (1899) 125 Fed. 78.

**Chutney.**—The article commercially known as "chutney," which consists of various fruits preserved with sugar and spices, is dutiable as "fruits preserved," under this paragraph, rather than as "edible fruits . . . prepared," under paragraph 262. *Park v. U. S.*, (1908) 164 Fed. 910.

**Excess of alcohol.**—Under this paragraph, relating to fruits in spirits and imposing a duty "per proof gallon on the alcohol contained therein in excess of ten per centum," the duty is to be levied on all such excess,

whether absorbed by the fruit or supernatant. *Mihalovitch v. U. S.*, (1908) 160 Fed. 988.

**Leghorn citron**, preserved by being cut in halves, boiled and soaked in salt water, freshened, and then covered with syrup and boiled down, and fresh sugar placed thereon, and the process repeated until the peel is thoroughly impregnated with the sugar and cured, was held to be taxable as "fruits preserved in sugar," under the Tariff Act of 1883, par. 302, and not entitled to admission free under paragraph 704 of that act, as dried fruits not specifically enumerated. *U. S. v. Nordlinger*, (1903) 121 Fed. 690, 58 C. C. A. 438, *reversing* (1902) 115 Fed. 828, cited in the original note.

**Marmalade** is dutiable under the provision in this paragraph relating to "sweetmeats and fruits preserved," rather than as "jellies," under the same paragraph. *Bogle v. U. S.*, (1909) 175 Fed. 889.

**Marrons**.—The term "comfits" in this paragraph is practically synonymous with "confections," and includes boiled marrons (chestnuts) preserved in syrup. *U. S. v. Schall*, (1906) 147 Fed. 760, *affirmed* (C. C. A. 1907) 154 Fed. 1005.

**Pineapples preserved in own juice**.—Pineapples preserved in cans in their own juice, with enough sugar added for flavoring, and not aiding substantially in their preservation, which is accomplished by the canning process, are held to be dutiable as "pineapples preserved in their own juice," and not as fruit preserved in sugar, under the same paragraph. *U. S. v. Boden*, (1904) 133 Fed. 839; *U. S. v. Johnson*, (C. C. A. 1907) 152 Fed. 164, *affirming* (1906) 143 Fed. 915; *Dudley v. U. S.*, (C. C. A. 1907) 153 Fed. 881, *reversing* (1906) 148 Fed. 333; *U. S. v. Johnson*, (1908) 166 Fed. 1002.

"Preservation" and "preparation" distin-

guished.—The process of hermetically sealing fruit in tin cans, thus preserving it from decay until the cans are opened, constitutes "preservation," rather than "preparation;" and fruit pulp that has been cooked and subjected to such sealing process is dutiable under this paragraph as fruit "preserved . . . in their own juices," rather than under paragraph 262, as fruit "prepared in any manner." *Habicht v. U. S.*, (1910) 175 Fed. 1009.

**Preserved figs**.—In *U. S. v. Reiss*, (C. C. A. 1905) 136 Fed. 741, *reversing* (1903) 126 Fed. 578, it was held that the "fruits preserved in sugar, molasses, spirits, or in their own juices," enumerated in this paragraph, are known commercially as a class by themselves, of which the use and form constitute the distinctive characteristics, and that certain figs preserved whole are within that provision, rather than the provision for "figs" in paragraph 264.

**Preserved fruit**.—The provision in this paragraph for "comfits, sweetmeats, and fruits preserved in sugar, molasses, spirits, or in their own juices," refers to a class of goods commercially known as preserved fruits, and is intended to apply to fruits treated so as to become a preserve or comfit and not to such as merely remain temporarily in their natural juice. *Causse Mfg. Co. v. U. S.*, (C. C. A. 1906) 151 Fed. 4.

**Cherries**.—See under this title, vol. 2, p. 434, par. 262.

**Cherries in maraschino**.—See under this title, vol. 2, p. 504, sec. 6.

**Fruits prepared**.—See under this title, vol. 2, p. 434, par. 262.

**Reciprocal agreement with France**.—See under this title, vol. 2, p. 501, sec. 3.

**Reciprocal agreement with Germany**.—See under this title, vol. 2, p. 501, sec. 3.

## Vol. II, p. 435, par. 264.

**"Gallon."**—Under this paragraph imposing a duty at various rates "per gallon," according to condition, the duty should be assessed on the basis of the wine or liquid gallon and not the dry gallon, regardless of whether the olives are imported dried or in brine. *Ceballos v. U. S.*, (C. C. A. 1906) 146 Fed. 380, *affirming* (1904) 139 Fed. 705.

**Olives in brine**.—Olives which have been immersed in salt and water for the purpose of preserving them from decay in shipment, and which have been subjected to no preparation to fit them for eating, are not "olives prepared," within the meaning of this paragraph. *U. S. v. Zucca*, (1909) 175 Fed. 578.

## Vol. II, p. 435, par. 266.

**Limes in brine**.—See under this title, vol. 2, p. 489, par. 559.

## Vol. II, p. 435, par. 267.

**Lemon peel preserved**.—Halved lemons in brine are "fruits in brine," within paragraph 559, and not dutiable as lemon peel preserved, under paragraph 267, notwithstanding the brine renders the pulp inedible, and the only value is in the peel. *Hills Bros Co. v.*

**Olives in ten gallon jars**.—This paragraph relates to olives "in bottles, jars, or similar packages," and "in casks or otherwise than in bottles, jars, or similar packages." It has been held that this language does not import an intention to make a division between olives in retail packages and those in wholesale packages, and that olives in jars holding ten gallons are therefore within the first of these provisions. *U. S. v. Shing Shun*, (1909) 173 Fed. 844.

**Preserved figs**.—See under this title, vol. 2, p. 434, par. 263.

*U. S.*, (C. C. A. 1903) 123 Fed. 477, *reversing* (1902) 113 Fed. 857, set out in the original note.

**Orange and lemon peel immersed in brine**.—See under this title, vol. 2, p. 494, par. 627.

## Vol. II, p. 435, par. 268.

Pineapples preserved in own juice.—See under this title, vol. 2, p. 434, par. 263.

## Vol. II, p. 435, par. 269.

Allowance for impurities.—In ascertaining the dutiable weight of shelled nuts dutiable by the pound under paragraphs 269, 270, no allowance should be made for impurities in importations not shown to contain abnormal quantities of foreign matter, nor to vary from the ordinary wholesale condition. *Spencer v. U. S.*, (1906) 143 Fed. 916.

Clear almonds.—The provision in this paragraph for "clear" shelled almonds refers to nuts that are practically and substantially free from shells, dust, and dirt, and after being divested of their outer covering are fairly free from that covering. *Heide v. U. S.*, (1909) 175 Fed. 316.

## Vol. II, p. 436, par. 270.

Allowance for impurities.—See under this title, vol. 2, p. 435, par. 269.

## Vol. II, p. 436, par. 272.

Apricot stones come within the common definition of "nuts," and apricot kernels are dutiable as "nuts . . . not specially pro-

vided for," under this paragraph. *Spencer v. U. S.*, (1906) 146 Fed. 112.

Marrons.—See under this title, vol. 2, p. 434, par. 263.

## Vol. II, p. 436, par. 275.

Duck meat in tins, some salted and dried, and some packed in oil, is not "poultry . . . dressed," within the meaning of paragraph 278, but is rather classifiable as "meats of all kinds, prepared or preserved," under paragraph 275. *Kwong Yuen Shing v. U. S.*, (1909) 177 Fed. 605.

Paté de foie gras.—In this paragraph the provision for "meats of all kinds, prepared or preserved," is broad enough to include not only the cooked meat of poultry and game, in tins, but also goose livers prepared as paté de foie gras. *Smith v. U. S.*, (1909) 168 Fed. 462.

## Vol. II, p. 436, par. 276.

Filled bottles.—See under this title, vol. 2, p. 405, par. 99.

## Vol. II, p. 436, par. 278.

Guinea fowl and turkeys, that are not shown to have been in a wild state, are classifiable as "poultry," under this paragraph, rather than as "birds and land . . . fowls," under paragraph 494. *Silz v. U. S.*, (1909)

167 Fed. 686, *affirmed* (1910) 178 Fed. 273, 101 C. C. A. 537.

Duck meat in tins.—See under this title, vol. 2, p. 435, par. 275.

Paté de foie gras.—See under this title, vol. 2, p. 436, par. 275.

## Vol. II, p. 436, par. 279.

Refined wool grease.—The provision for "wool grease" in this paragraph includes a refined wool grease, from which the natural odor and mineral matter have been removed by a superior process, and which is commer-

cially known as "wool grease." *Swan, etc., Co. v. U. S.*, (1903) 149 Fed. 304.

Adeps lanæ.—See under this title, vol. 2, p. 400, par. 68.

Olein.—See under this title, vol. 2, p. 392, par. 3.

## Vol. II, p. 436, par. 281.

Coverings for chocolate.—Certain coverings for chocolate, consisting of small boxes, some in the form of a trunk, having hinged tops fastened with a catch and hook, and lined with fancy paper, are "coverings, other than plain wooden," within the meaning of the part of this paragraph, which provides that "the weight

and value of all coverings, other than plain wooden, shall be included in the dutiable weight and value" of their contents, when containing chocolate and cocoa. *Cure v. U. S.*, (1901) 123 Fed. 994, *following* *U. S. v. Volkmann*, (C. C. A. 1901) 107 Fed. 109, set out in the original note.



## Vol. II, p. 437, par. 282.

**Cocoa-butterine**, as provided for in this paragraph, consists of products made in imitation of cocoa-butter, and adapted for use as a substitute therefor. *U. S. v. Oriental American Co.*, (1904) 129 Fed. 249.

**Refined cocoanut oil** is not "cocoa butterine," within the meaning of paragraph 282. *Fuerst v. U. S.*, (1909) 176 Fed. 95, 100 C. C. A. 25, *reversing* (1908) 166 Fed. 1014.

## Vol. II, p. 437, par. 283.

**Coffee essence**, which is used as coffee or as a substitute therefor, is not "coffee," within the meaning of paragraph 283, but is dutiable, either directly or by similitude, as

"articles used as coffee, or as substitutes for coffee," under paragraph 283. *Hazard v. U. S.*, (1909) 175 Fed. 967, 99 C. C. A. 357, *reversing* (1908) 164 Fed. 907.

## Vol. II, p. 438, par. 285.

**Arrowroot starch**.—The provision in paragraph 478, for "arrowroot in its natural state and not manufactured," relates to the tubers or root of the arrowroot plant, though no importations are ever made in that form, and does not include the article commercially known as arrowroot, consisting of starch made from arrowroot tubers, which is more

properly classifiable as "starch," under paragraph 285. *Leaycraft v. U. S.*, (C. C. A. 1904) 130 Fed. 106, *affirming* (1903) 124 Fed. 999; *Middleton v. U. S.*, (1906) 151 Fed. 16, 80 C. C. A. 512.

**Bone-size substitute**.—See under this title, vol. 2, p. 392, par. 3.

## Vol. II, p. 438, par. 286.

**White dextrine**, produced by the chemical treatment of starch, while not a dextrine, technically speaking, is classifiable as "dex-

trine," because it is commercially so known. *Morningstar v. U. S.*, (1907) 159 Fed. 287.

## Vol. II, p. 438, par. 287.

**Residuum from decorticating pepper berries**.—The residuum in the process of decorticating pepper berries, consisting of the inner cuticle in the form of a powder, which, without further grinding, is mixed with ground pepper as an adulterant, is not within the provision in paragraph 667 for pepper "un-ground." It is sufficient if the pepper reaches

its ground condition by decortication, or some other process equivalent to grinding, to be excluded from this provision. *Frame v. U. S.*, (1906) 143 Fed. 692, *affirmed* (C. C. A.) 149 Fed. 1022.

**Cracked ginger root**.—See under this title, vol. 2, p. 497, par. 667.

## Vol. II, p. 438, par. 289.

**Chinese spirituous beverages**.—Chinese spirituous beverages imported in bottles containing on the average one-tenth of one gallon, and in spirituous strength below proof, were dutiable at two dollars per gallon, under

paragraph 311 of the Tariff Act of 1893, corresponding to paragraph 289 of the Act of 1897. *Kwong Chin Chong v. U. S.*, (1902) 119 Fed. 383.

## Vol. II, p. 440, par. 296.

**Construction of paragraph**.—This paragraph separates still wines in bottles into three classes and fixes a specific rate of duty on each, as follows: (a) Bottles "containing each not more than one pint," which are to be assessed as full pints at \$1.60 per twenty-four bottles, or at the rate of 6½ cents per pint; (b) bottles "containing each not more than one quart and more than one pint," which are to be assessed as full quarts at \$1.60 per dozen bottles; that is, at the same rate of 6½ cents per pint; and (c) bottles containing "any excess beyond these quantities," which are to be assessed at the rate of \$1.60 per dozen, plus five cents per pint or fractional pint on the excess over a quart con-

tained in each bottle. *U. S. v. Cerecedo Hermanos y Compañia*, (1908) 200 U. S. 337, 28 S. Ct. 532, 52 U. S. (L. ed.) 821.

**Leakage of vermouth**.—Vermuth is not covered by this paragraph prescribing that no allowance of duty should be made for leakage of "wines, liquors, cordials, or distilled spirits," as the context indicates that Congress regarded vermouth as an independent article from those enumerated in said provision. *Wile v. U. S.*, (1909) 172 Fed. 164, *affirmed* (1910) 178 Fed. 269, 101 C. C. A. 574.

**Leakage of wine**.—In an importation of 3,660 gallons of wine there was a shortage of 12.17 gallons in excess of the normal leakage.

## Vol. II, p. 448, par. 318.

**Specific designation.**—With respect to embroidered hosiery, the provision in paragraph 339, for "wearing apparel . . . embroidered in any manner by hand or machinery, . . . composed wholly or in chief value of flax, cotton, or other vegetable fiber, and not elsewhere specially provided for," is less specific

than the provision in paragraph 318 for "stockings, hose, and half-hose . . . composed of cotton or other vegetable fiber." *Carter v. U. S.*, (C. C. A. 1906) 143 Fed. 256, *affirming* (1905) 137 Fed. 978.

**Embroidered hosiery.**—See under this title, vol. 2, p. 451, par. 339.

## Vol. II, p. 448, par. 320.

**Bindings.**—A narrow woven tape of cotton, used largely for covering the seams of underwear and waists, if a braid, within paragraph 339, placing a sixty per cent. duty on braids not otherwise provided for, is also a binding or tape, and therefore otherwise provided for by, and dutiable under, paragraph 320, placing a forty-five per cent. duty on bindings and tapes. *Steinhardt v. U. S.*, (1903) 121 Fed. 442. See also *Baruch v. U. S.*, (C. C. A. 1909) 172 Fed. 342, *reversing* (1907) 159 Fed. 294.

**Labels of cotton and silk.** cotton the chief component, are not to be excluded from the provision in this paragraph for labels "com-

posed of cotton," because not composed wholly of cotton. *U. S. v. Herzog*, (C. C. A. 1905) 145 Fed. 622, *reversing* (1904) 135 Fed. 919.

**Labels in the piece.**—In construing the provision in paragraph 320 for "labels, for garments or other articles, composed of cotton," it was held that labels are not to be excluded therefrom because in the piece and requiring to be cut apart before being used as labels. *U. S. v. Herzog*, (C. C. A. 1905) 145 Fed. 622, *reversing* (1904) 135 Fed. 919.

**Featherstitch braids.**—See under this title, vol. 2, p. 451, par. 339.

**Ribbons of silk and cotton.**—See under this title, vol. 2, p. 465, par. 391.

## Vol. II, p. 449, par. 321.

**"Cotton table damask."**—The expression "cotton table damask," in paragraph 321 was not used by Congress according to any trade meaning it might have, but according to its denominative, or common, popular sense, which includes completed articles as well as

goods in the piece from which such articles are made. *Wilson v. U. S.*, (C. C. A. 1906) 146 Fed. 64, *affirming* (1905) 138 Fed. 1007; *Dunham v. U. S.*, (1906) 150 Fed. 562, 80 C. C. A. 364; *contra Douglass v. U. S.*, (1901) 123 Fed. 993.

## Vol. II, p. 449, par. 322.

**Cotton-wool cloth**—Act of 1890.—Goods composed in part of wool, but in chief value of cotton, were more specifically enumerated in Tariff Act Oct. 1, 1890, ch. 1244, sec. 1, Schedule I, par. 355, 26 Stat. L. 593, as "manufactures of cotton" than in the provision in Schedule K, paragraph 392, 26 Stat. L. 596, for "manufactures of every description . . . in part of wool." *Benoit v. U. S.*, (1892) 150 Fed. 687.

**Crocheted goods.**—So-called "crochet yokes," made by knitting or crocheting, and used for the yokes of women's vests, are not trimmings or lace within the meaning of paragraph 339. *Loewenthal v. U. S.*, (1906) 147 Fed. 774.

**Hemstitched lawns**—Act of 1894.—Hemstitched cotton lawns, made by subjecting cotton cloth to the process of turning over the edges, drawing certain threads, and other manipulation, but not appropriated by these

processes to any particular ultimate use, were held to have been advanced beyond the condition of "cotton cloth," and not to be dutiable as such under the "countable clauses" of Tariff Act Aug. 27, 1894, c. 349, sec. 1, Schedule I, paragraphs 252-257, but to be dutiable as "manufactures of cotton," under paragraph 264 of said act. *Meyer v. U. S.*, (1901) 124 Fed. 296.

**"Manufactures of cotton."**—The provision for "manufactures of cotton," in Tariff Act Oct. 1, 1890, ch. 1244, sec. 1, Schedule I, par. 355, 30 Stat. L. 593, was held to include materials composed in chief value of cotton and in part of another substance. *Benoit v. U. S.*, (1892) 150 Fed. 687.

**Hat bands or hat trimmings.**—See under this title, vol. 2, p. 451, par. 339.

**Ruffled cotton curtains.**—See under this title, vol. 2, p. 451, par. 339.

## Vol. II, p. 450, par. 326.

**Flax noils.**—See under this title, vol. 2, p. 481, par. 463.

## Vol. II, p. 451, par. 337.

**Cravenette cloth**—Act of 1890.—Certain woolen goods known as "cravenette cloths," which have been subjected to a process in-

tended to make them rain-repellant, which are chiefly used for outer garments to be worn in rainy weather, and which, for all

ordinary purposes, are waterproof, were held to be dutiable as "waterproof cloth," under paragraph 369, Tariff Act Oct. 1, 1890, and not under paragraphs 392 and 395, relating, respectively, to "woolen or worsted cloths" and "dress goods . . . of wool, worsted," etc. *U. S. v. Brown*, (1905) 136 Fed. 550, 69 C. C. A. 260, *affirming* (1903) 126 Fed. 446.

Linoleum of colored material, mixed in making, and taking such form as the pressure of the rollers and resistance of the materials give them, is not taxable for duty as

"inlaid linoleum," but as linoleum "figured or plain," under this paragraph. *Hunter v. U. S.*, (1903) 121 Fed. 207, *affirmed* (1904) 127 Fed. 1022, 61 C. C. A. 270.

Plank linoleum, made by running upon the burlap foundation paste of two colors in stripes of equal width, a process differing from that employed in making linoleum, is, under paragraph 337, dutiable as "linoleum . . . figured or plain," rather than as "inlaid linoleum." *U. S. v. Scott*, (1908) 164 Fed. 285.

## Vol. II, p. 451, par. 339.

**Appliquéd mottoes.**—Certain so-called "Haussegen" or wahl mottoes, consisting of pasteboard cards with mottoes sewn thereon, and with various pictures surrounded by wreaths, affixed thereto by some adhesive material, are dutiable under this paragraph 339, relating to appliquéd or embroidered articles, and not under paragraph 407, as manufactures in chief value of paper. *Kaufmann v. U. S.*, (1904) 128 Fed. 468.

**Articles stitched on edge to prevent raveling.**—The provision in paragraph 339 for "embroidery" and articles "embroidered in any manner," does not include articles stitched on the edge with needlework of the plainest description, which simply serves the necessary and useful purpose of preventing raveling. The fundamental idea of embroidery is that it is needlework done upon a previously completed fabric, as distinguished from tapestry or lace work, in which the design is a part of the original fabric. It is also essential that it should be ornamental, rather than merely useful. *U. S. v. Waentig*, (1909) 168 Fed. 570.

**Braids of cotton and rubber.**—The provision in this paragraph for braids "wholly or in chief value of . . . cotton, . . . whether composed in part of india rubber or otherwise," applies only to braids in which cotton is the chief or only component. Braids in part of cotton and in chief value of rubber are dutiable under paragraph 449, as manufactures in chief value of india rubber. *Horrax v. U. S.*, (C. C. A. 1909) 167 Fed. 526. See also *Calhoun v. U. S.*, (1901) 122 Fed. 894.

**Braid sets.**—Collars and cuffs composed of braids sewn together and ornamented with cords and threads were held to be dutiable as "wearing apparel . . . in imitation of lace," under this paragraph. It is not necessary that articles coming within this provision should be imitation lace as known to the trade. *U. S. v. Hesse*, (C. C. A. 1907) 158 Fed. 407, *reversing* 154 Fed. 171.

**Drawnwork.**—The provision for articles "embroidered," in paragraph 339 has been held to include so-called "drawnwork" goods, consisting of fabrics in which an openwork effect has been produced by drawing out certain of the threads and interjecting different and independent threads, and which have ornamental work and figures in various portions of the goods. *Beach v. Sharpe*,

(1907) 154 Fed. 543. *Compare U. S. v. Simon*, (1909) 169 Fed. 106, 95 C. C. A. 434.

**Embroidered furs.**—Fur garments, ready to wear, lined with silk and trimmed with embroidery, are "embroidered articles," though the fur itself has not been embroidered. *Jaeckel v. U. S.*, (1910) 178 Fed. 260, 101 C. C. A. 620, *affirming* (1909) 172 Fed. 292.

**Embroidered hosiery.**—The proviso in this paragraph, prescribing that no embroidered wearing apparel, etc., "shall pay duty at a less rate than that imposed in any schedule . . . upon any embroideries of the materials of which such embroidery is composed," is not restricted to the articles previously enumerated in the same paragraph, but extends to other portions of the act. Silk embroidered cotton hosiery is therefore dutiable at the rate applicable to silk embroideries, when such rate exceeds that provided for cotton hosiery in paragraph 318. *Carter v. U. S.*, (C. C. A. 1906) 143 Fed. 256, *affirming* (1905) 137 Fed. 978.

**Embroidered screens.**—Under the proviso in paragraph 339, prescribing that embroidered articles shall not pay a less rate of duty than is applicable to "any embroideries of the materials of which such embroidery is composed," it was held that silk-embroidered screens, composed of wood and other materials, were liable to the rate provided for silk embroideries. The rule of "*noscitur a sociis*" does not operate to exclude such articles by reason of the enumeration in the same paragraph of laces, trimmings, etc. *Lichtenstein Millinery Co. v. U. S.*, (1907) 154 Fed. 736.

**Featherstitch braids**, so called, which are not produced by braiding, but by a process of weaving, but which are known commercially as braids, are within the provision for "braids" in this paragraph. *Vom Baur v. U. S.*, (1905) 141 Fed. 439.

**Flax drawn work.**—In *U. S. v. Ulmann*, (C. C. A. 1905) 139 Fed. 3, *affirming* (1904) 131 Fed. 649, it was held that certain woven flax articles, in portions of which ornamental effects had been produced by drawing out certain of the threads and interjecting different, independent threads, producing openwork effects, are not "articles . . . in imitation of lace," as enumerated in paragraph 339.

**Hat bands or hat trimmings.**—Certain

woven cotton articles, from 1 to 2½ inches wide, chiefly used as hat bands for trimming men's hats, were held to be dutiable as "trimmings" of cotton, under paragraph 276, Tariff Act Aug. 28, 1894, and not as "galloons," under paragraph 263 of said act, nor as "manufactures of cotton . . . not specially provided for," under paragraph 264 of said act. *U. S. v. Graef*, (C. C. A. 1904) 127 Fed. 688, *reversing* (1903) 120 Fed. 1015.

**Hemstitched lace-trimmed handkerchiefs.**—Paragraph 345 provides for handkerchiefs, hemmed, hemstitched, etc., the duty being increased for each of these stages of elaboration. Paragraph 339 provides a still higher rate for "handkerchiefs . . . in part of lace . . . not elsewhere specially provided for." It has been held that it was the intention of Congress to advance the duty in accordance with the advancement of the goods in condition, and that hemstitched lace-trimmed handkerchiefs are dutiable under the latter rather than the former paragraph. *Glendinning v. U. S.*, (1908) 162 Fed. 910.

**Lace articles.**—This paragraph includes goods made by sewing together pieces of lace produced in shapes designed to be used in making the articles; the term "lace" not being restricted to articles made up from lace that is bought and sold by the yard. *Goldenberg v. U. S.*, (1907) 152 Fed. 658.

**Lace neckwear.**—Lace neckwear is more specifically provided for in this paragraph, as "wearing apparel . . . made wholly or in part of lace," than in paragraph 314 of this act, as "articles of wearing apparel of every description, including neckties or neckwear." *Goldenberg v. U. S.* (C. C. A. 1904) 130 Fed. 108, *affirming* (1903) 124 Fed. 1003.

**Openwork embroidery.**—Act of 1890.—So-called openwork articles, having ornamental designs stitched thereon by hand with a needle and thread, were held to be "embroideries," within the meaning of Tariff Act

Oct. 1, 1890, ch. 1244, sec. 1, par. 373, Schedule J, 26 Stat. L. 594. *Neuss v. U. S.*, (1896) 142 Fed. 281.

**Ramie braids.**—In *U. S. v. Rosenberg*, (C. C. A. 1906) 145 Fed. 343, it was held that, as to braids of ramie, the provision in paragraph 339, for "braids . . . of . . . vegetable fiber," is more specific than that in paragraph 347 for "all manufactures of . . . ramie" and other vegetable fibers; the latter provision being intended to embrace any manufactures of vegetable fiber that have been omitted elsewhere in the tariff.

**Ruffled cotton curtains.**—In construing the Tariff Act of Aug. 27, 1894, paragraph 276, which relates to "neck ruffings, . . . and articles made wholly or in part of . . . ruffings," it was held that the word "neck" should not be reread in connection with the word "ruffings," and that cotton curtains made in part of ruffings were dutiable under said paragraph, and not under paragraph 264 of said Act as "manufactures of cotton." *Brill v. U. S.*, (1900) 123 Fed. 845.

**"Wearing apparel."**—In *Darlington v. U. S.*, (1905) 136 Fed. 716, it was held that dress shields, which are articles for women's wear, intended to be worn under the arms to protect the dress from perspiration, are "wearing apparel," within the meaning of paragraph 413, which corresponds to paragraph 339 of the Act of 1897.

**Bindings.**—See under this title, vol. 2, p. 448, par. 320.

**Braids used as bindings.**—See under this title, vol. 2, p. 448, par. 320.

**Cotton velvet fabric trimmings.**—See under this title, vol. 2, p. 447, par. 315.

**Crocheted goods.**—See under this title, vol. 2, p. 449, par. 322.

**Drawn work in flax.**—See under this title, vol. 2, p. 454, par. 346.

**Embroidered fans.**—See under this title, vol. 2, p. 474, par. 427.

**Specific designation.**—See under this title, vol. 2, p. 448, par. 318.

## Vol. II, p. 453, par. 344.

Selected pieces of second-hand jute bagging.—See under this title, vol. 2, p. 481, par. 463.

## Vol. II, p. 454, par. 345.

**Unfinished handkerchiefs.**—In *Meyer v. U. S.*, (1905) 138 Fed. 974, the provision in paragraph 345 for "handkerchiefs . . . unfinished," was held to include cloth cut into pieces which are in the shape of squares and other geometrical figures, and which in that

shape are principally used in the manufacture of handkerchiefs.

**Hemstitched lace-trimmed handkerchiefs.**—See under this title, vol. 2, p. 451, par. 339.

## Vol. II, p. 454, par. 346.

**Drawn work in flax.**—"Drawn work," composed of flax, made by drawing some of the threads and tying and looping them with other threads to form figures, are not dutiable as articles made in imitation of lace, under paragraph 339, but as fabrics of flax

under paragraph 346. *Simon v. U. S.*, (1904) 131 Fed. 649, *affirmed* (C. C. A. 1905) 139 Fed. 3.

**Flax-wool fabrics.**—Fabrics in chief value of flax, but in part of wool, are dutiable under paragraph 346, relating to goods "the

component material of chief value" in which is flax, and not under paragraph 366 relating to cloths "in part of wool." *U. S. v. Johnson*, (1907) 154 Fed. 752, *affirmed* (C. C. A.) 157 Fed. 754.

Includes piece goods and made up articles. — In construing this paragraph which relates to "woven fabrics or articles" of flax, etc., with a proviso "that none of the foregoing articles in this paragraph shall pay a less rate of duty than fifty per centum *ad valorem*," it has been held that this proviso includes the foregoing "woven fabrics" as

well as "articles." *Schulemann v. U. S.*, (1901) 123 Fed. 1002.

Variation in thread count. — In construing the provision in this paragraph of different rates of duty on fabrics of flax, varying according to thread count, etc., it has been held that it is not necessary that a fabric should be homogeneous throughout in order to bring it within said paragraph, and that the paragraph may include so-called "drawn work" from which some of the threads have been removed. *Simon v. U. S.*, (1904) 131 Fed. 649, *affirmed* (C. C. A. 1905) 139 Fed. 3.

## Vol. II, p. 454, sec. 347.

Burlaps — Act of 1894. — The provision for "burlaps," in the Tariff Act of Aug. 27, 1894, ch. 349, sec. 2, Free List par. 424½, 28 Stat. L. 539, did not include so-called double-warp

Dundee bagging. *Corbitt, etc., Co. v. U. S.*, (1907) 153 Fed. 648.

Ramie braids. — See under this title, vol. 2, p. 451, par. 339.

## Vol. II, p. 455, par. 348.

The growth on cabretta skins is dutiable as "wool." *Johnson v. U. S.*, (1907) 159 Fed. 189, *affirmed* (C. C. A. 1908) 166 Fed. 728.

## Vol. II, p. 455, par. 349.

"Merino blood, immediate or remote." — In paragraph 349, relating to wools, the words "merino blood, immediate or remote," convey an unmistakable meaning, and include

wool in which the presence of merino blood is marked, though of inferior quality. *U. S. v. American Express Co.*, (1910) 177 Fed. 735.

## Vol. II, p. 455, par. 351.

Growth on the skin of mocha sheep. — See under this title, vol. 2, p. 497, par. 664.

## Vol. II, p. 456, par. 352.

Conclusiveness of samples. — The standard samples of wool prescribed by the secretary of the treasury on the authority of this paragraph are conclusive in respect to classification and quality, except, perhaps, where the issue is one of fraud or mistake, and regulations in respect to such samples are not subject to review by the courts or the board of

general appraisers; and where imported wools answer the quality of the standard samples, they should be classified accordingly, regardless of whether such standards operate unjustly, oppressively, or disproportionately to other classifications and values. *U. S. v. American Express Co.*, (1910) 177 Fed. 735.

## Vol. II, p. 456, par. 356.

"Changed in character or condition." — In construing paragraph 356 it has been held that it is not necessary that there should be any mechanical or chemical change, disguising the quality or character of the wool; and that, where white and black Iceland wools, which had always been dealt in and imported separately in different bales, were imported mixed together in the same bale for the purpose of securing a lower rate of duty on the white wool, the wool had been changed in condition within the meaning of the law. *Stone, etc., Co. v. U. S.*, (1906) 147 Fed. 603.

Double duty. — Where two kinds of wools were changed in condition by mixing them in the same bale, in order to make the mixture subject to the lower duty provided for the

poorer kind, it was held (1) that, within the meaning of paragraph 356, only the better kind is changed "for the purpose of evading the duty to which it would otherwise be subject," because the poorer kind would be subject to the same rate, whether mixed or not; (2) that, therefore, the further provision in the same paragraph that wool changed for such purpose shall pay "twice the duty to which it would be otherwise subject," would apply only to the better kind, and not the poorer; and (3) that the duty which is thus doubled is that which would have been applicable to the better kind if imported in its natural condition. *Stone, etc., Co. v. U. S.*, (1906) 147 Fed. 603.

## Vol. II, p. 457, par. 360.

"Reasonable number."—The question of what is a "reasonable number" of skins to test in ascertaining the quantity of wool thereon is one that is to be determined by the testimony of men qualified by experience and knowledge to pass upon that subject. Without such evidence it will not be held to be self-evident that an estimate based on an examination of eight out of 20,000 skins was inadequate. *U. S. v. Thomas*, (1910) 178 Fed. 602.

Weight of wool on skins.—In attacking the estimate of customs officers as to the

quantity of wool on imported sheepskins, it is not enough to show a different weight to have been found by others. It must appear by direct and positive evidence that the method adopted by such officers was incorrect; and, in the absence of evidence to the contrary, it will not be assumed that a test of eight out of 20,000 skins was inadequate, especially where there is evidence that such test was in accordance with the usual mode. *U. S. v. Thomas*, (1910) 178 Fed. 602.

Growth on the skins of mocha sheep.—See under this title, vol. 2, p. 497, par. 664.

## Vol. II, p. 458, par. 362.

Clippings of woolen material.—See under this title, vol. 2, p. 458, par. 363.

Waste containing wool.—See under this title, vol. 2, p. 494, par. 632.

## Vol. II, p. 458, par. 363.

Clippings of woolen material, produced in the process of making up garments, are "rags," within both the popular and the commercial signification of the term, and are more specifically provided for as "woolen

rags" in this paragraph than in paragraph 362, as "wastes composed wholly or in part of wool, not specially provided for." *U. S. v. Pearson*, (1904) 131 Fed. 571, *affirmed* (C. C. A. 1905) 137 Fed. 1021.

## Vol. II, p. 458, par. 366.

Camel's-hair press cloth is dutiable as manufactures of "wool" under this paragraph, rather than as "hair press cloth" under paragraph 431. *Oberle v. U. S.*, (C. C. A. 1908) 165 Fed. 53.

Cattle-hair goods are dutiable by similitude as manufactures of "wool," under this paragraph, being similar in quality, use, and texture. *Rosenstern v. U. S.*, (1909) 171 Fed. 71, 96 C. C. A. 175.

Woolen powder puffs.—In paragraph 410, the provision for "brushes" does not include so-called powder puffs, which are composed of flat circular pieces of woolen cloth with a fuzzy surface and are useful in applying toilet powder, and which, though resembling brushes in use, do not resemble them in construction, and are properly classi-

fied under paragraph 366. *U. S. v. Borgfeldt*, (1907) 153 Fed. 480.

Wool travelling rugs, which are not "portions of carpets or carpeting," were not included in the provision in Tariff Act of Oct. 1, 1890, ch. 1244, sec. 1, Schedule K, par. 408, 26 Stat. L. 598, for "rugs . . . and other portions of carpets or carpeting, made wholly or in part of wool," but were dutiable under the provision in paragraph 392 of that act, for "all manufactures of every description made wholly or in part of wool." *U. S. v. Haynes*, (1901) 124 Fed. 295.

Cotton-wool cloth—Act of 1890.—See under this title, vol. 2, p. 449, par. 322.

Cravenette cloth—Act of 1890.—See under this title, vol. 2, p. 451, par. 337.

Flax-wool fabrics.—See under this title, vol. 2, p. 545, par. 346.

## Vol. II, p. 459, par. 368.

Cravenette cloth—Act of 1890.—See under this title, vol. 2, p. 451, par. 337.

## Vol. II, p. 459, par. 369.

Embroidered dress goods.—In *Thomas v. Wanamaker*, (1904) 129 Fed. 92, 63 C. C. A. 594, *affirming* (1903) 123 Fed. 193, it was held that so-called wool "dress robes" or "dress patterns," consisting of women's dress goods of wool, embroidered with silk, imported in single patterns in separate lengths and pieces, each pattern comprising the material for the body and trimming of a dress, were "dress goods," and were dutiable under the provision in paragraph 369, for

"women's . . . dress goods . . . composed wholly or in part of wool," which is limited by the expression "not specially provided for in this act," and not under paragraph 371, which provides, without such limitation, for "articles embroidered, . . . made of wool," nor under paragraph 370, relating to "articles of wearing apparel of every description, . . . manufactured . . . in part, . . . composed wholly or in part of wool." See also *Hall v. U. S.*, (1904) 131 Fed. 648.

## Vol. II, p. 460, par. 370.

Beaver strips.—See under this title, vol. 2, p. 479, par. 450.

Embroidered dress goods.—See under this title, vol. 2, p. 459, par. 369.

## Vol. II, p. 460, par. 371.

Embroidered dress goods.—See under this title, vol. 2, p. 459, par. 369.

Spangled horsehair braid.—See under this title, vol. 2, p. 470, par. 408.

## Vol. II, p. 461, par. 379.

Measurement.—In assessing the duty "per square foot" provided for rugs in this paragraph, it was held as to certain oriental rugs having a pile and a selvage, that the

entire area of the rug, including the selvage, should be measured in ascertaining the number of square feet. *Fritz v. U. S.*, (1904) 135 Fed. 916.

## Vol. II, p. 461, par. 382.

Wool traveling rugs.—See under this title, vol. 2, p. 458, par. 366.

## Vol. II, p. 462, par. 383.

Manufactures of wool.—Goods of silk and wool, the latter being the minor component, were held to be within the purview of Tariff Act Aug. 27, 1894, deferring until Jan. 1,

1895, the reduction in duties provided in said Act on "manufactures of wool." *Robinson v. U. S.*, (1905) 143 Fed. 919.

## Vol. 2, p. 462, par. 384.

Combed silk that has fallen from or been caught in the machines in which it was undergoing further operations is dutiable under the provision in this paragraph for silk not further manufactured than combed, and is not subject to the provision for silk waste in paragraph 661. *Fawcett v. U. S.*, (1906) 146 Fed. 83, *affirmed* (C. C. A. 1907) 154 Fed. 1003.

Silk on tubes.—In construing the provision in paragraph 660, for "silk, raw, or as reeled from the cocoon, but not . . . advanced in manufacture in any way," it was held: (1) That the provision does not cover any form of raw silk advanced beyond the

condition of skeins; (2) that silk known as "singles" or "silk on tubes," which has been wound from the skeins onto tubes, the effect of this process being to advance the silk to a stage in preparation for its ultimate use, has been "advanced in manufacture;" and (3) that silk in this form is not free of duty under this provision, but dutiable under paragraph 384 as "silk . . . not further advanced or manufactured than carded or combed silk." *Klots v. U. S.*, (C. C. A. 1905) 139 Fed. 606, *affirming* (1904) 133 Fed. 808.

Re-reeled silk.—See under this title, vol. 2, p. 497, par. 660.

## Vol. II, p. 462, par. 385.

Silk organzine, damaged in dyeing, is not by reason of the damage removed from the provision for "organzine," in this paragraph, and is classifiable as such, rather than as "silk waste," under paragraph 661. *Cohen v. U. S.*, (1910) 180 Fed. 834.

Artificial horsehair.—See under this title, vol. 2, p. 441, par. 302.

"Nearsilk."—See under this title, vol. 2, p. 441, par. 302.

## Vol. II, p. 462, par. 386.

Dividing line between plush and velvet.—No rule exists in trade or commercial usage declaring that fabrics having a pile of 3.5 millimeters or less in length should be regarded as velvets, and over 3.5 millimeters as plush. *U. S. v. Silberstein*, (1907) 153 Fed. 965.

Panne velvets.—Under this paragraph enumerating "plush" and "velvets" as subject to different rates of duty, panne velvets are subject to the former classification. *U. S. v. Silberstein*, (1907) 153 Fed. 965, *followed* in *U. S. v. Passavant*, (1908) 164 Fed. 912.

## Vol. II, p. 463, par. 387.

**Appraisal by examiner, not by weigher.**—In appraising goods under this paragraph the goods may appropriately be sent to an examiner, rather than to a weigher, whose duty is confined to weighing articles in bulk; and it is within the examiner's duty to make return of the weight, as well as the other requisite facts. *U. S. v. Rosenthal*, (1903) 126 Fed. 766, *affirmed* (C. C. A. 1905) 145 Fed. 1.

**Figured silk.**—In *Wimpfheimer v. U. S.*, (1905) 142 Fed. 849, *affirmed* (C. C. A. 1906) 149 Fed. 1022, it was held, in regard to a fabric of two colors, one of which is produced by threads introduced by the swivel process to form figures, and not extending across the cloth from selvage to selvage, that the swivel threads are not a part of the filling, and that the goods are not within the provision in paragraph 391, for Jacquard figured silks containing two or more colors "in the filling" but were properly dutiable under paragraph 387. *Compare Johnson v. U. S.*, (1901) 123 Fed. 997.

## Vol. II, p. 464, par. 390.

**Appliquéd articles.**—It does not appear that there is any definition of "appliqué" in trade and commerce different from the dictionary definition of it as "any ornament laid out and applied on another surface such as cloth;" and goods within this definition are dutiable under paragraph 390, relating to "articles . . . appliquéd." It is not necessary that the design should be regular, conventional, or highly ornamental, and therefore the provision includes a fabric to which a gilt cord has been applied in irregular loops of a crude design, being in this form fairly durable, permanent, and salable. *U. S. v. Vantine*, (C. C. A. 1908) 166 Fed. 735, *affirming* (1907) 155 Fed. 149.

**"Articles."**—The ordinary use of the word "articles" in tariff acts is a broad one; and there is nothing in the structure of paragraph 390, which would require the restriction of that term to completed articles. It may include woven fabrics in 25-yard pieces. *U. S. v. Vantine*, (C. C. A. 1908) 166 Fed. 735, *affirming* (1907) 155 Fed. 149.

**Artificial silk hats** are dutiable under paragraph 390, by similitude to silk wearing apparel. *U. S. v. Wanamaker*, (1910) 175 Fed. 900, 99 C. C. A. 390, *reversing* (1909) 160 Fed. 664.

**Construction of proviso.**—In construing paragraph 390, relating to articles of silk, or in chief value of silk, with a proviso that the "articles provided for in this paragraph, . . . when composed in part of India rubber, shall be subject to" the same duty, it has been held that the proviso does not cover articles not in chief value of silk. *Simpson-Crawford Co. v. U. S.*, (1909) 172 Fed. 301, *affirmed* (1910) 178 Fed. 1006, 101 C. C. A. 665.

Garters were included within the term "wearing apparel," as used under paragraph

"In the gum"—"boiled off."—Under this paragraph, providing for silk fabrics when "in the gum" and when "boiled off," it was held that fabrics which on boiling lost from eighteen to twenty-seven per cent. in weight were classable under the former, rather than the latter, clause. *Mendelson v. U. S.*, (C. C. A. 1907) 154 Fed. 33, *reversing* (1906) 146 Fed. 78.

Where certain silk fabrics were partly boiled, so that, out of twenty-five per cent. of gum 7.6 per cent. was removed, it was held that this slight boiling was not sufficient to bring the goods within the provision in paragraph 387, for silk piece goods "boiled off," or to remove them from the provision in the same paragraph for fabrics "in the gum." *Rice v. U. S.*, (1901) 123 Fed. 848.

**Articles in chief value of metal threads.**—See under this title, vol. 2, p. 420, par. 179.

**Jacquard figured goods.**—See under this title, vol. 2, p. 465, par. 391.

**Mourning crepes.**—See under this title, vol. 2, p. 464, par. 390.

413 of the Tariff Act of 1890. *U. S. v. Steinhart*, (1892) 141 Fed. 494.

**Mourning crepes.**—So-called mourning crepes, consisting of all-silk fabrics in the piece, of the width known as "4/4," are not dutiable as "woven fabrics in the piece not specially provided for," under paragraph 387, but as "trimmings . . . made of silk, . . . not specially provided for," under paragraph 390. *Robinson v. U. S.*, (1900) 122 Fed. 970.

**Narrow strips of silk with interwoven designs.**—The provision in this paragraph for galloons or trimmings includes narrow strips of silk having interwoven thereon ornamental designs, which are chiefly used to decorate and embellish women's apparel. *Loewenthal v. U. S.*, (1910) 180 Fed. 941.

The term "trimmings" is used in this paragraph in a commercial rather than a descriptive sense. *Naday v. U. S.*, (C. C. A. 1908) 164 Fed. 44.

**Trimmed hats.**—In applying the provision in paragraph 432, for "hats . . . trimmed, . . . composed wholly or in chief value of fur," the composition of the hats should be determined by reference to the whole hat including the trimming; so that where hats, the bodies of which are fur, are so trimmed that the silk trimming is the component of chief value in the hats, they are dutiable under paragraph 390, as wearing apparel in chief value of silk. *Leon Rheims Co. v. U. S.*, (C. C. A. 1908) 160 Fed. 925, *affirming* (1907) 154 Fed. 969.

**Trimmings.**—While ribbons that must be made up into bows, rosettes, and the like before being used for purposes of trimming or ornamentation are not dutiable as "trimmings" under paragraph 390, goods are so dutiable which are manufactured with ornamentation and characteristic design to be used as a trimming, and intended to be so



used without anything further being done to them. *Naday v. U. S.*, (1907) 155 Fed. 303, *affirmed* (C. C. A. 1908) 164 Fed. 44.

**Embroidered screens.**—See under this title, vol. 2, p. 451, par. 339.

**Garnitures and hussar sets.**—See under this title, vol. 2, p. 465, par. 391.

## Vol. II, p. 465, par. 391.

**Construction of proviso.**—In construing paragraph 391, relating to "all manufactures . . . of which silk is the component material of chief value," and containing a proviso that "manufactures of which wool is a component material shall be classified and assessed for duty as manufactures of wool," it was held that the ordinary rule should be applied that a proviso at the close of an independent paragraph like this should be construed as limiting only what precedes it, and that the words "all manufactures" in the proviso have no broader relation than the same words in the beginning of the paragraph. *U. S. v. Walsh*, (1907) 154 Fed. 770, 83 C. C. A. 472, *affirming* 184 Fed. 749. See also *Woodruff v. U. S.*, (1909) 168 Fed. 452, *affirmed* 175 Fed. 776, 99 C. C. A. 348. *Contra*, *U. S. v. Seruggs, etc.*, *Dry Goods Co.*, (C. C. A. 1907) 156 Fed. 940, *reversing* (1906) 147 Fed. 888.

**Flax-wool fabrics.**—The provision in paragraph 391 "that all manufactures, of which wool is a component material, shall be classified and assessed for duty as manufactures of wool," is limited to said schedule, which relates to goods containing silk, and the classification of fabrics of flax and wool should be determined without regard to said provision. *U. S. v. E. De F. Wilkinson Co.*, (1907) 154 Fed. 751; *U. S. v. Johnson*, (C. C. A. 1907) 157 Fed. 754, *affirming* 154 Fed. 752.

**Garnitures and hussar sets in designs of silk cord and braid, stitched in place in extremes about sixteen inches long and ten or eleven inches wide for the fronts of dress waists, and twenty-four to twenty-six inches long and twenty to twenty-four inches wide for dress skirts, and bought and sold by the piece, are not dutiable as silk trimmings, under paragraph 390, but as manufactures of silk not specially provided for, under paragraph 391.** *Garrison v. U. S.*, (1903) 121 Fed. 149.

**Jacquard figured goods.**—Goods which have been made on a Jacquard loom and contain two or more colors in the filling are dutiable under the provision in this paragraph for "all Jacquard figured goods in the piece, made on looms . . . and containing two or more colors in the filling," irrespective of the fact that they are not such goods as are customarily made upon the Jacquard loom nor are its characteristic and usual product. *Bassett v. U. S.*, (1907) 154 Fed. 681.

In *U. S. v. Johnson*, (1905) 139 Fed. 55, *affirmed* (C. C. A. 1906) 142 Fed. 1039, it was held that silk goods woven on Jacquard looms, with broad and narrow stripes, the body between having a watered effect, were

Ornaments in the piece.—See under this title, vol. 2, p. 465, par. 391.

**Silk ribbons.**—See under this title, vol. 2, p. 465, par. 391.

**Trimmings for women's hats.**—See under this title, vol. 2, p. 465, par. 391.

within the provision in paragraph 391 for "Jacquard figured goods" of silk.

**Ornaments in the piece.**—Ornaments, loops, etc., which are manufactured separately but are temporarily stitched together in six-yard lengths for convenience and economy in handling and carding, and which are used singly in decorating garments, are not "trimmings or galloons" within the meaning of paragraph 390, but are properly classified under paragraph 391. *U. S. v. Hilbert*, (1909) 171 Fed. 69, 96 C. C. A. 173.

**Remanit.**—So-called remanit, in the form of ropes, braids, and mats, which has been manufactured from silk produced by carbonizing rags containing silk, has been held to be a manufacture of silk, within the meaning of this paragraph. *Frank v. U. S.*, (1906) 143 Fed. 702, *affirmed* (C. C. A.) 149 Fed. 1023.

**Ribbons of silk and cotton.**—Ribbons composed chiefly of silk, but in part of cotton, are not "ribbons . . . of cotton, . . . whether composed in part of India rubber or otherwise," under paragraph 320, for the word "otherwise" is there used with the meaning of "not," and not as relating to other materials than India rubber. Such ribbons are properly assessed as manufactures of silk, under paragraph 391. *Gartner v. U. S.*, (1907) 154 Fed. 967, *affirmed* (C. C. A. 1908) 168 Fed. 1019.

**Silk powder.**—In *Thomas v. U. S.*, (1905) 140 Fed. 98, *affirmed* (C. C. A. 1906) 145 Fed. 1023, it was held that a powder made from raw silk, which is used in the manufacture of wall paper and artificial flowers, is dutiable under paragraph 391, as manufactures of silk, or is at least so dutiable by similitude, under section 7.

**Silk ribbons.**—Silk ribbons, of which some are, and others are not, in the nature of trimmings, but which, whenever used for trimmings are required to be further fashioned for such use, and which are not in fact or commercially within the class of goods known as "trimmings," are not dutiable as silk trimmings, under paragraph 390, but as manufactures of silk, not specially provided for, under paragraph 391. *Gartner v. U. S.*, (1904) 131 Fed. 574.

**Small silk flags.**—The provision for "toys" in paragraph 418 does not include small silk flags mounted on slender wooden staffs about four and one-half inches long, which are properly assessed under paragraph 391. *Tuska v. U. S.*, (1908) 162 Fed. 814.

**Trimmings for women's hats.**—Goods woven wholly from silk from four to twelve inches wide, and used directly in these widths

for trimming women's hats, etc., are not assessable as trimmings, under paragraph 390, not being trimmings until made into designs to be applied as trimmings, or into trimmings as they are applied to articles being trimmed,

but are assessable as manufactures of silk, under paragraph 391. *Robinson v. U. S.*, (1903) 121 Fed. 204.

**Figured silks.**—See under this title, vol. 2, p. 463, par. 387.

## Vol. II, p. 466, par. 393.

**Construction of foreign law.**—Under paragraph 393, prescribing a countervailing duty on wood pulp imported from a "country or dependency" imposing "an export duty on pulp wood exported to the United States," customs officers are not required to pass upon questions of foreign constitutional or statutory construction, to determine whether such export duty was authorized. They are justified if they find correctly that what in fact was an export duty was acted upon by taxing officers throughout the country of exportation as fully as if imposed by unquestionable authority. *Heckendorn v. U. S.*, (C. C. A. 1908) 162 Fed. 141.

**"Country or dependency."**—The British North America Act (Stat. 30-31 Vict., ch. 3, secs. 91, 92) gives the Dominion of Canada exclusive power to impose export and import duties, but distributes among the provinces of Canada certain legislative powers, including that of taxation by way of license; and under this authority the province of Quebec imposes what is in point of fact and in effect an export duty. It has been held that such duty is imposed by a "country or dependency," within the meaning of paragraph 393. *Myers v. U. S.*, (1905) 140 Fed. 646.

**Mixed goods.**—In regard to pulp imported from Canada, made from wood of which a part is subject to a Canadian export duty, it was held that the countervailing duty equal to such export duty, which is imposed under paragraph 393, should be assessed on the basis of the percentage used therein of wood subject to the export duty, when such percentage is established by satisfactory evidence. *Myers v. U. S.*, (1905) 140 Fed. 648.

**Place of manufacture.**—Pulp produced in Canada from wood cut on public lands in Quebec is subject to the countervailing duty provided in paragraph 393, irrespective of whether it is manufactured into pulp in that province or not. *Myers v. U. S.*, (1905) 140 Fed. 648.

**Canada license fee.**—The action of the province of Quebec in imposing a license fee for cutting wood on public lands, which is reduced when the wood is manufactured into pulp in Canada, is in effect the imposition of an "export duty on pulp wood exported to the United States," within the meaning of paragraph 393. *Myers v. U. S.*, (1905) 140 Fed. 648; *Heckendorn v. U. S.*, (C. C. A. 1908) 162 Fed. 141.

**Wood flour.**—See under this title, vol. 2, p. 426, par. 208.

## Vol. II, p. 466, par. 396.

**Classification of printing paper.**—In *Hensel v. U. S.*, (1903) 126 Fed. 576, it was held that the provision in paragraph 396 for "printing paper . . . suitable for books and newspapers," is not limited to such paper as is suitable for printing both books and newspapers, and that certain paper used for printing covers of booklets, pamphlets, and the like, but not suitable for printing newspapers, is properly classifiable for duty under said provision, rather than under paragraph 402, covering "all other paper not specially provided for."

**Thin, flimsy, colored paper.**—In paragraph 396 the provision for printing paper "suitable for books and newspapers" prescribes

an exceptionally low duty on such material on account of the educational value of books and newspapers, and only such paper as comes within the true spirit of the law should be assessed thereunder. A thin, flimsy, colored paper, said to be used for "printing circulars and printing of all kinds," but not shown to be used for books or newspapers, is not within the scope of the provision. *Gallenkamp v. Wyman*, (1906) 178 Fed. 460.

**Handmade printing paper.**—See under this title, vol. 2, p. 468, par. 401.

**Grease-proof paper.**—See under this title, vol. 2, p. 468, par. 402.

## Vol. II, p. 466, par. 397.

**Crepe paper.**—The provision for "crepe paper" in this paragraph was intended to apply to paper that has been subjected to a creping process; and a paper made by that process and resembling crepe paper generally, but somewhat heavier, and treated with sizing for waterproofing purposes, is dutiable under that provision. *Fiigel v. U. S.*, (C. C. A. 1909) 167 Fed. 537, affirming (1908) 160 Fed. 285.

**Filtering paper—Act of 1890.**—Filtering paper that has been cut into disks and made ready for use in filtering is not by this treatment removed from the provision in paragraph 419, Tariff Act Oct. 1, 1890, ch. 1244, sec. 1, Schedule M, 26 Stat. L. 599, for "papers commercially known as . . . 'filtering paper,' . . . made up in copying books, reams, or in any other form." *Murphy v. U. S.*, (1896) 149 Fed. 336.

## Vol. II, p. 467, par. 398.

Box tops made of surface-coated paper and having designs printed by the lithographic process are dutiable as "surface-coated papers . . . printed," under this paragraph, rather than as lithographic prints under paragraph 400. *Devoy v. U. S.*, (1906) 147 Fed. 765.

Decalcomania paper is not dutiable, under

paragraphs 400, 403, as lithographic prints or printed matter, being commercially a distinct article from either, but falls under the provision for "surface-coated papers . . . printed," under paragraph 398. *U. S. v. Hempstead*, (1908) 159 Fed. 290.

Handmade surface-coated paper. — See under this title, vol. 2, p. 468, par. 401.

## Vol. II, p. 467, par. 399.

"Flat envelopes." — Paper cut into particular shapes and sizes, ready to be folded and gummed, so as to constitute envelopes, and found to have been commercially known as "flat envelopes" at the time of the passage of the Act, was held dutiable as "paper envelopes, plain," under paragraph 399.

*Hunter v. U. S.*, (1906) 143 Fed. 914, *distinguishing* *Hunter v. U. S.*, (1904) 134 Fed. 361, 67 C. C. A. 343, on the ground that in this case the article in question was shown by competent evidence to have been generally known as envelopes at the time of the passage of the Act of 1897.

## Vol. II, p. 468, par. 400.

Books for children's use. — In *Petry v. U. S.*, (C. C. A. 1903) 127 Fed. 115, *affirming* 121 Fed. 207, it was held that the provision in this paragraph for "books of paper or other material for children's use, containing illuminated lithographic prints, not exceeding in weight twenty-four ounces each," is more specific than that in paragraph 502, for "books . . . printed exclusively in languages other than English."

Calendars composed of lithographic sheets with a metal strip at each end, and having a calendar pad composed of lithographic sheets attached thereto, the lithographic prints being the most important feature of the importation, are dutiable as lithographic prints bound, under paragraph 400, rather than as printed matter, paragraph 403, or as manufactures of paper, paragraph 407. *Luyties v. U. S.*, (1910) 180 Fed. 1022.

Determination of cutting size. — The "cutting size" of post cards, imported in a folded, undetached condition, should be ascertained, under this paragraph, by measuring each card by itself, rather than by taking the whole series as the unit of measurement. *Downing v. U. S.*, (1909) 172 Fed. 447.

Folded post cards. — Under this paragraph, relating respectively to "lithographic prints" and to "booklets," articles consisting of several post cards folded together and ready to

be detached, with a paper cover pasted thereon, are covered by the former rather than the latter term. *Downing v. U. S.*, (1909) 172 Fed. 447.

Lithographic prints — commercial designation. — The expression "lithographic prints," in paragraph 400, had no such definite, general, and uniform meaning in the wholesale trade and commerce of the United States at the time of the passage of that Act as to control its construction. *Knauth v. U. S.*, (1907) 155 Fed. 144.

Lithographic prints of varying thickness. — In *Fuld v. U. S.*, (1905) 138 Fed. 973, it was held, as to lithographic prints in the form of folding pictures, of which substantial parts are of one thickness, and relatively smaller parts, consisting of little figures of an ornamental and incidental character, of a less thickness, that they should be classified according to the thickness of the substantial portions.

Book with lithographic covers. — See under this title, vol. 2, p. 469, par. 403.

Box tops. — See under this title, vol. 2, p. 457, par. 398.

Decalcomania paper. — See under this title, vol. 2, p. 467, par. 398.

Wall pockets. — See under this title, vol. 2, p. 469, par. 407.

## Vol. II, p. 468, par. 401.

Handmade printing paper. — Under paragraphs 398, 401, handmade printing paper is dutiable as "handmade" rather than as "printing paper," even when suitable for printing. *U. S. v. Davies*, (1910) 177 Fed. 371, 101 C. C. A. 425, *reversing* (1909) 172 Fed. 298. *Contra*, *U. S. v. Miller*, (1904) 135 Fed. 349, 68 C. C. A. 131, *affirming* 128 Fed. 469.

Handmade surface-covered paper. — The provision in paragraph 401 for handmade paper is not restricted to paper *ejusdem generis* with the writing, letter, and other papers

enumerated in that paragraph; and handmade surface-coated paper is more specifically provided for thereunder than under the provision in paragraph 398, for surface-coated paper "not specially provided for." *U. S. v. Seyd*, (C. C. A. 1907) 158 Fed. 408, *reversing* 152 Fed. 657.

History of legislation. — In construing the application of the terms "handmade" and "printing," as applied to paper imports, consideration must be given to the evident intent of Congress (1) as revealed in numerous successive tariff acts to reduce the duties on

printing paper for the benefit of the ordinary reading public, and (2) by elevating handmade paper into a new class, now that it has become in the art of printing a luxury. *U. S. v. Davies*, (1910) 177 Fed. 371, 101 C. C. A. 425, *reversing* (1909) 172 Fed. 298.

**India transfer paper.**—The handmade papers covered by paragraph 401, enumerat-

ing "writing, letter, handmade, drawing, . . . and typewriter paper," are not only those used as writing papers, but also paper suitable for other uses, as handmade India transfer paper used for making lithographic transfers and in printing. *Benneche v. U. S.*, (1907) 153 Fed. 861, 83 C. C. A. 43.

## Vol. II, p. 468, par. 402.

**Duplex lithographic transfer paper**, which is used in transferring decalcomania designs to pottery, and is produced by pasting together two sheets of paper, one coated with a gummy substance and the other uncoated, is "paper" rather than "manufactures of paper," under paragraphs 403, 407. *Drakenfield v. U. S.*, (C. C. A. 1909) 167 Fed. 798.

**Grease-proof paper.**—In *Germania Importing Co. v. U. S.*, (1905) 142 Fed. 215, it was held that an imitation parchment paper, known as grease-proof paper, which, though it can be printed on, is not suitable for printing purposes, but is used almost altogether as wrapping paper, is not dutiable as printing paper, under paragraph 396, but as paper not specially provided for, under paragraph 402.

## Vol. II, p. 469, par. 403.

**Book with lithographic covers.**—A book having no lithographic prints, except one on the front cover, was held not to be within the provision for "books . . . containing illuminated lithographic prints," in paragraph 400, but to be dutiable under paragraph 403. *Dutton v. U. S.*, (1907) 154 Fed. 214.

**Cinematograph films** are photographs within the meaning of this paragraph, and not dutiable under paragraph 17, as manufactures "of which collodion or any compound of pyroxylin is the component material of chief value." *U. S. v. Berst*, (1909) 175 Fed. 121.

**Feathered post cards.**—In *Ringk v. U. S.*, (1908) 164 Fed. 1021, it appeared that imported post cards bore on the face words printed in different languages and on the back printed pictorial representations, and were ornamented with feathers; the feathers being the element of chief value. It was held that the printing, and not the feathers, constituted the chief feature of the cards, and that therefore the cards were "printed matter," within the meaning of paragraph 403.

**Lace paper**, which is used in decoratively packing confectionery, etc., is not brought within the provision for printed matter in paragraph 403 by reason of having names and addresses of merchants printed thereon. Said provision does not cover matter on which the

**Lace paper.**—In *Hamilton v. U. S.*, (C. C. A. 1909) 167 Fed. 796, it appeared that plain paper was stamped by a single operation into shapes with lacelike effects, which are known as tops or doilies, and are used for placing on the tops of packages of candy, fruit, etc., or under finger bowls. Plain paper might have been used for the same purpose, except that it would not have been so pleasing. It was held that, as the improvement of the original material had not interfered with its distinguishing characteristics, it was dutiable as "paper," rather than as "manufactures of paper." *Contra*, *U. S. v. Hensel*, (1907) 152 Fed. 578.

**Classification of printing paper.**—See under this title, vol. 2, p. 466, par. 396.

**Crepe paper.**—See under this title, vol. 2, p. 466, par. 297.

printing is but a subordinate feature. *U. S. v. Hensel*, (1907) 152 Fed. 578.

**Post cards.**—The provision in paragraph 403, for "printed matter," includes post cards of paper combined with such materials as celluloid, silk, and wool, the latter the components of chief value; one side bearing floral and decorative effects produced by spraying and embossing, and the other being printed with the words "Post Card" in various languages. *U. S. v. Deutsch*, (1910) 178 Fed. 272, 101 C. C. A. 116, *affirming* (1909) 172 Fed. 290.

**Paper used for box tops** and similar purposes was printed with trademarks and business names and addresses, and in some instances with floral or other decorative designs. It was held that the authorities would justify its classification as "printed matter," under paragraph 403. *Hamilton v. U. S.*, (C. C. A. 1909) 167 Fed. 796.

**Calendars composed of lithographic sheets.**—See under this title, vol. 2, p. 468, par. 400.

**Decalcomania paper.**—See under this title, vol. 2, p. 467, par. 398.

**Japanese paper napkins.**—See under this title, vol. 2, p. 469, par. 407.

**Post card albums.**—See under this title, vol. 2, p. 469, par. 404.

**Printed paper bags.**—See under this title, vol. 2, p. 469, par. 407.

## Vol. II, p. 469, par. 404.

**Post card albums.**—Books or albums used for preserving collections of postal cards are dutiable as "scrapbooks," under paragraph 404, and not under paragraph 403 as "books

of all kinds including blank books." *American News Co. v. U. S.*, (1908) 142 Fed. 786, *affirmed* (C. C. A.) 148 Fed. 1017, (C. C. A.) 149 Fed. 1022.

## Vol. II, p. 469, par. 407.

**Japanese paper napkins.**—The provision for "printed matter" in paragraph 403 does not include Japanese napkins made of crinkled paper and ornamented with designs in colors, stenciled, stamped, or printed thereon, which are properly classified under paragraph 407. *Morimura v. U. S.*, (1908) 172 Fed. 248.

**Printed paper bags.**—Paper bags printed with advertising matter relating to the goods intended to be packed and sold within them are not "printed matter" within the meaning of paragraph 403, but are dutiable as manufactures of paper not specially provided for under paragraph 407. *Kraut v. U. S.*, (1903) 130 Fed. 392; *Kraut v. U. S.*, (1904) 134 Fed. 701, *affirmed* (C. C. A. 1905) 142 Fed. 1037.

**Paper fans for decorative purposes.**—The provision in paragraph 427 for "fans of all kinds" does not include so-called fans consisting of unsubstantial paper novelties in the shape of fans, which range from four feet in diameter down to very small sizes, and which are not commercially known nor dealt

in as fans, nor adapted to practical use as such, but are intended solely for decorative purposes, and which are dutiable under paragraph 407. *Downing v. U. S.*, (1905) 141 Fed. 490.

**Wall pockets.**—Articles composed of cardboard on which lithographic prints have been pasted, and which is cut into forms adapted to be folded into pockets to hang on walls, some of them having pincushions or calendars attached, are not dutiable as "lithographic prints," under paragraph 400, but as manufactures of paper under paragraph 407. *Knauth v. U. S.*, (1907) 155 Fed. 144.

**Appliqued mottoes.**—See under this title, vol. 2, p. 451, par. 339.

**Calendars composed of lithographic sheets.**—See under this title, vol. 2, p. 468, par. 400.

**Duplex lithographic transfer paper.**—See under this title, vol. 2, p. 468, par. 402.

**Filtering paper—Act of 1896.**—See under this title, vol. 2, p. 466, par. 397.

**Lace paper.**—See under this title, vol. 2, p. 469, par. 402.

## Vol. II, p. 470, par. 408.

**Bead fringes,** which consist of beads strung on a cord or webbing, and which are used to decorate lamps as trimmings and shades, are not removed by the doctrine of *ejusdem generis* from the provision for "ornaments, trimmings, and other articles . . . in part of beads," in paragraph 408. *Holcomb v. U. S.*, (1910) 180 Fed. 795.

**Beaded leather hand bags.**—Ladies' hand bags in chief value of leather and ornamented with beads are dutiable as "articles . . . in part of beads," under this paragraph, rather than as "manufactures of leather, finished or unfinished, . . . or of which [leather] is the component material of chief value," under paragraph 450. *U. S. v. Guthman*, (1907) 159 Fed. 273.

**Beads temporarily strung.**—The provision in paragraph 408, for "beads of all kinds not threaded or strung," was intended to exclude only beads permanently threaded or strung, as in the manufacture of fabrics and other articles, and is held to include metal beads intended for the manufacture of purses, threaded or strung temporarily for the purpose of transportation and sale only, on cheap, weak cotton threads, and arranged in bunches. *U. S. v. Buettner*, (1904) 133 Fed. 183, 86 C. C. A. 289.

**Gelatin spangles strung on cord,** and used in making trimmings or ornaments for wearing apparel, are *ejusdem generis* with the articles enumerated in paragraph 408, and are dutiable under that paragraph rather than under paragraph 450 relating to "manufactures of . . . gelatin." *Hirsch v. U. S.*, (1905) 141 Fed. 380, *affirmed* (C. C. A. 1906) 145 Fed. 1022.

**Pierced imitation pearls.**—Pierced imitation pearls are dutiable under paragraph 408 rather than under paragraph 435. *U. S. v. Weinberg*, (1905) 139 Fed. 1006.

**Rice paste curtains.**—Curtains in chief value of rice paste formed into regular-shaped particles are dutiable under this paragraph, relating to "articles . . . in part of beads," not being excluded by the doctrine of *ejusdem generis*, though the paragraph also enumerates laces, wearing apparel, ornaments, etc. *Morimura v. U. S.*, (1909) 169 Fed. 279, 94 C. C. A. 555.

**Rosaries** are not subject to duty as "articles . . . in part of beads" under this paragraph, because not *ejusdem generis* with the other goods (ornaments, trimmings, etc.) there enumerated. *Benziger v. U. S.*, (1909) 172 Fed. 280, *affirmed* (1910) 178 Fed. 1006, 101 C. C. A. 664.

**Spangled hat crowns** are in a general way of the same character as the class of materials considered under the provision in this paragraph for fabrics, wearing apparel, trimmings, etc., including "other articles . . . composed wholly or in part" of gelatin spangles, and are dutiable under said provision for "articles," rather than under paragraph 450 as manufactures of gelatin. *Metzger v. U. S.*, (1905) 141 Fed. 381, *affirmed* (C. C. A. 1906) 146 Fed. 132.

**Spangled horsehair braids,** being very loose braids of the very long hair from the manes and tails of horses, carrying the spangles, which are the chief feature of the manufacture, are not assessable as "manufactures of wool ornamented with beads or spangles of whatever material composed," under paragraph 371, but as articles "composed wholly or in part of beads or spangles, . . . but not composed in part of wool," under paragraph 408. *Veit v. U. S.*, (1903) 121 Fed. 205.

**Metal beads temporarily strung.**—See under this title, vol. 2, p. 425, par. 193.

**Opal balls—rock crystal rondelles.**—See under this title, vol. 2, p. 474, par. 435.

## Vol. II, p. 470, par. 409.

**Braid tied with cotton.**—A small amount of cotton thread in straw braids will not remove such articles from the provision in paragraph 409 for braids composed "wholly" of straw, where the thread is only used for temporarily tying the ends of the braids to prevent them from unraveling. *Schiff v. U. S.*, (1905) 140 Fed. 63, *affirmed* (C. C. A. 1906) 145 Fed. 1023.

**Horsehair goods.**—Trimmed and untrimmed hats, and braids, composed of horsehair, are respectively dutiable by similitude as straw hats, trimmed and untrimmed, and straw braids, suitable for hats, under paragraph 409. *Rheims Co. v. U. S.*, (1909) 169 Fed. 662, *affirmed* 175 Fed. 778, 99 C. C. A. 350. See also *Paterson v. U. S.*, (C. C. A. 1908) 166 Fed. 733, *reversing* (1907) 159 Fed. 320.

**Straw braids or plaits for hats.**—In *Schiff*

*v. U. S.*, (1905) 140 Fed. 63, *affirmed* (C. C. A. 1906) 145 Fed. 1023, it was held that certain merchandise, consisting of wide braids or plaits of straw, fastened together so as to form rectangular strips measuring about eighteen by thirty-six inches, are not dutiable as hats partly manufactured, under paragraph 409, but as straw braids or plaits, "suitable for making or ornamenting hats," etc., under the same paragraph.

**Untrimmed hats of imitation horsehair**, which is a material of vegetable origin, resemble untrimmed hats of straw more than silk wearing apparel, and are accordingly dutiable at the rate provided for the former, under paragraph 409. *Cochran v. U. S.*, (1910) 180 Fed. 955.

**Straw lace sewed with thread.**—See under this title, vol. 2, p. 478, par. 449.

## Vol. II, p. 470, par. 410.

**Woolen powder puffs.**—See under this title, vol. 2, p. 458, par. 366.

## Vol. II, p. 470, par. 411.

**Bristles in bunches.**—In paragraph 411, relating to "bristles, sorted, bunched, or prepared," and in paragraph 509, relating to "bristles, crude, not sorted, bunched, or prepared," the distinction made is between absolute crudeness and advancement one or more steps in preparation for the arts; and

bristles that have been tied in separate bundles, with their butt ends together, in preparation for brushmakers, are subject to duty under the former provision. *Puashee v. U. S.*, (1907) 155 Fed. 265, *affirmed* (C. C. A. 1908) 158 Fed. 968.

## Vol. II, p. 471, par. 414.

**Button shanks.**—The provision in this paragraph for "button molds," includes articles commercially known as button shanks, consisting of pairs of metal disks so constructed that when a piece of cloth is placed on top of one of the disks, and they are subjected to pressure, a cloth-covered button is produced. *Hormann v. U. S.*, (1907) 153 Fed. 868, 83 C. C. A. 50, *reversing* (1906) 144 Fed. 707.

**Construction of paragraph—parts of buttons.**—In construing paragraph 414, which enumerates "buttons or parts of buttons" as being subject to "the following rates," and provides for "buttons" certain rates of duty, and "in addition thereto, on all the foregoing articles in this paragraph," a further rate of duty, it was held that parts of buttons were not subject to the rates provided for buttons; that they were not liable to the

additional rate on "all the foregoing articles;" and that, no definite rate being attached to them, they were dutiable as manufactures of the component material of chief value. *Hormann v. U. S.*, (1906) 144 Fed. 707.

**Metal button molds.**—Paragraph 414 provides that "buttons . . . and button molds . . . shall pay duty at the following rates," and the schedule of rates then prescribed mentions only "buttons." It was held that this provision for "buttons" should be construed as though reading "buttons and button molds," and that metal button molds should pay the rate assigned to metal buttons. *Hormann v. U. S.*, (1907) 153 Fed. 868, 83 C. C. A. 50, *reversing* (1906) 144 Fed. 707.

**Rhinestones.**—See under this title, vol. 2, p. 408, par. 112.

## Vol. II, p. 471, par. 415.

**Amendment.**—This section was amended by Act of Jan. 15, 1903, ch. 189, sec. 2, 10 Fed. Stat. Annot. 70.

**Allowance of drawback.**—Continuous customs custody is not essential to the allowance of drawback, under this paragraph, on coal imported into the United States and afterwards used for fuel on board of vessels regis-

tered under the laws of the United States, propelled by steam, and engaged in trade with foreign countries. (1908) 26 Op. Atty.-Gen. 531.

**Anthracite coal.**—In *Perkins Co. v. U. S.*, (1910) 180 Fed. 935, it was held that certain anthracite coal does not contain ninety-two per cent. of fixed carbon, and is therefore

within the provision in paragraph 415 for "all coals containing less than ninety-two per centum of fixed carbon."

Coal imported for the use of the navy is subject to the duties prescribed by paragraph 415, notwithstanding the coal is imported by the navy department, and the duties will have to be paid from the appropriations of that department. (1908) 26 Op. Atty.-Gen. 463.

Honolulu is a Pacific port of the United States within the meaning of this paragraph, and coal imported into the United States, which is afterwards used for fuel on board a vessel propelled by steam plying between the ports of New York and Honolulu and registered under the laws of the United States, is

## Vol. II, p. 472, par. 418.

Articles sold by toy dealers not necessarily toys.—Articles do not become dutiable as toys because of the mere fact that they are imported and generally sold by toy dealers, nor because they may be used chiefly by children. *Hamburger v. U. S.*, (1910) 180 Fed. 632.

Artificial shamrocks.—Artificial shamrocks, that are used by the Irish of all ages as a national emblem and are not commercially known as "toys," are not toys, though usually to be obtained in toy shops. *U. S. v. Cattus*, (C. C. A. 1909) 167 Fed. 532. See also under this title, vol. 2, p. 473, par. 425.

Bath babies and position babies are "dolls" within the meaning of this paragraph, and are dutiable as such, rather than as china toys, under paragraph 95. *U. S. v. Butler*, (1910) 180 Fed. 1005.

Cigar and firecracker fans.—The provision in paragraph 427, for "fans of all kinds," was, notwithstanding its broad language, not intended to include everything which might be called a fan, and to an exceedingly limited extent used as a fan; and so-called cigar and firecracker fans, consisting of small folding fans closing into cases representing cigars, etc., are not dutiable under said provision, but under paragraph 418 as "toys." *Morimura v. U. S.*, (1909) 175 Fed. 887.

Magic lanterns.—Certain slightly made magic lanterns, not sufficiently substantial to be used by mature persons, but rather by children as toys, were dutiable as "toys," under paragraph 321, Tariff Act Aug. 27, 1894, and not as "optical instruments" under paragraph 98 of that Act. *Borgfeldt v. U. S.*, (1900) 124 Fed. 457.

Mouth organs and metallophones.—Certain metallophones and mouth organs or harmonicas, having at least one full octave, and capable of playing a musical air, but not

entitled to drawback. (1902) 24 Op. Atty.-Gen. 6.

Mixtures of coal and slack.—In *U. S. v. Bond*, (1908) 161 Fed. 165, it appeared that an importation in question was a mixture of bituminous coal and slack, in the proportion of about two to one. It was held that the two classes of merchandise should be subjected to the rates of duty respectively provided therefor in the tariff, on the basis of this proportion, regardless of their intermingled condition; but that, as such proportion could be fixed by the use of scale and screen on a single tub, the law would not cast on the importer the burden of the useless separation of the two kinds of coal.

so finished as to musical qualities that they would be used by musicians, being fitted rather for the amusement of children, are dutiable as "toys" under paragraph 418 and not as "musical instruments" under paragraph 453. *Borgfeldt v. U. S.*, (1900) 124 Fed. 473.

"Toys."—An article is not necessarily a toy simply because children can or do play with it. In order to fall within that designation its intended and principal use must be for the amusement of children; or, if capable of other uses, it must nevertheless be commercially known as a "toy." *Thaehauser v. U. S.*, (1908) 159 Fed. 228.

Toys made of celluloid, a compound of pyroxylin, are less specifically designated in the provision in paragraph 17 for "all compounds of pyroxylin, . . . and articles of which . . . any compound of pyroxylin is the component material of chief value," than in that in paragraph 418 for "toys . . . not specially provided for." *U. S. v. Schwarz*, (1905) 140 Fed. 302, *affirmed* (C. C. A. 1906) 140 Fed. 989.

Christmas tree ornaments.—See under this title, vol. 2, p. 420, par. 179.

Diminutive penknives with odd-shaped handles.—See under this title, vol. 2, p. 416, par. 153.

Figures of animals used as mantel ornaments.—See under this title, vol. 2, p. 423, par. 193.

Imitation roses of celluloid and metal.—See under this title, vol. 2, p. 473, par. 425.

Ping-pong balls.—See under this title, vol. 2, p. 394, par. 17.

Small silk flags.—See under this title, vol. 2, p. 465, par. 391.

Stuffed birds.—See under this title, vol. 2, p. 485, par. 493.

## Vol. II, p. 473, par. 419.

Ground corundum ore that has been advanced in value by processes of manufacture for a specific use is not a "crude mineral," within the meaning of paragraph 614, nor "manufactured sand," within the meaning of

paragraph 671, but is dutiable as emery by similitude under paragraph 419. *Myers v. U. S.*, (1910) 178 Fed. 462.

Pulverized corundum, which, though a distinct article from emery, is identical with it

in use and nearly identical in material, is dutiable by similitude to ground emery under this paragraph. *Myers v. U. S.*, (1907)

155 Fed. 502, *affirmed* (C. C. A. 1908) 163 Fed. 53.

## Vol. II, p. 473, par. 425.

Artificial shamrocks are not "toys" within the meaning of paragraph 418, but are dutiable as "artificial leaves" under paragraph 425. *U. S. v. Cattus*, (C. C. A. 1909) 167 Fed. 532.

Bleached or dyed grasses that are intended for ornamental or decorative purposes are classifiable as "ornamental . . . leaves . . . not specially provided for," under this paragraph, rather than under paragraph 449 as "manufactures" of grass, or under paragraph 566 relating to "grasses . . . not dressed or manufactured." *U. S. v. Bayersdorfer*, (1909) 175 Fed. 959, 99 C. C. A. 449.

Crude ostrich feathers, which in that condition are never used for ornamental purposes, but need to be dressed and otherwise manufactured before becoming suitable for such use, are dutiable as "feathers . . . crude" and not as "ornamental feathers." *Brodie v. U. S.*, (1904) 135 Fed. 914.

Eagle and condor quills, which are ornamental feathers, but are in a crude state, and require further treatment before becoming suitable for ornamental purposes, are dutiable as crude feathers and not as ornamental feathers. *Spero v. U. S.*, (1904) 135 Fed. 915.

Feather boas, made by stringing dressed feathers upon a cord, are subject to the classification of "feathers . . . dressed," etc., under this paragraph, by virtue of section 7 prescribing that enumerated articles "shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value." *Legg v. U. S.*, (C. C. A. 1908) 163 Fed. 1006, *affirming* (1907) 154 Fed. 858.

Florists' ornamental supplies, consisting of leaves of various plants arranged in the form of wreaths, crosses, etc., are dutiable as "ornamental leaves" under this paragraph. *Bayersdorfer v. U. S.*, (1909) 171 Fed. 286.

Goose skins with down. — The provision in paragraph 426, for "furs dressed on the skin," does not include dressed goose skins with the down on. Such articles are dutiable as "bird skins, . . . dressed . . . or manufactured in any manner," under paragraph 425. *Herskovitz v. U. S.*, (1910) 180 Fed. 631.

Grass piquets, consisting of stalks of oats or of wheat, cut in the milk, and grasses dyed to imitate their natural color, mixed

with palm leaf and other artificial leaves, bound at the ends of the stems with wire, in all about fifteen inches in length, to be used for millinery purposes, are not taxable for duty under paragraph 449, as manufactures of grass, palm leaves, straw, weeds, etc., but are properly assessed at fifty per cent. *ad valorem*, under paragraph 425, as artificial or ornamental grains, leaves, and flowers, and stems or parts thereof, not specially provided for. *Herman v. U. S.*, (1903) 121 Fed. 201, *affirmed* (1904) 128 Fed. 420, 63 C. C. A. 162.

Imitation roses of celluloid and metal, which are worn as boutonnières, chiefly by children on occasions of frolic and fun, and are also used as gifts in prize packages, are not "toys" within the meaning of paragraph 418, but are dutiable as "artificial . . . flowers," under paragraph 425. *Hamburger v. U. S.*, (1910) 180 Fed. 632.

Peacock feathers in a crude condition, used in that state for ornamental purposes, are dutiable under the provision in this paragraph for "ornamental feathers," and not under that in the same paragraph for "feathers . . . crude." *Silva v. U. S.*, (1903) 127 Fed. 781.

Prepared palm leaves. — Palm leaves that have been subjected to a process of painting, etc., to give them their natural appearance and to prevent decomposition, are dutiable as "ornamental . . . leaves . . . not specially provided for" under this paragraph, rather than as "palms, preserved, . . . suitable for decorative purposes," under paragraph 251, or as "manufactures" of palm leaf, under paragraph 449. *Kreshower v. U. S.*, (1907) 152 Fed. 485; *U. S. v. Bayersdorfer*, (1909) 175 Fed. 959, 99 C. C. A. 449.

Wreaths and crosses mounted on wire frames are dutiable as "ornamental . . . leaves . . . not specially provided for" under paragraph 425, rather than as articles in part of metal under paragraph 193. *U. S. v. Bayersdorfer*, (1909) 175 Fed. 959, 99 C. C. A. 449.

Feathered post cards. — See under this title, vol. 2, p. 469, par. 403.

Grasses. — See under this title, vol. 2, p. 478, par. 449.

Millinery articles containing feathers and wire. — See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 474, par. 426.

Pieces of fur temporarily sewn together — Act of 1883. — Pieces of fur sewn together continuously for convenience or safety, but not intended to be used as articles in that shape, were not "articles made of" fur under Tariff Act March 3, 1883, ch. 121, sec. 2502, schedule N. 22 Stat. L. 512, but were dutiable

as "dressed furs on the skin," under the same schedule. *Fleet v. U. S.*, (1892) 148 Fed. 335.

Fur combings. — See under this title, vol. 2, p. 481, par. 463.

Goose skins with down. — See under this title, vol. 2, p. 473, par. 425.



## Vol. II, p. 474, par. 427.

**Embroidered fans.**—Embroidered fans are subject only to the provision in paragraph 427 for "fans of all kinds," not being within the scope of the proviso in paragraph 339, imposing the embroidery rate on "embroidered wearing apparel or other article or tex-

tile fabric." *U. S. v. Quong Lee*, (1909) 173 Fed. 819.

**Cigar and fire cracker fans.**—See under this title, vol. 2, p. 472, par. 418.

**Paper fans for decorative purposes.**—See under this title, vol. 2, p. 469, par. 407.

## Vol. II, p. 474, par. 431.

**Hair press cloth.**—The provision in paragraph 431 for "hair press cloth" is not limited to fabrics composed of the same material (horsehair) as the other articles enumerated

in said paragraph. *Caldwell v. U. S.*, (1905) 141 Fed. 487.

**Camel's-hair press cloth.**—See under this title, vol. 2, p. 458, par. 366.

## Vol. II, p. 474, par. 432.

**Beaver strips.**—See under this title, vol. 2, p. 479, par. 450.

**Trimmed hats.**—See under this title, vol. 2, p. 464, par. 390.

## Vol. II, p. 474, par. 433.

**Printed beer mats, consisting of round pieces of wood pulp upon which have been printed German verses, and the name and**

**advertisement of beer dealers, are within this paragraph as a manufacture of pulp.** *Hollender v. U. S.*, (1910) 177 Fed. 594.

## Vol. II, p. 474, par. 434.

**Chatelaine purses of metal, gilded or plated in imitation of gold and silver, and set with imitation precious stones, which range in value from thirty-four marks per gross to thirty marks per dozen, are not within the provision in paragraph 434 for "articles commonly known as jewelry."** *Steinhardt v. U. S.*, (1903) 148 Fed. 512.

**Millinery ornaments.**—This section does not include so-called "millinery ornaments," used in trimming hats, which are flimsy articles, intended for ephemeral use, are not made by jewelers, and contain no gems or precious metals, but are made of base metal either wholly or in combination with imitation jet or imitation precious stones. *U. S. v. Schiff*, (C. C. A. 1905) 139 Fed. 549.

**Pearls are within the provisions of this section.** *Hahn v. U. S.*, (1903) 131 Fed. 1000, *affirmed* (1904) 135 Fed. 349, 68 C. C. A. 130.

**"Half pearls."**—See under this title, vol. 2, p. 475, par. 436.

**Leather watch guards.**—See under this title, vol. 2, p. 479, par. 450.

**Loose pearls.**—See under this title, vol. 2, p. 475, par. 436.

**Miniature frames of precious metal set with diamonds.**—See under this title, vol. 2, p. 423, par. 193.

**Ornamental slipper buckles.**—See under this title, vol. 2, p. 423, par. 193.

**Silver hand bags.**—See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 474, par. 435.

**Cut agate, garnet, etc., for jewelry settings.**—Small pieces of agate, garnet, etc., advanced from their natural state by cutting or other process, for the purpose of fitting them for use as settings for jewelry, and known commercially as agates, garnets, etc., are more specifically provided for as "precious stones advanced," under this paragraph, than as "manufactures of agate, garnet, etc.," under paragraph 115. *U. S. v. Lorsch*, (1909) 172 Fed. 277.

**"Dimensions."**—The provision in this paragraph for imitation precious stones not exceeding an inch in "dimensions" does not exclude stones exceeding an inch in a single dimension. To be excluded they must exceed an inch in more than one direction. *Lorsch v. U. S.*, (C. C. A. 1906) 146 Fed. 379, *modified* (1904) 135 Fed. 214.

**Imitation pearls.**—The provision in this paragraph for imitations of precious stones was held to cover imitation whole and half pearls, including such as have been strung on wire for purposes of manufacture. *U. S. v. Weinberg*, (1905) 139 Fed. 1006.

**Incrusted stones.**—In construing the provision in paragraph 435, for imitation precious stones not "ornamented or decorated," it was held, as to stones which have been incrusted but in which the incrustations are a part of the imitation, that they are not ornamented or decorated within the meaning of said provision. *U. S. v. Downing*, (1905) 139 Fed. 155.

**Jewels for bearings.**—Sapphires intended for bearings for electrical instruments are dutiable as precious stones, under this paragraph, rather than as articles composed of

mineral substances under paragraph 97. *U. S. v. American Express Co.*, (1904) 147 Fed. 894.

**Opal balls—rock crystal rondelles.**—In construing the provisions in paragraphs 408, 435, for "beads of all kinds," and "precious stones," respectively, it was held that pierced opal balls about one-fourth of an inch in diameter and pierced rock crystal rondelles, or small, flat, faceted disks, were dutiable under paragraph 435 rather than paragraph 408; these articles not being commercially known as beads. It was held also as to the rock crystal articles that they were dutiable under paragraph 435 rather than as manufactures of rock crystal under paragraph 115. *U. S. v. American Gem, etc., Co.*, (1905) 142 Fed. 283.

**Paste cameos**, in imitation of shell cameos, which imitate certain descriptions of precious stones, are dutiable as imitation precious stones under this paragraph. *U. S. v. Goldberg*, (1904) 139 Fed. 706.

**Rock crystal intaglios.**—In construing the provision in paragraph 435 for "precious stones advanced in condition or value from their natural state by cleaving, splitting,

cutting, or other process," in reference to intaglios incised in rock crystal (a precious stone), which have been attractively and skillfully painted, the value and salability of the articles being chiefly attributable to the painting, it was held that the words "or other process" include such process of painting, and that such intaglios were dutiable under said provision, rather than as manufactures of rock crystal, not specially provided for, under paragraph 115. *Benedict v. U. S.*, (1904) 135 Fed. 242, *affirmed* (C. C. A. 1906) 145 Fed. 914.

**"Set."**—The word "set," as used in this paragraph, has a well-known and well-defined trade meaning in connection with precious stones, which would not include the insertion of an agate bearing in a scale. *Smith v. Computing Scale Co.*, (1906) 147 Fed. 890.

**Agate bearings.**—See under this title, vol. 2, p. 409, par. 115.

**Bort.**—See under this title, vol. 2, p. 488, par. 545.

**Pierced imitation pearls.**—See under this title, vol. 2, p. 470, par. 408.

## Vol. II, p. 475, par. 436.

**"Half pearls."**—Under section 7, providing that any unenumerated article "shall pay the same rate of duty which is levied on the enumerated article which it most resembles," it has been held that so-called "half pearls," consisting of the better part of the true pearl, from which the flaws or blemishes have been removed by sawing or splitting, and which are not adapted for stringing, but are chiefly useful for jewelry settings, and require labor and expense in completion, are dutiable at the same rate as "pearls in their natural state," under paragraph 436, which they resemble more than the "pearls, set or strung," enumerated in paragraph 434. *Hahn v. U. S.*, (1903) 131 Fed. 1000, *affirmed* (C. C. A. 1904) 135 Fed. 349.

**Loose pearls.**—In *Citroen v. U. S.*, (1909) 166 Fed. 693, 92 C. C. A. 365, it appeared that loose drilled pearls, imported in separate packages, had been assembled into a necklace abroad and tentatively worn by a person who contracted to purchase them, delivery to be made in the United States, and who, after receiving them here, added six more pearls and had them made into a necklace. It was held that as imported they were not "jew-

elry," within the meaning of paragraph 434, but that they were dutiable as "pearls in their natural state," by similitude, under paragraph 436. Of similar effect see *U. S. v. Tiffany*, (1909) 172 Fed. 300, *affirmed* (1910) 178 Fed. 1006, 101 C. C. A. 665.

In *Neresheimer v. U. S.*, (1904) 136 Fed. 86, 68 C. C. A. 654, *reversing* (1903) 131 Fed. 977, it appeared that certain drilled pearls of exceptionally large size and fine quality were imported together, arranged in collections according to size, the largest in the centre. It appeared that these collections had not been selected for a special piece of jewelry, but that the pearls were to be sold separately on their individual merits, and that they had not been advanced to a special value beyond the aggregate amount of their individual values by an assortment and selection that fitted them for immediate transformation into a necklace or string of pearls. It was held that under the similitude clause in section 7 they bore a closer resemblance to "pearls in their natural state not strung or set" than to "pearls set or strung," which are enumerated in paragraphs 436 and 434, respectively.

## Vol. II, p. 475, par. 437.

**Hides of the East Indian buffalo.**—The term "hides of cattle" in paragraph 437 is not used in a commercial sense, but according to the ordinary dictionary meaning of the words, and refers to the hides of domesticated animals of the bovine species, including those of the East Indian buffalo. *U. S. v. Schmoll*, (1907) 154 Fed. 734, *affirmed* (C. C. A.) 157 Fed. 1005.

**Singapore buffalo hides.**—Singapore buffaloes are not "cattle," because they are not domesticated, and their hides are therefore

not within the provision for hides of "cattle," in paragraph 437. Furthermore, the presence in the same paragraph of a drawback provision with respect to leather indicates an intention to include therein only such hides as can be tanned into leather, a use of which these Singapore hides are not susceptible. *U. S. v. Wadleigh*, (1909) 172 Fed. 169, *affirmed* (1910) 178 Fed. 1007, 101 C. C. A. 666.

**Mud buffalo hides.**—See under this title, vol. 2, p. 497, par. 664.

## Vol. II, p. 475, par. 438.

**Japanned skins**—Act of 1890.—Japanned skins, used for uppers, were within the provision in paragraph 456, Tariff Act Oct. 1, 1890, ch. 1244, sec. 1, Schedule N, 26 Stat. L. 601, for "dressed upper leather, including . . . japanned leather," rather than under the provision in the same paragraph for "japanned calfskins," the latter provision being limited to japanned skins which were

not upper leather. *U. S. v. Bittel*, (1892) 155 Fed. 554, *affirmed* (1893) 4 C. C. A. 680.

**Skins for morocco**.—The provision in this paragraph for "skins for morocco" is not limited to goatskins, but includes also certain sheepskins known as "New Zealand basils," or "Cape sheepskins." *Helmuth v. U. S.*, (1903) 125 Fed. 634.

## Vol. II, p. 476, par. 439.

**Measurement of gloves**.—In *U. S. v. Mayer*, (C. C. A. 1909) 175 Fed. 963, *affirming* (1908) 164 Fed. 905, it appeared that imported gloves exceeded the statutory dividing line as to length in some instances as much as a half inch; but that this excess was accidental, and did not affect the value, nor

result in any advantage to buyer or seller. It was held that this excess is negligible, and should not affect the classification of the gloves, notwithstanding the provision in paragraph 439, that gloves shall be classified according to their measurement at "extreme length when stretched to their full extent."

## Vol. II, p. 477, par. 445.

**Cumulative duties**.—The provision relative to leather gloves in this paragraph, that "in addition to the foregoing rates there shall be paid the following cumulative duties," justifies the imposition of more than one of said "cumulative duties" in addition to the rates applicable by virtue of the preceding provisions for gloves. *Douillet v. U. S.*, (1904) 133 Fed. 1007.

**Embroidered gloves**.—This paragraph has been held not to cover gloves having three rows of embroidery, each of which presents on the back of the gloves the appearance of

three-plait crochet work, but is produced by the needle with only one cord or strand or thread. *U. S. v. Robinson*, (1900) 124 Fed. 1013; *Trefousse v. U. S.*, (1905) 144 Fed. 708, *affirmed* (C. C. A. 1907) 154 Fed. 1005.

Neither does it include gloves having but three points each, each point having three distinct rows of stitching, though the stitching shows nine chains of embroidery on the outside of the backs of the gloves and nine single rows of stitching on the inside. *U. S. v. La Fetra*, (1909) 172 Fed. 297, *affirmed* (1910) 178 Fed. 1006, 101 C. C. A. 665.

## Vol. II, p. 478, par. 448.

**Albolene**.—The article known as "albolene," consisting of a mechanical combination of paraffin, a petroleum product, and ceresia, a fossil wax, the paraffin constituting eighty per cent. of the article by weight, but only four-elevenths of its value, is not a product of petroleum within the meaning of paragraph 626, providing for a countervailing duty on products of petroleum produced in

any country which imposes a duty on petroleum or its products exported from the United States," but is dutiable under paragraph 448, as a manufacture of wax. *Ropes v. U. S.*, (1900) 123 Fed. 990.

**Ground cork refuse**.—See under this title, vol. 2, p. 481, par. 463.

**"Manufacture"**.—See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 478, par. 449.

**Bone swords**.—The provision for "swords" in paragraph 154, relating to "swords, sword-blades, and side-arms," does not include so-called "bone swords" used as curios, ornaments, etc., which are properly dutiable under paragraph 449. *Morimura v. U. S.*, (1908) 165 Fed. 64.

**"Chip"**.—In *Ollesheimer v. U. S.*, (1907) 154 Fed. 167, certain baskets were held not to be manufactures of "chip" within the meaning of that term as used in this paragraph.

**Dress shields**—Act of 1890.—In *Darlington v. U. S.*, (1905) 136 Fed. 718, it was held that certain wearing apparel, consisting of dress shields, and composed in chief value of rubber, and in part of cotton, were dutiable as manufactures in chief value of India rubber, under paragraph 460, Tariff Act Oct.

1, 1890, and not under paragraph 349 of said Act, relating to wearing apparel composed of cotton, or in chief value thereof, and to such wearing apparel "having India rubber as a component material."

**Grasses**.—Certain grasses were held to be more specifically provided for as manufactures of grass under this paragraph than as "artificial grains, leaves, or flowers," under paragraph 425. *Bayersdorfer v. U. S.*, (1909) 171 Fed. 286.

**Kinoki baskets**.—Baskets made of twisted kinoki wood shavings were held to be dutiable as "manufactures of chip," under this paragraph. *Morimura v. U. S.*, (1909) 167 Fed. 687.

**Rubber recoil pads**, intended for reducing the shock from the discharge of a gun, but

which are not a necessary attachment, their use being optional, were held, in the absence of satisfactory evidence of a commercial understanding in support of such classification, not to be dutiable as parts or fittings of guns, under paragraph 158, but as manufactures of India rubber, under paragraph 449. *Schoverling v. U. S.*, (1906) 142 Fed. 302.

Rubber sponges are dutiable under this paragraph as manufactures of india rubber, and not under paragraph 82, relating to sponges. *Alfred H. Smith Co. v. U. S.*, (1906) 143 Fed. 691, *affirmed* (C. C. A.) 149 Fed. 1022.

Straw lace sewed with thread which constitutes a substantial element of its cost, and without which the material could not be held together or be a merchantable article, is not within the provision in paragraph 409, for lace composed "wholly" of straw, but is dutiable as a manufacture in chief value of

straw, under paragraph 449. *Kurtz v. U. S.*, (1904) 136 Fed. 268, *affirmed* (C. C. A. 1906) 146 Fed. 127. To the same effect under the Tariff Act of 1890. *U. S. v. Rheims*, (1894) 154 Fed. 865, *affirming* (C. C. A.) 89 Fed. 1020.

Automobile with tires unattached. — See under this title, vol. 2, p. 423, par. 193.

Baskets made from willow chip. — See under this title, vol. 2, p. 426, par. 206.

Bleached or dried grasses. — See under this title, vol. 2, p. 473, par. 425.

Braids of cotton and rubber. — See under this title, vol. 2, p. 451, par. 339.

Grass piquets. — See under this title, vol. 2, p. 473, par. 425.

Prepared palm leaves. — See under this title, vol. 2, p. 473, par. 425.

Slide basket. — See under this title, vol. 2, p. 426, par. 206.

## Vol. II, p. 479, par. 450.

Beaver strips. — In *Hermann v. U. S.*, (1905) 141 Fed. 486, it was held that so-called beaver strips, in the form of rectangular pieces of felted material measuring fifteen to twenty-four inches wide and thirty-six to forty-eight inches long, used in the manufacture of hats and composed in part of wool, but chiefly of rabbit fur, are not within the provision in paragraph 370 for articles of wearing apparel in part of wool, nor within that in paragraph 432 for hats or forms for hats, but are dutiable as manufactures in chief value of fur, under paragraph 450.

Fountain pens without the pen points are not "penholders" within the meaning of paragraph 187, but are dutiable as manufactures of hard rubber under paragraph 450. *Schrader v. U. S.*, (1910) 180 Fed. 953.

Leather watch guards, mounted with cheap miniature bits, stirrups, etc., intended to be worn by horsemen, are not "articles commonly known as jewelry," as provided for in paragraph 434, but are dutiable as manufactures of leather, under paragraph 450. *Veil v. U. S.*, (1904) 128 Fed. 471.

Plaster of paris statuettes. — Decorated and ornamental statuettes, made from plaster

of paris — sulphuric acid, lime, and water — are not taxable under paragraph 95, as china, porcelain, or crockery ware, including statuettes ornamented, etc., but are taxable under paragraph 450, as manufactures of plaster of paris, or of which such substance is the component material of chief value, not specially provided for in the Act. *Bing v. U. S.*, (1903) 121 Fed. 194.

Slabs of mother-of-pearl. — This paragraph covering "manufactures" of mother-of-pearl was held to include mother-of-pearl made into slabs by cutting or grinding, which are designed for use in the manufacture of knife handles and similar articles. *Morris European, etc., Express Co. v. U. S.*, (1906) 150 Fed. 608.

Beaded leather hand bags. — See under this title, vol. 2, p. 470, par. 408.

Gelatin. — See under this title, vol. 2, p. 396, par. 23.

Gelatin spangles. — See under this title, vol. 2, p. 470, par. 408.

Pieces of fur temporarily sewn together — Act of 1893. — See under this title, vol. 2, p. 474, par. 426.

Spangled hat crowns. — See under this title, vol. 2, p. 470, par. 408.

## Vol. II, p. 479, par. 453.

Mouth organs and metallophone. — See under this title, vol. 2, p. 472, par. 418.

## Vol. II, p. 479, par. 454.

Bronze statuary. — The provision for "statuary . . . wrought by hand . . . from metal," in paragraph 454, does not include a bronze statue cast in a foundry by artisans from a model made in plastic material by an artist, but upon which he did little or no retouching. *Altman v. U. S.*, (1909) 172 Fed. 161.

But in *U. S. v. Tiffany*, (C. C. A. 1908) 160 Fed. 408, *affirmed* (1907) 154 Fed. 168, it appeared that a statute of great value and

high artistic merit, in which bronze was overwhelmingly predominant in bulk, though ivory was the component of chief value, was produced by the "cire perdue" process. After the metal part was cast, it was gone over carefully by hand by a renowned sculptor, who thereby made the alterations necessary to the execution of his artistic conceptions; this being the important part, which gave the piece its distinctive personal character. The entire work, from the original

conception to the last touch, was under the sculptor's constant supervision, and he did everything that a sculptor could do to make his work complete. It was held that this statue was within the provision of paragraph 454, for "such statuary as is cut, carved, or otherwise wrought by hand . . . from metal, and is the professional production of a statuary or sculptor only," and not within paragraph 450 as a manufacture of metal and ivory, ivory chief value.

"By hand."—Under this paragraph it is not necessary that the entire work on a statue shall be "by hand," nor that the entire handiwork must be that of the statuary or sculptor personally. *U. S. v. Tiffany*, (C. C. A. 1908) 160 Fed. 408, *affirming* (1907) 154 Fed. 168.

Carved "cistern."—A "cistern" in several pieces, with figures sculptured thereon in almost full relief, is "statuary" within the meaning of that term as used in this paragraph. *U. S. v. American Express Co.*, (1905) 139 Fed. 80.

Metal statuary.—The provision for "statuary . . . wrought . . . from metal" does not require metal to be the only component, or even the component of chief value. It is enough if it so greatly predominate as to characterize the entire work. *U. S. v. Tiffany*, (C. C. A. 1908) 160 Fed. 408, *affirming* (1907) 154 Fed. 168.

Painted calendar.—The term "paintings," in paragraph 454, includes handpainted panels having a small calendar affixed, which is a trifling part of the entire article. *Vantine v. U. S.*, (1909) 168 Fed. 562.

Painted lithographs.—The provision in this paragraph for "paintings" in oil or water colors, does not include articles consisting of lithographic prints pasted on wood, and painted to a slight extent, and varnished. *Steinhardt v. U. S.*, (1909) 172 Fed. 168.

"Paintings."—The expression "paintings in oil or water colors," as used in this paragraph, is not a commercial term, but is used descriptively. *Steinhardt v. U. S.*, (1909) 172 Fed. 168.

Paintings on copper.—Certain antique mythological paintings of great value and high artistic character, consisting of a ewer and tray made of copper, and enameled by a process not now understood, were held not to be covered by the provision in paragraph 159, for "sheets, plates, wares, or articles of iron, steel, or other metal, enameled or glazed with vitreous glasses," but were duti-

able under paragraph 454, as "paintings in oil or water colors." *Amerman v. U. S.*, (1900) 124 Fed. 298.

Paragraph construed liberally.—In providing a low rate of duty on works of art in this paragraph Congress evidently intended to welcome the works of meritorious artists and sculptors, and to exclude from the low rate the productions of artisans and empirics. The definition of statuary as "the professional production of a statuary or sculptor only" was aimed against such articles as are made by machinery or unskilled labor, or are cast in large numbers from molds by ordinary workmen. Such paragraph should be construed liberally. *U. S. v. Tiffany*, (C. C. A. 1908) 160 Fed. 408, *affirming* (1907) 154 Fed. 168.

Professional productions of a statuary or sculptor.—A marble figure, produced in the establishment of a professional sculptor, under whose instructions the original model was made, and who gave such oral instructions and other supervision as were necessary to insure a faithful reproduction of the design, was held to be "statuary," within the meaning of paragraph 454, where it is provided that that term, wherever used in the Act, "shall be understood to include only such statuary . . . as is the professional production of a statuary or sculptor only." *Sibbel v. U. S.*, (1900) 124 Fed. 105.

Reciprocal commercial agreements.—The definition given the term "statuary," as used in this Act, governs the provision for "statuary" in section 3, and the reciprocal commercial agreements negotiated as provided in said section. *Altman v. U. S.*, (1909) 172 Fed. 161.

"Solid block."—The words "solid block," as used in this paragraph, do not refer to metal. *U. S. v. Tiffany*, (C. C. A. 1908) 160 Fed. 408, *affirming* (1907) 154 Fed. 168.

Statues in pieces.—The provision in this paragraph for statuary produced from "a solid block or mass of marble," etc., is not limited to statuary made from single blocks, and has been held to include statues each carved from three solid blocks of marble. *U. S. v. Perry*, (1904) 133 Fed. 841.

Bronze statuary—Reciprocal agreement with Italy.—See under this title, vol. 2, p. 501, sec. 3.

Pen and ink drawings.—See under this title, vol. 2, p. 501, par. 703.

Splash mats or screens.—See under this title, vol. 2, p. 426, par. 208.

## Vol. II, p. 480, par. 456.

Soap pencils.—See under this title, vol. 2, p. 504, sec. 6.

## Vol. II, p. 481, par. 459.

Pyroxylin smokers' articles.—This paragraph enumerates pyroxylin smokers' articles more specifically than does paragraph 17, covering "all compounds of pyroxylin . . . if in finished or partly finished articles." *U. S. v. Knauth*, (1908) 150 Fed. 610.

Smokers' articles.—Certain articles used chiefly for the convenience of smokers, con-

sisting of tables on top of which are affixed smokers' accessories, and of an ornamental miniature automobile for the use of smokers, are dutiable as "smokers' articles" under this paragraph, and not as "house or cabinet furniture of wood," under paragraph 208. *Steinhardt v. U. S.*, (1903) 126 Fed. 443.

## Vol. II, p. 481, par. 462.

**Umbrella sticks with celluloid handles.**—Umbrella sticks of wood having celluloid handles, that constitute the chief element of value in the articles, are more specifically provided for as “sticks for umbrellas” in

this paragraph than as “articles of which . . . any compound of pyroxylin is the component material of chief value” in paragraph 17. *U. S. v. Borgfeldt*, (1900) 124 Fed. 304.

## Vol. II, p. 481, par. 463.

**Flax rolls** are dutiable as waste, under this paragraph, and not under paragraph 326 as “tow of flax” by similitude. *Ritchie v. U. S.*, (1905) 141 Fed. 664.

**Fur combings.**—In *U. S. v. Hatters' Fur Exch.*, (1907) 153 Fed. 595, it was held as to combings of loose or dead hair obtained in preparing rabbit or hare skins, which are commercially known as “hares' combings” or “fur waste,” and which, after further treatment, are used as an adulterant in cheap hats, that they are dutiable as waste under this paragraph, and not as furs prepared for hatters' use under paragraph 426, nor free of duty as “furs, undressed,” under paragraph 561.

**Ground cork refuse.**—Small pieces of cork, which have been produced by grinding the refuse of cork bark for convenience in handling, and which need further preparation before becoming fit for its ultimate use in the manufacture of linoleum, etc., have been held to be dutiable as waste, under this paragraph, and not as a manufacture of cork under para-

graph 448. *Gudewill v. U. S.*, (1904) 142 Fed. 214.

**Selected pieces of second-hand jute bagging**, intended for patching the covering of cotton bales, are not “bagging for cotton, gunny cloth, and similar fabrics, suitable for covering cotton,” under paragraph 344, nor “rags,” under paragraph 648, but are dutiable as “waste” under paragraph 463. *U. S. v. Davies*, (1908) 160 Fed. 456, 87 C. C. A. 672.

**Cotton waste containing jute.**—See under this title, vol. 2, p. 488, par. 537.

**Floral waters.**—See under this title, vol. 2, p. 504, sec. 6.

**Granito or terrazo.**—See under this title, vol. 2, p. 504, sec. 6.

**Hog hair.**—See under this title, vol. 2, p. 490, par. 569.

**Remnant piece of fur.**—See under this title, vol. 2, p. 489, par. 561.

**Small tin disks.**—See under this title, vol. 2, p. 412, par. 134, and p. 423, par. 193.

**Wood flour.**—See under this title, vol. 2, p. 426, par. 208.

## Vol. II, p. 482, sec. 2.

**Presumption to classification.**—Where the classification of an import is open to a construction which would as well place it on the free list as on the dutiable list, the course

most favorable to the importer must be adopted. *Hempstead v. Thomas*, (C. C. A. 1903) 122 Fed. 538.

## Vol. II, p. 482, par. 464.

**Phthalic anhydride and tetrachlorphthalic anhydride.**—Two coal-tar preparations, consisting of phthalic anhydride and tetrachlorphthalic anhydride, which, though not acids chemically, are commercially known as, and perform the functions of, acids, were free of

duty under paragraph 473, Free List, sec. 2, ch. 1244, Tariff Act Oct. 1, 1890, as “acids used for . . . manufacturing purposes,” and were not dutiable under paragraph 19 of said Act as “coal-tar preparations.” *Heller, etc., Co. v. U. S.*, (1900) 124 Fed. 299.

## Vol. II, p. 482, par. 468.

**Albumen.**—An article which is not albumen in the technical language of chemists, though one in common speech, is not within paragraph 245, putting a duty on “albumen,

egg or blood,” but within paragraph 468, putting on the free list “albumen not specially provided for.” *Merchants' Despatch Transp. Co. v. U. S.*, (1903) 121 Fed. 443.

## Vol. II, p. 482, par. 473.

**Amendment.**—This paragraph was amended by Act of March 3, 1903, ch. 998, 32 Stat. L. 1023, 10 Fed. Stat. Annot. 71.

**Construction of paragraph.**—This paragraph does not limit the right of free importation to citizens of the United States, nor restrict it to animals imported for the personal use of the importer, and not for sale; and, in view of the manifest policy of the provision to encourage improvement in the breeds of live stock by farmers and stock raisers, neither the administrative officers

nor the courts are authorized to read such restriction into the law. *In re Page*, (1904) 128 Fed. 317.

**Regulations of Secretary of Treasury.**—The requirement in the regulations of the Secretary of the Treasury that proof should be produced of the registry of the grandsires and granddames of animals imported for breeding purposes is not in contravention of the statute. *Borden v. U. S.*, (1904) 132 Fed. 205.

## Vol. II, p. 483, par. 478.

Arrowroot starch.—See under this title, vol. 2, p. 438, par. 285.

## Vol. II, p. 484, par. 482.

Chrome alum.—The provision for articles in a "crude state," in this paragraph, does not include chrome alum, which is removed from its crude state of a paste by a crystallizing process, in which it is freed from inci-

dental impurities. *Kuttroff v. U. S.*, (1909) 169 Fed. 283, 94 C. C. A. 559.

Zinc dust.—To the same effect as the original note, see *U. S. v. Klipstein*, (1901) 123 Fed. 996.

## Vol. II, p. 484, par. 483.

Importations of Porto Rican products.—All articles of Porto Rican origin exported from Porto Rico to foreign countries after the passage of the Foraker Act of April 12, 1900, 31 Stat. L. 77, 5 Fed. Stat. Annot. 762, may, since the proclamation of the President on July 25, 1901, doing away with the fifteen per cent. duty imposed under section 3 of that Act, be imported into the United States free of duty under paragraph 483, provided the articles have not been advanced in value or improved in condition by any process of

manufacture or other means. (1902) 24 Op. Atty.-Gen. 55.

Tobacco grown in Porto Rico after the cession of that island to the United States, and brought into this country for warehousing, and afterwards exported to Canada and thence returned to the United States, is within the benefits of paragraph 483. (1903) 24 Op. Atty.-Gen. 612.

Proof of identity.—*Roberts v. U. S.*, (1910) 178 Fed. 607, following *U. S. v. Dominici*, (C. C. A. 1897) 78 Fed. 334, set out in the original note.

## Vol. II, p. 485, par. 489.

Commercial carbonate of baryta is exempt from duty under this paragraph, and not dutiable at twenty-five per cent. *ad valorem*,

under paragraph 3, as a chemical compound or salt not provided for. *Gabriel v. U. S.*, (1903) 121 Fed. 208.

## Vol. II, p. 485, par. 493.

Stuffed birds.—In *Morimura v. U. S.*, (1904) 141 Fed. 383, it was held in regard to stuffed skins of domestic chicks and ducklings, used by confectioners and dealers in

Easter goods and novelties, that they were not "toys" within the meaning of paragraph 418, but "birds, stuffed," under paragraph 493.

## Vol. II, p. 485, par. 494.

Guinea fowls and turkeys.—See under this title, vol. 2, p. 436, par. 278.

## Vol. II, p. 485, par. 498.

Under Act of 1894.—In *U. S. v. Markt*, (1899) 124 Fed. 1012, it was held that the provision in Tariff Act of Aug. 27, 1894, ch. 349, sec. 2, Free List, par. 407, 28 Stat. L. 538, for "bolting cloths, especially for mill-

ing purposes, but not suitable for the manufacture of wearing apparel," was not limited to bolting cloth composed of silk, but included also bolting cloth made of fine copper-wire gauze.

## Vol. II, p. 486, par. 502.

Unbound portfolios.—In *Downing v. U. S.*, (1903) 130 Fed. 393, it was held that the provision in paragraph 502, for "books and pamphlets printed exclusively in languages other than English," includes certain portfolios of two kinds, made up of loose sheets not intended to be bound together in book form, and containing, respectively, nineteen

and twenty-four sheets of pictures and prints, and accompanied, respectively, with four and twelve loose pages printed in foreign languages; each portfolio having a loose outside covering, bearing the title of the work.

Books for children's use.—See under this title, vol. 2, p. 468, par. 400.

## Vol. II, p. 486, par. 503.

Architectural portfolios.—This paragraph includes architectural portfolios containing eighteen or twenty pages of illustrations and

a preface of fifteen lines in German. *Downing v. U. S.*, (1905) 140 Fed. 92, following *Downing v. U. S.*, (1903) 130 Fed. 393.

**Literary and social club.**—In *U. S. v. Vandiver*, (1903) 122 Fed. 740, it appeared that the charter of a club provided that it was formed "as a permanent social club, for the promotion of literary, artistic, and antiquarian tastes among the citizens of P., and such kindred purposes as the club may from time to time determine, by establishing and

maintaining a library and reading room, and a collection of works of art and antiquities, either by loan or otherwise." It appeared that while the club maintained a well-selected and valuable library, etc., its social side was fully as prominent as its literary or artistic side. It was held that books for the club were not admissible free of duty.

## Vol. II, p. 486, par. 504.

**Automobiles.**—In the provision in paragraph 504, for books, libraries, furniture, and "similar household effects," it differs from previous legislation in the insertion of the term "similar." It has been held: (1) That this insertion indicated an intention to do away with the exemption of household effects generally, and to restrict it to such as are like books, etc., there mentioned; and (2) that automobiles are not "similar" to such articles. *U. S. v. Grace*, (1909) 166 Fed. 748, 92 C. C. A. 596. *Compare Hillhouse v. U. S.*, (1907) 152 Fed. 163, 81 C. C. A. 415, *reversing* (1906) 142 Fed. 303, in which it was held that an automobile should not be excluded from importation free of duty as

household effects used abroad more than one year, by reason of having been extensively repaired shortly before importation; but that so much of the machine as was a new manufacture might be assessed with duty, while the rest, including the cost of overhauling, oiling, cleaning, readjusting, and regulating, was free under this paragraph.

**Continuity of use abroad.**—The provision for household effects "used abroad . . . not less than one year," is satisfied if the periods of such use aggregate one year, even though not continuous. *Hillhouse v. U. S.*, (1907) 152 Fed. 163, 81 C. C. A. 415, *reversing* (1906) 142 Fed. 303.

## Vol. II, p. 486, par. 505.

**Old cannon.**—See under this title, vol. 2, p. 423, sec. 193.

## Vol. II, p. 487, par. 509.

**Bristles in bunches.**—See under this title, vol. 2, p. 470, par. 411.

## Vol. II, p. 487, par. 514.

**Zinc ores.**—The zinc ores known as carbonate, silicate, and sulphide of zinc, are free of duty, the carbonate and silicate as "calamine," under this paragraph, and the sulphide as "minerals, crude," under paragraph 614,

except that when they contain lead they are subject to the duty provided on "lead bearing ore of all kinds," in paragraph 181. *U. S. v. Brewster*, (1909) 167 Fed. 122, 92 C. C. A. 574.

## Vol. II, p. 487, par. 515.

**Synthetic camphor.**—The classification of synthetic camphor should be determined by the same consideration as of natural camphor, and where, measured by the principal tests, it still retains impurities that bring it far below the standard of refined camphor, and

closely resembles the crude natural product, it is subject to classification as "camphor, crude," under paragraph 515, rather than as "camphor, refined," under paragraph 12. *U. S. v. Schering*, (C. C. A. 1908) 163 Fed. 246.

## Vol. II, p. 487, par. 524.

**Soluble creosote**, an article prepared from coal-tar dead oil, is less specifically provided for as a "chemical compound" than under a provision for "products or preparations of coal-tar," and was properly classified for duty

under the latter head in paragraph 443, Free List, sec. 2, ch. 349, Tariff Act Aug. 27, 1894. 28 Stat. L. 539, or paragraph 15 of the Tariff Act July 24, 1897. *Schoellkopf v. U. S.*, (1901) 124 Fed. 89.

## Vol. II, p. 487, par. 529.

**Coffee essence.**—See under this title, vol. 2, p. 437, par. 283.

## Vol. II, p. 487, par. 530.

**"Coin swords."**—See under this title, vol. 2, p. 423, par. 193.



## Vol. II, p. 488, par. 532.

Copper plates for engravers' use. — Plates that have been ground, polished, and planished are not copper in "plates . . . not manufactured," within the meaning of this

paragraph. *U. S. v. Drakenfeld*, (1910) 178 Fed. 258, 101 C. C. A. 618, *reversing* (1909) 172 Fed. 296.

## Vol. II, p. 488, par. 533.

Bronze ornaments. — Act of 1894. — See under this title, vol. 2, p. 423, par. 193.

Flitters. — See under this title, vol. 2, p. 423, par. 193.

Old cannon. — See under this title, vol. 2, p. 423, par. 193.

## Vol. II, p. 488, par. 534.

Copper matte, an article containing lead and copper, and produced in smelting ores, which is not strictly an ore itself, and which is shown to be known commercially and scientifically as copper regulus, is not duti-

able under the provisions in paragraph 181, for "lead-bearing ore of all kinds," but is free of duty as "copper, regulus of," under paragraph 534. *Spencer v. Philadelphia Smelting, etc., Co.*, (1899) 124 Fed. 1002.

## Vol. II, p. 488, par. 537.

Cotton waste containing jute. — The provision in paragraph 537, for "cotton waste," includes a mixture of cotton waste and jute

threads in about equal proportions, which is commercially known as "cotton waste." *Wood v. U. S.*, (1908) 160 Fed. 990.

## Vol. II, p. 488, par. 542.

Extract of mangrove bark. — The extract of the bark of the mangrove used for tanning is classifiable under this paragraph. *U. S. v. Marden*, (1909) 175 Fed. 153.

## Vol. II, p. 488, par. 545.

Bort. — Industrial diamonds of the description known as bort, which have been pierced by a process of drilling or cutting, are not dutiable as diamonds advanced by cutting or other process, under paragraph 435, but are free of duty as "bort," under paragraph 545. *U. S. v. American Express Co.*, (1905) 140 Fed. 967. See also *U. S. v. Fifteen Drilled Diamonds*, (1904) 127 Fed. 753.

Construction of paragraph. — In the provision for "diamonds . . . not advanced . . . including miners' diamonds," in this paragraph, "including" is used as a word of

addition, rather than of specification. *Sullivan Machinery Co. v. U. S.*, (1909) 168 Fed. 561.

Unset miners' diamonds. — This paragraph provides for "diamonds . . . not advanced from their natural state by cleaving, splitting, . . . including miners' . . . diamonds not set." It has been held that the provision for miners' diamonds is not qualified by what precedes, and that such diamonds, split but unset, are within the paragraph. *Sullivan Machinery Co. v. U. S.*, (1909) 168 Fed. 561.

## Vol. II, p. 488, par. 548.

Dried lizards, used by the Chinese in compounding a medicine, are drugs within the meaning of this paragraph. *Wing On Wo v. U. S.*, (1906) 148 Fed. 334.

Guarana, a medicinal drug, consisting of a dried paste in the form of sausage-shaped rolls, this being the crudest state in which it is ever imported, and which, before being used as a medicine, must be further prepared, is not dutiable as a "medicinal preparation" under paragraph 68, but is free of

duty under the provision in paragraph 548, for articles "which are drugs and not edible and are in a crude state." *Cowl v. U. S.*, (1900) 124 Fed. 475.

Articles used in dyeing and tanning. — See under this title, vol. 2, p. 395, par. 20.

Balsam in capsules. — See under this title, vol. 2, p. 400, par. 68.

Capers pickled in vinegar. — See under this title, vol. 2, p. 431, par. 241.

## Vol. II, p. 489, par. 549.

Fish roe, or caviar, which was necessarily put into brine before importation, because otherwise it would not be suitable for food after importation, is "preserved for food

purposes," within the meaning of paragraph 549. *Hansen v. U. S.*, (1908) 175 Fed. 892.

Duck's eggs. — See under this title, vol. 2, p. 431, par. 241.

## Vol. II, p. 489, par. 555.

Under Act of 1890. — In *Detroit Fish Co. v. U. S.*, (1901) 125 Fed. 801, it appeared that an American corporation imported fish caught in Canadian fresh waters by a Canadian corporation, which in catching the fish used nets which were bought by the former corporation, and leased to the latter for a period covering the life of the nets, and for a sum much less than their value. It was held that the importing corporation "owned"

these nets within the contemplation of paragraph 571, Tariff Act Oct. 1, 1890, ch. 1244, sec. 2, Free List, 26 Stat. L. 606, providing for the free entry of "fresh or frozen fish (except salmon), caught in fresh waters . . . with nets or other devices owned by citizens of the United States," and that the fish thus caught were free of duty under said paragraph.

## Vol. II, p. 489, par. 559.

"Brine." — Cherries immersed in a solution containing not more than .402 per cent. of salt are not fruits in "brine" within the meaning of this paragraph. *Cause Mfg. Co. v. U. S.*, (C. C. A. 1906) 151 Fed. 4.

Limes in brine have been held not to be dutiable as "limes" under paragraph 266, but to be free of duty under paragraph 559 as "fruits in brine, not specially provided for." *Brennan v. U. S.*, (1905) 136 Fed. 743,

69 C. C. A. 395, reversing (1904) 129 Fed. 837.

Ripo olives, sometimes called "black olives," are free of duty under this paragraph as "fruits in brine." *U. S. v. Zucca*, (1909) 175 Fed. 578.

Fox berries. — See under this title, vol. 2, p. 434, par. 262.

Lemon peel preserved. — See under this title, vol. 2, p. 435, par. 267.

## Vol. II, p. 489, par. 561.

Remnant pieces of fur. — This paragraph includes undressed clippings and detached portions of fur, used for the same purpose as the skin from which derived; and such material is therefore removed from the provision for "waste, not specially provided for," in paragraph 463. *Hatters' Fur Exch. v. U. S.*, (1909) 175 Fed. 588.

Unsorted sheepskins. — Sheepskins, pur-

chased indiscriminately and imported unsorted, without regard to any particular use to which they might be adapted, and not shown to be used as furs, are not classifiable as "furs" or "fur skins" under this paragraph. *International Hide, etc., Co. v. U. S.*, (1909) 177 Fed. 602.

Fur combings. — See under this title, vol. 2, p. 481, par. 463.

## Vol. II, p. 490, par. 565.

Construction of proviso. — In construing the provision in this paragraph for "glass plates or discs, rough cut or unwrought," with the proviso that "discs exceeding eight inches in diameter may be polished sufficiently to enable the character of the glass to be determined," it was held that the proviso does

not require the exclusion from the paragraph of polished square plates less than eight inches across, where the polishing is done simply to determine the character of the articles, is of no other use, and is taken off in their manufacture. *Hämsel v. U. S.*, (1905) 139 Fed. 95.

## Vol. II, p. 490, par. 566.

Birch bark. — See under this title, vol. 2, p. 504, sec. 6.

Bleached or dried grasses. — See under this title, vol. 2, p. 473, par. 425.

## Vol. II, p. 490, par. 568.

Niger-seed oil, which, while used in soap making, can be used for other purposes, though without the proper qualities for such purposes, is within the provision in paragraph 568 for oils "commonly used in soap making,

. . . fit only for such use," and not within paragraph 3. *U. S. v. Colby*, (1907) 153 Fed. 883, 82 C. C. A. 629.

Oleic acid or red oil. — See under this title, vol. 2, p. 362, par. 1.

## Vol. II, p. 490, par. 569.

Hog hair. — Certain waste of hog hair, consisting of sweepings in factories, which is used solely in the manufacture of artificial fertilizers, although not suitable in its imported condition for use as fertilizer, is sub-

ject to classification under paragraph 569, and not as "waste, not specially provided for," under paragraph 463. *Shallus v. U. S.*, (1903) 129 Fed. 845.

## Vol. II, p. 490, par. 574.

**Hones and whetstones.**—The provision for "hones and whetstones," in this paragraph, includes only articles used in sharpening

edged instruments. *Waddell v. U. S.*, (1904) 135 Fed. 211. See also *HONE-STONE POLISHERS*, p. 504, sec. 6.

## Vol. II, p. 491, par. 579.

**Crude balata** is "india rubber, crude," within the meaning of paragraph 579, and not a nonenumerated manufactured article under section 6. *Earle v. U. S.*, (1907) 153 Fed. 773.

"India rubber."—The term "india rubber," in paragraph 579, has a commercial

meaning that includes nearly a hundred varieties of inspissated vegetable gums, among them balata, which are used in the manufacture of what are commonly known as "rubber goods." *Earle v. U. S.*, (1907) 153 Fed. 773.

## Vol. II, p. 491, par. 587.

**A dried paste of sandalwood dust and clay**, in the form of sticks, cones, and coils, which, when lighted, yields a fragrant odor and is burnt at the altars and shrines of joss houses and temples in China and Japan, is "joss light," within the meaning of paragraph 587. *Yamanaka v. U. S.*, (1909) 172 Fed. 249.

**Joss sticks.**—This paragraph includes articles used in setting off fireworks, other than those well known as joss sticks and used for incense. *Champion v. U. S.*, (1906) 150 Fed. 239.

## Vol. II, p. 491, par. 588.

**Scrap iron.**—See under this title, vol. 2, p. 410, par. 122.

## Vol. II, p. 491, par. 594.

**Casein** is "lactarene," as enumerated in this paragraph. *U. S. v. Brownell*, (1907) 159 Fed. 219, *affirmed* (C. C. A. 1908) 166 Fed. 1022.

**Casein industrielle**, which is produced by

drying the substance left after drawing off the whey from skimmed milk that has been allowed to sour, has been held to be "lactarene" under this paragraph. *B. P. Ducau Co. v. U. S.*, (1906) 143 Fed. 362.

## Vol. II, p. 492, par. 614.

**Talc sawed into cubes for use in making gas burners and insulators**, the sawing being not merely to remove the foreign matter and to put the material in shape for transportation, but to give it certain desired dimensions, has been "advanced in value or condition" within the meaning of paragraph 614. *Kraemer v. U. S.*, (1910) 180 Fed. 638.

**Tungsten ore**, the primary extracted product of which is used as a mordant in dyeing cloth and for various other commercial purposes, and another to make high-grade steel, imparting thereto extreme hardness, density, weight, and durability, is free from duty under this paragraph, and not dutiable at twenty per cent. *ad valorem* under section 183, which covers "metallic mineral sub-

stances in a crude state." *Hempstead v. Thomas*, (C. C. A. 1903) 122 Fed. 538.

**Whetstone blocks**, of an approximately rectangular shape, which after being quarried have had their projections removed by a process of rough dressing, and which are used in that state, are within the provision for "minerals, crude, or not advanced in value or condition by refining or grinding, or by other process of manufacture," under paragraph 614. *Johnson v. U. S.*, (1906) 152 Fed. 656.

**Ground corundum ore.**—See under this title, vol. 2, p. 473, par. 419.

**Zinc ores.**—See under this title, vol. 2, p. 487, par. 514.

## Vol. II, p. 492, par. 616.

**Exact models of steamships of improved design**, showing the details of the vessels, valued at about \$1,000 each, and intended for exhibition in steamship offices, are models of improvements in the art of shipbuilding, and are free of duty under this paragraph. *Boas v. U. S.*, (1904) 128 Fed. 470.

**Molders' patterns.**—This paragraph is not limited to the class of patterns known as

"model patterns," intended to show the working of the thing illustrated, but includes also molders' patterns, which are used as models about which to form sand molds in which castings may be made and which are fitted for successive use in that way. *Hoe v. U. S.*, (1905) 141 Fed. 488, *affirmed* (C. C. A. 1906) 147 Fed. 201.

## Vol. II, p. 492, par. 617.

**Lily of the valley roots**—Act of 1894.—Lily of the valley roots were not covered by the Tariff Act of Aug. 27, 1894, ch. 349, sec. 2, Free List, par. 558, 28 Stat. L. 542, relating to "moss, seaweeds, and vegetable substances," not being vegetable substances in the class of moss and seaweeds. *McAllister v. U. S.*, (1896) 147 Fed. 773.

**Nori**, a seaweed gathered from the ocean and sun-dried, without the addition of any

other substance and without being subjected to any other process than spreading it on mats to facilitate drying, is "seaweeds . . . crude or unmanufactured," within the meaning of this paragraph. *U. S. v. Furuya*, (1910) 176 Fed. 480.

**Birch bark**.—See under this title, vol. 2, p. 504, sec. 6.

**Lily buds**.—See under this title, vol. 2, p. 432, par. 251.

## Vol. II, p. 492, par. 620.

**Surgical needles**.—The provision in this paragraph for "hand sewing" needles, relates to such as are used by persons generally

who use needles, and does not include surgical needles. *Woodruff v. U. S.*, (1905) 138 Fed. 946.

## Vol. II, p. 492, par. 621.

**Act of 1883**.—The provision for "periodicals" in the Tariff Act of March 3, 1883, ch. 121, sec. 6, schedule M, 22 Stat. L. 510, was held to include a periodical publication not

devoted at all to current events, but made up of serial stories supplemented by a small quantity of miscellaneous matter. *Schmidt v. U. S.*, (1892) 150 Fed. 238.

## Vol. II, p. 493, par. 626.

**"American fisheries"**.—In *Downing v. U. S.*, (1900) 124 Fed. 107, it appeared that a corporation consisting of American citizens fitted out a registered American vessel, which was manned with an American crew, and engaged in the business of catching turtles in Central American waters, and canning them aboard the vessel. It was held that this constituted an American fishery, within the meaning of Tariff Act Aug. 27, 1894, par. 568, which exempted from duty "all fish and other products" of "American fisheries," and that the canned turtle meat was free of duty as the product of such fishery.

**Ground sesame seed**.—The provision for sesame oil in this paragraph has been held to include ground sesame seed in the form of pulp from which the oil has not been removed, the article being known commercially as sesame oil. It is immaterial that there is another and more refined product known and dealt in under the same name. *Zaloom v. U. S.*, (1905) 140 Fed. 31.

**Muguet pomade**.—So-called muguet pomade produced by the combination of several kinds of enfleurage grease, to which is added about one-half of one per cent. of various essential oils to fortify and combine the article, thus producing an odor like that of the lily of the valley, was held to be free of duty, under this paragraph, as enfleurage grease. *Lueders v. U. S.*, (1905) 143 Fed. 918.

**Nut oil**.—So-called nut oil, derived from the fruit of *aleurites vernica*, of China, is properly subject to classification under the provision in this paragraph for "nut oil or oil of nuts not otherwise specially provided for," and not under that in paragraph 3, for "essential oils." *Hills v. U. S.*, (1903) 127 Fed. 970.

**Olive oil**.—In *Holbrook Mfg. Co. v. U. S.*, (1909) 174 Fed. 736, certain olive oil was

found to be edible, and was held therefore to be excluded from paragraph 626.

**Paraffin**.—The proviso in this paragraph providing a countervailing duty on "crude petroleum, or the products of crude petroleum," is not limited to the articles enumerated in the preceding portion of that paragraph, but should be read into every section of the tariff which enumerates a product of petroleum. The special enumeration of "paraffin," in paragraph 633, does not remove that substance from the scope of this proviso. *U. S. v. Downing*, (C. C. A. 1906) 146 Fed. 56, *reversing* (1905) 139 Fed. 58.

**Petroleum products—countervailing duty**.—This paragraph, providing a countervailing duty on "crude petroleum, or the products of crude petroleum, produced in any country which imposes a duty on petroleum or its products exported from the United States," is intended to provide that when crude petroleum or any of its products is imported from a country which imposes a duty thereon when imported from the United States, it shall pay duty at the rate so imposed by such country on merchandise in the same condition. A product of petroleum is subject to the duty so imposed by the country of manufacture on such product when coming from the United States, rather than to that so imposed on crude petroleum by the country in which the petroleum was produced. If no duty is so imposed on such product by the country in which it is manufactured, it is not liable to the countervailing duty, even though produced from petroleum originating in a country which does impose such a duty thereon. *U. S. v. Downing*, (C. C. A. 1906) 146 Fed. 56, *reversing* (1905) 139 Fed. 58; *U. S. v. Marsily*, (C. C. A. 1908) 165 Fed. 186; *U. S. v. Swan, etc., Co.*, (1909) 169 Fed. 108, 95 C. C. A. 669.

**"Products of petroleum."**—The provision in this paragraph for "products of crude petroleum" does not include articles not composed in chief value of petroleum, even though the petroleum predominates in quantity. *U. S. v. Downing*, (C. C. A. 1906) 146 Fed. 56, *reversing* (1905) 139 Fed. 58.

**Refined cocoanut oil.**—Cocoanut oil of the melting point of 70° to 75° F., which has been purified and rendered suitable for culinary purposes and the manufacture of high-grade soaps, and which is not susceptible of

the same uses as cocoa-butter, is not subject to duty as "cocoa-butterine," under paragraph 282, but is free of duty under paragraph 626, as cocoanut oil. *U. S. v. Oriental American Co.*, (1904) 129 Fed. 249; *Fuerst v. U. S.*, (1909) 176 Fed. 95, 100 C. C. A. 25, *reversing* (1908) 166 Fed. 1014.

**Albolene.**—See under this title, vol. 2, p. 478, par. 448.

**Ichthyol sodium.**—See under this title, vol. 2, p. 400, par. 68.

## Vol. II, p. 494, par. 627.

**Orange and lemon peel immersed in brine** for the purpose of protecting it from decay during transit, without affecting its properties or quality, is not "preserved" within

the meaning of paragraph 267, but is free of duty under paragraph 627. *Causse Mfg. Co. v. U. S.*, (1906) 150 Fed. 419.

## Vol. II, p. 494, par. 628.

**Orchid and Persian berry extract.**—See under this title, vol. 2, p. 504, sec. 6.

## Vol. II, p. 494, par. 632.

**Waste containing wool.**—Certain waste of an inferior quality, fit only for paper stock, consisting of mill sweepings, which contain not more than one per cent. of wool, that is not of sufficient fibre for commercial purposes, and is not separable from the material

with which it is mixed, is not dutiable as waste in part of wool, under paragraph 362, but is within the provision for "paper stock . . . fit only to be converted into paper," in paragraph 632. *In re Downing*, (1905) 139 Fed. 590.

## Vol. II, p. 494, par. 633.

**Paraffin.**—See under this title, vol. 2, p. 493, par. 626.

## Vol. II, p. 494, par. 638.

**Museum or preparation jars** are admissible free of duty. *Hempstead v. U. S.*, (1903) 122 Fed. 752.

**Reagent bottles** are admissible free of duty. *Hempstead v. U. S.*, (1903) 122 Fed. 752.

**Surgical scissors** are admissible free of duty. *Hempstead v. U. S.*, (1903) 122 Fed. 752.

**Treasury regulations.**—In *Eimer v. U. S.*, (1906) 146 Fed. 144, it appeared that certain scientific apparatus, etc., imported for educational institutions was claimed to be subject to paragraph 638, exempting such arti-

cles from duty when imported in compliance with regulations of the Secretary of the Treasury; but that the importers had not filed a certificate of delivery to the institutions within ninety days after entry, as required by such regulations. It was held that that requirement was a reasonable one, and that the collector, in default of a compliance therewith, properly exacted duty on the apparatus.

**Casts of sculpture.**—See under this title, vol. 2, p. 496, par. 649.

## Vol. II, p. 496, par. 647.

**Euquinine.**—In this paragraph the provision for "salts of cinchona bark" is not in the language of chemical science. It was meant to include derivatives of cinchona bark which preserved its essential medicinal ele-

ment, and therefore euquinine, which is such a preparation, though not chemically a salt, is within said provision. *U. S. v. Merck*, (C. C. A. 1909) 168 Fed. 244.

## Vol. II, p. 496, par. 648.

**Old bagging.**—The term "rags" in this paragraph includes coarse pieces of jute bagging which are in their condition as torn from cotton bales, and are not sufficiently large and otherwise suitable for use other than as mere rags in stuffing and as paper

stock. *Train-Smith Co. v. U. S.*, (1905) 140 Fed. 113.

**Selected pieces of second-hand jute bagging.**—See under this title, vol. 2, p. 481, par. 463.

## Vol. II, p. 496, par. 649.

**Cast of sculpture.**—The omission from paragraph 638 of the provision of prior tariff acts for the free entry of casts was not intended to prevent the free entry of such casts as also come within the designation of "casts of sculpture," which, under paragraph 649, are entitled to free entry where specially imported, in good faith, for the use and by the order of any society incorporated or established solely for religious, philosophical, scientific, educational, or literary purposes. *Benziger v. U. S.*, (1904) 192 U. S. 38, 24 S. Ct. 189, 48 U. S. (L. ed.) 331, *reversing* (1902) 113 Fed. 1016, 51 C. C. A. 587.

**Plaster casts of clay models**, though painted and gilded and produced in unlimited quantities, are "casts of sculpture," which, under paragraph 649, are entitled to free entry where specially imported, in good faith, for the use and by the order of any society incorporated or established solely for religious, philosophical, scientific, educational, or lit-

erary purposes. *Benziger v. U. S.*, (1904) 192 U. S. 38, 24 S. Ct. 189, 48 U. S. (L. ed.) 331, *reversing* (1902) 113 Fed. 1016, 51 C. C. A. 587.

**Production of proof.**—Proof that certain imported regalia was entitled to admission under this paragraph was not produced at the time of entry as required by the customs regulations, but was offered the collector before he had liquidated the entry. It was held that free entry should have been allowed by the collector. *Siegman v. U. S.*, (1905) 141 Fed. 491.

**A marble statue** is a specimen of sculpture, within the meaning of this paragraph. *Sibbel v. U. S.*, (1900) 124 Fed. 105.

**Authority of Secretary of Treasury.**—The Secretary of the Treasury is not empowered to abridge the right of free entry of the articles covered by this paragraph, relating to regalia, etc. *Siegman v. U. S.*, (1905) 141 Fed. 491.

## Vol. II, p. 497, par. 655.

**Chinese sausages** are not within this paragraph. *Wing Sing Lung v. U. S.*, (1910) 180 Fed. 392, 103 C. C. A. 538, *affirming* 171 Fed. 906.

## Vol. II, p. 497, par. 656.

**Canary seed.**—See under this title, vol. 2, p. 432, par. 254.

## Vol. II, p. 497, par. 657.

**Used for other purposes.**—The application of the exception in this paragraph is not to be determined by the rule of chief or predominant use of an article as sheep dip; and therefore "Cannon's dip," a preparation advertised as fit for various other purposes, and presumably having commercial value for such

purposes, is not covered by the paragraph. *Moody v. Patterson*, (1907) 153 Fed. 830.

Likewise thymo-cresol, a sheep dip which is used also as a disinfectant and otherwise, is, by reason of such other uses, excluded from this paragraph. *Shallus v. Stone*, (1906) 150 Fed. 605.

## Vol. II, p. 497, par. 658.

**Shotgun barrels**—Act of 1894.—Certain gun barrels, made under the Whitmore patent process, and shown to have been subjected to a hammering process, were held to be "forged"

and to be free of duty as "shotgun barrels, forged, rough bored" under Tariff Act Aug. 27, 1894, ch. 349, sec. 2, Free List, paragraph 614. *U. S. v. Baldwin*, (1899) 125 Fed. 156.

## Vol. II, p. 497, par. 660.

**Re-reeled silk.**—Raw tussah silk, in the same condition as when reeled from cocoons, except that it has been transferred from the large reels on which it was taken from the cocoons to smaller reels, the result of this process not being any change in the condition of the silk other than to adapt the skeins thus produced to American spinning machines,

is not dutiable as "silk partially manufactured from cocoons," under paragraph 384, but is free of any duty under paragraph 660, as "silk, raw, or as reeled from the cocoon, but not . . . advanced in any way." *U. S. v. Stewart*, (1904) 133 Fed. 811.

**Silk on tubes.**—See under this title, vol. 2, p. 462, par. 384.

## Vol. II, p. 497, par. 661.

**Combed silk.**—See under this title, vol. 2, p. 462, par. 384.

**Remanit.**—See under this title, vol. 2, p. 465, par. 391.

**Silk organzine, damaged in dyeing.**—See under this title, vol. 2, p. 462, par. 385.

## Vol. II, p. 497, par. 664.

A growth on skins of mocha sheep imported from Arabia, which is commercially known, designated, and dealt in as mocha hair, having none of the characteristics of wool, and which would not be accepted by dealers therein as a good delivery of wool, is not dutiable under paragraph 360, as wool on the skin, but is entitled to free entry under paragraph 664, placing on the free list "skins of all kinds, raw (except sheepskins with the wool on) and hides not specially provided for in this Act." Goat, etc., *Import Co. v. U. S.*, (1907) 206 U. S. 194, 27 S. Ct. 634, 51 U. S. (L. ed.) 1022, *reversing* (1906) 145 Fed. 1022, 74 C. C. A. 82.

Cabretta skins are "sheepskins," within the meaning of the provision in this paragraph relating to raw skins "except sheepskins with the wool on," and the growth thereon is subject to duty, as provided in paragraph 360 for "wools on the skin." *Lawrence v. U. S.*, (1903) 124 Fed. 1000; *Johnson v. U. S.*, (1905) 140 Fed. 116, *affirmed* (C. C. A. 1906) 145 Fed. 1022.

Evidence to distinguish skins from hides. —

Where importations of hides and skins, mixed together, were sorted by experienced men, who determined whether they were under or over twelve pounds, the dividing line between hides and skins, by handling alone, except with doubtful pieces on which they used the scales, and it appeared that the pieces considered by them to be skins were treated as such, being sold on that basis, it was held that the evidence of these facts justified a finding that such pieces were actually skins, and not hides. *Helmuth v. U. S.*, (1904) 135 Fed. 912, *affirmed*. (C. C. A. 1906) 145 Fed. 36.

Long-haired Russian calfskins were held to be free of duty under this paragraph. *Weil v. U. S.*, (1900) 124 Fed. 1006.

Mud buffalo hides. — The hide of the mud buffalo of the Straits Settlements, an animal killed in the chase, is not within the provision for "hides of cattle" in paragraph 437, but is free of duty under paragraph 664, covering "hides not specially provided for." *U. S. v. Winter*, (1904) 134 Fed. 841, 67 C. C. A. 437.

## Vol. II, p. 497, par. 667.

Pepper shells. — Shells of pepper, which, when ground, make a low grade of black pepper, are within the provision for the entry free of duty of "pepper black or white, . . . when unground," in this paragraph. *U. S. v. Leggett*, (1899) 124 Fed. 1015.

Spent ginger. — The article known as spent ginger, which is a by-product from the treatment of ginger root in the manufacture of

ginger extract, etc., and consists of a dried cake of ginger particles, has been held to be "ginger root, unground," as enumerated in this paragraph. *German v. U. S.*, (C. C. A. 1905) 137 Fed. 817, *reversing* (1904) 128 Fed. 467.

Residuum from decorticating pepper berries. — See under this title, vol. 2, p. 438, par. 287.

## Vol. II, p. 498, par. 671.

Sand. — In this paragraph relating to "sand, crude or manufactured," the term "sand" is inapplicable to any metalliferous mineral, though it be in comminuted fragments; and therefore corundum ore, being a mineral of this character, is not, when

ground, classable as "sand, . . . manufactured." *Myers v. U. S.*, (C. C. A. 1908) 163 Fed. 53, *affirming* (1907) 155 Fed. 502.

Ground corundum ore. — See under this title, vol. 2, p. 473, par. 419.

## Vol. II, p. 499, par. 690.

Broken stereotype plates. — See under this title, vol. 2, p. 422, par. 190.

## Vol. II, p. 499, par. 692.

"Anthrax vaccine" or "blackleg." — A preparation known as "anthrax vaccine," or "blackleg," which is used for the prevention of anthrax or blackleg, a disease of cattle, is included within this paragraph, and is there-

by taken out of the provision in paragraph 69, for "medicinal preparations not specially provided for." *Pasteur Vaccine Co. v. U. S.*, (1900) 123 Fed. 846.

## Vol. II, p. 499, par. 695.

Carnauba wax substitute, which is compounded of carnauba wax (vegetable wax) and paraffin (mineral wax), and which is to all appearance a waxy substance used for the same purpose as other waxes, is covered by the provision for "wax, vegetable or mineral," in this paragraph. *U. S. v. Morningstar*, (C. C. A. 1909) 168 Fed. 541.

Mineral wax. — The expression "wax . . . mineral," in this paragraph, must have been used in the popular sense of those words, inasmuch as the so-called mineral waxes are not waxes in the chemical sense. *U. S. v. Morningstar*, (C. C. A. 1909) 168 Fed. 541.

## Vol. II, p. 499, par. 696.

Edible wafers. — See under this title, vol. 2, p. 504, sec. 8.

## Vol. II, p. 499, par. 697.

Classification according to citizenship. — To the same effect as the original note see *U. S. v. Bernays*, (1908) 158 Fed. 792, 86 C. C. A. 52.

Construction of proviso. — The proviso in this paragraph limits the articles, which may be brought into this country free of duty by residents returning from abroad, to all the wearing apparel and other personal effects originally taken by them out of the United States without regard to their value, and to other articles of wearing apparel, and similar personal effects which may have been purchased abroad by them not exceeding in value the sum of \$100. *U. S. v. Bernays*, (1908) 158 Fed. 792, 86 C. C. A. 52.

Duty of making entry of exempted articles. — In construing the provision in this paragraph the court held that it was the passenger's duty to enter and declare the value of

such articles, whether they cost more than \$100 or not, and that when not so declared they were subject to forfeiture under R. S. sec. 2802, 2 Fed. Stat. Annot. 645. *Dodge v. U. S.*, (1904) 131 Fed. 849, 65 C. C. A. 603.

Not applicable where improper entry. — The provision in this paragraph, exempting \$100 in value of dutiable articles in the baggage of returning residents of the United States, is not applicable in proceedings under R. S. sec. 2802, 2 Fed. Stat. Annot. 645, for the forfeiture of, and the collection of penal duty on, dutiable articles not mentioned on the entry of the baggage. It applies only when a proper entry has been made of the articles entitled to such exemption, and not otherwise. *U. S. v. Harts*, (1904) 131 Fed. 886, *affirmed* (C. C. A. 1905) 140 Fed. 848.

## Vol. II, p. 500, par. 699.

Rossed pulp wood. — Pulp wood subjected to the rossing process, by which the bark and excrescences are mechanically removed, in order to prepare it for use, is not, by reason of this treatment, to be excluded from the provision in this paragraph for "logs and round unmanufactured timber, including pulp woods, . . . not specially provided for." *U. S. v. Pierce*, (1905) 140 Fed. 962, *affirmed* (C. C. A. 1906) 147 Fed. 199.

Sandalwood. — In *Lueders v. U. S.*, (1904) 131 Fed. 656, it was held that sandalwood,

in pieces of varying sizes, several feet long and several inches thick, to which nothing has been done beyond removing the bark and sawing the wood into lengths convenient for transportation, is not dutiable under paragraph 198, as "wood, unmanufactured, not specially provided for," but is free of duty, under the provision in paragraph 699, for "logs" of wood.

Round timber in rough condition. — See under this title, vol. 2, p. 425, par. 194.

## Vol. II, p. 500, par. 700.

Bamboo dyers' sticks, rounded at the ends and smoothed off at the joints, are covered by the enumeration of bamboo in this paragraph rather than by the provision for wood, unmanufactured, in paragraph 198. *U. S. v.*

*Knipscher, etc.*, *Silk Dyeing Co.*, (1907) 152 Fed. 590.

Cabinet wood. — See under this title, vol. 2, p. 425, par. 198.

Manicure sticks. — See under this title, vol. 2, p. 426, par. 208.

## Vol. II, p. 500, par. 701.

Instrument for reproduction of artists' models, statuary, etc. — An instrument designed for the reproduction of artists' models, statuary, and decorative architecture, imported for the purpose of being temporarily exhibited as a philosophical or scientific ap-

paratus for the promotion of industry in the United States, and to be exported within six months after its importation, may fairly be regarded as a "philosophical or scientific apparatus" within the meaning of this paragraph. (1902) 24 Op. Atty.-Gen. 28.

## Vol. II, p. 500, par. 702.

Picture frames, containing oil paintings which are imported into this country for exhibition purposes, are not to be treated as

parts of "works of art" and therefore entitled to entry free of duty under paragraph 702. (1904) 25 Op. Atty.-Gen. 276.



## Vol. II, p. 501, par. 703.

A native Porto Rican, an artist by profession, although temporarily living in France on the 11th day of April, 1899, is, under section 7 of the Act of April 12, 1900, 31 Stat. L. 79, 5 Fed. Stat. Annot. 765, a citizen of Porto Rico, and, as such, is an American artist, whose paintings upon importation into the United States are entitled to the privileges provided in paragraph 703. (1902) 24 Op. Atty.-Gen. 40.

Church altar.—In *U. S. v. Ecclesiastical Art Works*, (1904) 139 Fed. 798, *affirmed* (C. C. A. 1905) 142 Fed. 1038, it was held that the provision in this paragraph for "works of art" intended for presentation to religious societies, included certain marble

altars imported for presentation to a church, which were carved by a professional sculptor and were of a value of \$1,800.

Fashion-plate drawings.—The provision in this paragraph for "works of art" does not include fashion-plate drawings, which, though possessing artistic merit, are for purely practical and utilitarian purposes. *Harper v. U. S.*, (1909) 172 Fed. 289.

Pen and ink drawings of an artistic character, of a proposed building, produced by an architect, are within this paragraph relating to "works of art, the production of American artists," and not dutiable under paragraph 454. *Young v. Bohn*, (1905) 141 Fed. 471.

## Vol. II, p. 501, par. 704.

Pueraria roots.—The provision for "yams" includes the pueraria root, which, though not scientifically known as a yam, has always been so called in the trade that deals in it,

and was the only vegetable so known that was imported prior to the passage of the Act. *Kwong Yuen Shing v. U. S.*, (1909) 175 Fed. 317.

## Vol. II, p. 501, sec. 3.

Right to reduce duty.—In order to be entitled to the benefits of the reciprocal commercial agreements negotiated with foreign countries, under this section, importers must furnish satisfactory evidence that their importations were both produced in and exported from the country with which the agreement was made. *Migliavacca Wine Co. v. U. S.*, (1905) 148 Fed. 142.

Scope of agreements.—Reciprocal commercial agreements made with foreign countries under the authority of this section cannot legally extend the scope of said section. *U. S. v. Wile*, (C. C. A. 1904) 130 Fed. 331, *affirming* (1903) 124 Fed. 1023.

Place of exportation not conclusive.—In *U. S. v. Luyties*, (C. C. A. 1904) 130 Fed. 333, *affirming* (1903) 124 Fed. 977, it appeared that a bill of lading for certain merchandise was made out in Switzerland, but that the invoice was certified by a United States consul in France, and the evidence showed France to have been the country of production, and from which the merchandise was exported. It was held that the importation was within the reciprocal commercial agreement with France and the United States (May 30, 1898, 30 Stat. L. 1774, 7 Fed. Stat. Annot. 556) negotiated under the authority of section 3.

Evidence of origin of goods.—With respect to merchandise alleged to be within the reciprocal commercial agreement with France, as having been both produced in and exported from that country, it was held that evidence of those facts should be furnished by a witness who knows them, or from his position may be presumed to know them, and that a deposition by an importer to the effect that he had ordered the goods through a New York agency and that they were consigned to him direct by the exporting establishment in France, but which did not show that he

had any further personal knowledge, was incompetent. *Migliavacca Wine Co. v. U. S.*, (1905) 148 Fed. 142.

Reciprocal agreement with France.—*Cordials* are within the provision for "spirits manufactured or distilled from grain or other materials," in section 3, and, when imported from France, are subject to the reduced rate of duty provided for such spirits in the reciprocal commercial agreement with that country. *U. S. v. Wile*, (C. C. A. 1904) 130 Fed. 331, *affirming* (1903) 124 Fed. 1023.

Liqueurs.—Merchandise known as "liqueurs" is included in this agreement. *Nicholas v. U. S.*, (1900) 122 Fed. 892.

Chartreuse.—So the cordial known as "Chartreuse," imported from France, is a liqueur, and is included in the provision for a reduced rate of duty on "brandies, or other spirits," in the reciprocal commercial agreement between the United States and France. *Nicholas v. U. S.*, (1900) 122 Fed. 892.

Alcohol in preserved fruits.—The reciprocal commercial agreement with France was held to supersede the provision of a different rate by paragraph 283 on the alcohol in excess of ten per cent. found in fruit preserved in spirits. *La Manna v. U. S.*, (C. C. A. 1906) 144 Fed. 683.

Absinthe is a liqueur within the French reciprocity agreement. *U. S. v. Luyties*, (1903) 124 Fed. 977, *affirmed* (C. C. A. 1904) 130 Fed. 333.

Question whether or not Algeria is a part of France.—*U. S. v. Tartar Chemical Co.*, (1903) 127 Fed. 944, 62 C. C. A. 576, *affirming* (1902) 116 Fed. 726, set out in the original note.

Reciprocal agreement with Germany.—The reciprocal commercial agreement with Germany (July 13, 1900, 31 Stat. L. 1978, 7 Fed. Stat. Annot. 562), negotiated under section 3, which allows a reduction of duty on

"spirita," supersedes the provision of a different rate by paragraph 263, on the alcohol in excess of ten per cent, found in fruit preserved in spirits. *Mihalovitch v. U. S.*, (1908) 160 Fed. 988.

**Reciprocal agreement with Italy.**—The provision for "statuary" in section 3, and in the reciprocal commercial agreement with Italy (Act July 18, 1900, 31 Stat. L. 1979, 7 Fed. Stat. Annot. 665), negotiated under said section, has the same meaning as in paragraph 454, where it is prescribed that "the term 'statuary' as used in this Act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble,

stone, or alabaster, or from metal." Bronze statuary, not being covered by this definition, is therefore not covered by said reciprocal agreement. *Richard v. U. S.*, (1907) 151 Fed. 954, *affirmed* (C. C. A.) 158 Fed. 1019.

**Reciprocal agreement with Spain.**—The reciprocal commercial agreement with Spain suspending "the imposition and collection of the duties mentioned in" the Tariff Act of 1897 on wines, etc., had only the effect of reducing the duty on wines provided in paragraph 296, but did not supersede the further provision in said paragraph that there should be no allowance for leakage of wines. *Shaw v. U. S.*, (1907) 158 Fed. 648.

## Vol. II, p. 504, sec. 5.

**Additional duty on quantity entered only.**—The "additional" duty imposed by section 5, on articles or merchandise imported into the United States and upon which an export bounty has been paid by the country of production, and which it is provided shall be "equal to the net amount of such bounty," is leviable only upon the article or merchandise which enters the United States, and in case of merchandise dutiable by weight and as to which the bounty as declared by the secretary of the treasury is also by weight, such as sugar, where the quantity entered at the custom house as shown by the official weigher is less than that shown by the foreign invoice, the "additional" duty, like the regular duty, is assessable only on the quantity so entered, and the cause of the loss or shrinkage is immaterial. The mere diminution in the quantity of units of weight or measure of a commodity usually measured by such units is not such a change of condition "by remanufacture or otherwise," within the meaning of such section, as to authorize a resort to other than the usual means for ascertaining the amount of the additional duty. *Franklin Sugar Refining Co. v. U. S.*, (1906) 142 Fed.

376, 73 C. C. A. 476, *reversing* (1905) 137 Fed. 665.

**Conclusiveness of Treasury determination.**—Under R. S., secs. 161, 245, 3 Fed. Stat. Annot. 58, 7 Fed. Stat. Annot. 367, providing, respectively, that "in case of . . . absence . . . of the head of any department, the first or sole assistant shall . . . perform the duties of such head," and that "assistant secretaries of the treasury shall . . . perform such . . . duties in the office of the secretary of the treasury as may be prescribed by the secretary or by law," it is clear that the secretary of the treasury could require an assistant secretary to "ascertain, determine, and declare" the amount of foreign sugar bounties; that being a duty assigned "the secretary of the treasury" by section 5; and where an assistant secretary has issued a declaration under said section it will be presumed, in the absence of evidence to the contrary, that he was performing a duty in accordance with law, and that the declaration was properly issued. *Franklin Sugar Refining Co. v. U. S.*, (1910) 178 Fed. 743.

## Vol. II, p. 504, sec. 6.

**What constitutes enumeration.**—In order to remove an imported article from the operation of a tariff provision for merchandise not "enumerated," it is not necessary to show that there is an enumeration of the article according to its chief use. It is enough if there is an enumeration describing any minor use. *Dodge v. U. S.*, (1891) 130 Fed. 624.

**Birch bark** is properly classified under section 6, as an unenumerated manufactured article, instead of under paragraph 566 or 617. *Reed v. U. S.*, (1909) 172 Fed. 453.

**Bone size.**—So-called bone size, used for filling and softening corduroys, is held to be dutiable as an unenumerated manufactured article, under section 6, and not as "glue," under paragraph 23, as resembling glue in material, quality, texture, or use, within the meaning of the so-called similitude clause in section 7. *Sheldon v. U. S.*, (1903) 127 Fed. 494.

**Cherries in maraschino.**—In *Reiss v. U. S.*, (1904) 135 Fed. 248, *affirmed* (C. C. A. 1906) 142 Fed. 1039, it was held that certain fruit in spirits, consisting of cherries in maraschino, were not dutiable under paragraph 218, Tariff Act Aug. 27, 1894, relating to "fruits preserved in sirup," but under section 3 of said Act, as unenumerated manufactured articles.

**Chlorophyll**, a coloring matter used in staining oils and foodstuffs, is not a "color," within the meaning of paragraph 58, but is dutiable as an unenumerated manufactured article under section 6. *U. S. v. Magnus*, (1908) 159 Fed. 751.

**Edible wafers**, raised in the making by the use of baking powder or bicarbonate of soda, are "leavened," although such agents do not produce fermentation, and are dutiable under section 6, as nonenumerated manufactured articles, and not entitled to free entry under paragraph 696 in the free list, covering

"wafers, unleavened or not edible." *Leggett v. U. S.*, (1904) 131 Fed. 817.

**Floral waters** are dutiable as unenumerated manufactured articles, under section 6, rather than as "waste," under paragraph 463, *Burr v. U. S.*, (C. C. A. 1909) 167 Fed. 801; or as medicinal preparations, under paragraph 68, *Euler v. U. S.*, (1906) 147 Fed. 765.

**Granito or terrazo**, produced by crushing the waste of marble quarries and sifting it into various sizes, is subject to classification as an unenumerated manufactured article, under this section, rather than as "waste," under paragraph 463, or as minerals "crude," under paragraph 614. *U. S. v. Graser-Rothe*, (1908) 164 Fed. 205.

**Herbs in alcohol.**—In *Boericke, etc., Co. v. U. S.*, (1903) 126 Fed. 1018, it was held that certain herbs, imported in kegs, immersed in their natural condition in alcohol for preservation, were not dutiable as "alcohol compounds," under paragraph 2, nor as "drugs . . . advanced in value or condition," under paragraph 20, but under the provision in section 6 for "all raw or unmanufactured articles, not enumerated or provided for," at the rate of ten per cent. *ad valorem*.

**Hone-stone polishers.**—In *Waddell v. U. S.*, (1904) 135 Fed. 211, it was held that certain articles of hone stone, which are used in polishing marble and lithographic stones, and which are not shown to be known commercially as "hones," are not free of duty as "hones" under paragraph 574, but are dutiable as unenumerated manufactured articles under section 6. See also under this title, vol. 2, p. 490, par. 574.

**Japanese garden lanterns of granite**, completed manufactured articles imported in separate pieces merely for convenience of shipment, have passed out of the class of "building or monumental stone, . . . hewn, dressed," etc., mentioned in paragraph 118, and are dutiable under section 6. *U. S. v. Vantine*, (C. C. A. 1908) 166 Fed. 751, *affirming* (1907) 159 Fed. 289.

**"Marasque water" or "eau de marasque."**—The article known as "marasque water" or "eau de marasque," which is produced by distilling the juice of crushed cherries, diluted somewhat with water used in the distilling process, is not dutiable as cherry juice, under paragraph 299, but as an unenumerated manufactured article under section 6. *Leerbarger v. U. S.*, (1904) 141 Fed. 1023.

**Persian berry extract**, which is used in staining food products, and also as a dye-stuff for coloring fabrics, is not dutiable under paragraph 58 as a color, not belonging to the "paints, colors, pigments," etc., therein enumerated, nor by similitude, under paragraph 20 or 22, relating, respectively to berries advanced in value and to extracts of barks, etc., used for dyeing, but is dutiable as an unenumerated manufactured article under section 6. *U. S. v. Berlin Aniline Works*, (1907) 154 Fed. 925. See also *Siegle v. U. S.*, (1908) 166 Fed. 1015.

**Pickled walnuts.**—The provision for "pickles" in paragraph 241 covers only vegetables. Pickled walnuts are therefore ex-

cluded therefrom, and are classifiable as unenumerated manufactures under section 6. *U. S. v. Acker, etc., Co.*, (1909) 171 Fed. 77, 96 C. C. A. 181.

**Plastillina, or modeling clay**, an article not containing clay, is not dutiable as "clay," either directly or by similitude, under paragraph 93, but as an "unenumerated manufacture," under section 6. *Bancel v. U. S.*, (1909) 176 Fed. 132.

**Sawed soapstone.**—Small pieces of soapstone, cut in regular sizes for gas tips and burners, have been "manufactured," and are dutiable as unenumerated "manufactured" articles, under section 6. *Kirschberger v. U. S.*, (1908) 166 Fed. 1012.

**Soap pencils**, for cleaning spectacle and eyeglass lenses, in which soap is the material of chief value, are dutiable as nonenumerated manufactured articles under this section, and not as pencils under paragraph 456. *U. S. v. American Express Co.*, (C. C. A. 1905) 136 Fed. 594, *affirming* (1904) 131 Fed. 656.

**Soluble grease**, a preparation of tallow used in the process of dyeing cotton cloth for softening the fabric after the application of the dye, is not dutiable under paragraph 32, as an alizarin assistant, but under section 6 as an unenumerated manufactured article. *De Ronde v. U. S.*, (1905) 140 Fed. 92.

**Thick soy.**—In paragraph 241 the provision for "sauces" means for a seasoning or dressing usually placed on the table to be used with prepared food; and thick soy, which is not so used, but is employed as an ingredient of sauces, or as a flavor or color for food while cooking, is not a "sauce," and does not resemble a sauce in material, quality, texture, or use, but is classifiable as an unenumerated manufactured article, under section 6. *U. S. v. Wo On*, (1909) 167 Fed. 314, 92 C. C. A. 626.

**Wafers and biscuits.**—Sweet crackers, known as "wafers and biscuits," in which the proportion of the sweetened centres to the pastry envelopes is large, but in which flour is used to a substantial extent, are not dutiable either directly or by similitude as "confectionery," under paragraph 212, but as unenumerated manufactured articles, under section 6. *U. S. v. Meadows*, (1906) 147 Fed. 757, *affirmed* (C. C. A. 1907) 154 Fed. 1005.

**Asphalt mastic.**—See under this title, vol. 2, p. 403, par. 93.

**Blood charcoal.**—See under this title, vol. 2, p. 393, par. 10.

**Capers pickled in vinegar.**—See under this title, vol. 2, p. 431, par. 241.

**Carbon sticks.**—See under this title, vol. 2, p. 404, par. 98.

**Carnauba wax substitute.**—See under this title, vol. 2, p. 499, par. 695.

**Casein.**—See under this title, vol. 2, p. 491, par. 594.

**Casein industrielle.**—See under this title, vol. 2, p. 491, par. 594.

**Cattle-hair goods.**—See under this title, vol. 2, p. 458, par. 366.

**Chutney.**—See under this title, vol. 2, p. 434, par. 263.

**Crude balata.**—See under this title, vol. 2, p. 491 par. 579.

**Gelatin.**—See under this title, vol. 2, p. 396, par. 23.

**"Ghee."**—See under this title, vol. 2, p. 431, par. 286.

**Monuments in sections.**—See under this title, vol. 2, p. 409, par. 118.

**Nori.**—See under this title, vol. 2, p. 492, par. 617.

**Orange-flower water and rosewater.**—See under this title, vol. 2, p. 400, par. 68.

**Prte de foie gras.**—See under this title, vol. 2, p. 436, par. 275.

**Untrimmed hats of imitation horsehair.**—See under this title, vol. 2, p. 470, par. 409.

**Whetstone blocks.**—See under this title, vol. 2, p. 492, par. 614.

## Vpl. II, p. 506, sec. 7.

**"Similar."**—The term "similar" is used in this section in the sense of nearly corresponding, resembling in many respects, somewhat like, or having a general resemblance. *U. S. v. Komada*, (C. C. A. 1908) 162 Fed. 465, *reversing* (1906) 148 Fed. 125.

**Similitude is a question of fact.**—The question whether an article is "similar" to another within the meaning of the similitude clause is one of fact. *U. S. v. Komada*, (C. C. A. 1908) 162 Fed. 465, *reversing* (1906) 148 Fed. 125.

**Degree of similitude.**—The provision in section 7, that articles not enumerated shall pay the same rate that is applicable to the enumerated article which they most resemble, does not require identity. It is enough if there be a substantial similitude in any of the particulars mentioned in the statute. *U. S. v. Roesseker, etc., Chemical Co.*, (C. C. A. 1905) 137 Fed. 770, *affirming* (1904) 131 Fed. 576; *U. S. v. Komada*, (C. C. A. 1908) 162 Fed. 465, *reversing* (1906) 148 Fed. 125; *Paterson v. U. S.*, (C. C. A. 1908) 166 Fed. 733, *reversing* (1907) 159 Fed. 320.

**Nature of resemblance.**—In applying the similitude clause relative to articles similar to other articles in "material" difference in the original materials from which the articles compared is not controlling. The law concerns itself only with the condition of the articles at the time of importation. *U. S. v. Komada*, (C. C. A. 1908) 162 Fed. 465, *reversing* (1906) 148 Fed. 125.

The similarity required by the similitude clause of this section is a real or substantial similarity. *U. S. v. Komada*, (C. C. A. 1908) 162 Fed. 465, *reversing* (1906) 148 Fed. 125.

Within the meaning of the similitude clause in section 7, fabrics composed of calf hair and cotton and used in manufacturing cloaks resemble in "use" fabrics of calf hair, cotton, and wool, and also used in manufacturing cloaks, notwithstanding that the latter fabrics are of a better grade and command a higher price. *Rosenstern v. U. S.*, (1909) 171 Fed. 71, 96 C. C. A. 175.

The provision in paragraph 97, for mineral substances, being limited to articles susceptible of decoration, wares not susceptible of decoration are not to be brought within the paragraph through the operation of the similitude clause in section 7. *Kirschberger v. U. S.*, (1908) 166 Fed. 1012.

Where an unenumerated article has a very vague and questionable resemblance to some enumerated article, and is exactly identical

with another enumerated article, its status under the similitude clause is fixed by the latter condition; the former being disregarded. *Paterson v. U. S.*, (C. C. A. 1908) 166 Fed. 733, *reversing* (1907) 159 Fed. 320.

The amount of duty is not one of the tests prescribed for the application of the similitude clause in section 7. *U. S. v. Behrend*, (C. C. A. 1909) 167 Fed. 318.

**Determination of component of chief value.**—The provision in this paragraph that the component material of chief value in imported merchandise shall be determined with reference to the value of the components in their condition as found in the article means the state which the materials are in when put together, without regard to their value after being advanced to completion; and therefore articles of cotton covered with varnish, in which, before combination, the latter is of less value, should be regarded as composed in chief value of cotton, irrespective of the fact that subsequent labor in applying the varnish may render it the component of chief value in the completed articles. *U. S. v. Johnson*, (C. C. A. 1907) 154 Fed. 39, *reversing* (1906) 146 Fed. 148.

In *U. S. v. Hoeninghaus*, (1905) 137 Fed. 478, 69 C. C. A. 626, *affirming* (1904) 131 Fed. 570, it was held that, as to woven fabrics, the ascertainment should be made with reference to the time the process of weaving commences; that the operation of warping is not a part of such process; and that the cost of such operation should be included wholly in the value of the material constituting the warp of the fabrics, and not distributed between the warp and the weft.

The test of chief value is to be applied as values may be at the time of importation. Evidence that goods are identical with some previously imported is unpersuasive that the relative value of their components remains the same. *U. S. v. Leerburger*, (C. C. A. 1908) 160 Fed. 651, *affirming* (1907) 155 Fed. 146.

The determination as to the component material of chief value of imported merchandise is to be in reference to the values of the components in the country where the compound is produced. Evidence as to the value of one component material in one country and of another component in another country is not sufficient to overcome the sworn statement of the manufacturer of the goods. *U. S. v. Downing*, (C. C. A. 1906) 146 Fed. 56, *reversing* (1905) 139 Fed. 58.

Metal, consisting of steel-point ornamentation and of buckles, was the component of chief value in certain belts, and the buckles were an essential part of the construction of the articles. It was held that the metal could not be considered as immaterial and incidental to the belts, but must be considered in determining the tariff classification of the goods. *Simpson-Crawford Co. v. U. S.*, (1909) 172 Fed. 301, *affirmed* (1910) 178 Fed. 1006, 101 C. C. A. 665.

In *Hoeninghaus v. U. S.*, (1904) 131 Fed. 570, *affirmed* (C. C. A. 1905) 137 Fed. 478, it was held that warping is not a part of the process of weaving, and that in determining, under the provisions of this section, the component material of chief value in fabrics having a silk warp and a cotton weft, the cost of warping should be included wholly in the value of the silk component, and not distributed between the silk and the cotton.

In manufacturing certain braids composed of cotton and india rubber, nine-tenths of the labor was employed on the cotton. It was held that under the provision in section 7, that "the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article," it was proper to add this cost of labor to the original cost of the cotton, in finding the component material of chief value, rather than to apply the value of the labor equally between the cotton and the rubber. *Calhoun v. U. S.*, (1901) 122 Fed. 894.

Application of last sentence.—A provision for "all manufactures of cotton" and one for "all manufactures of every description . . . in part of wool" are not equally applicable to cloth composed in part of wool but in chief value of cotton; the latter being less specific than the former. Therefore they are not controlled by the provision in Tariff Act Oct. 1, 1890, ch. 1244, sec. 5, 26 Stat. L. 613, that "if two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates." *Benoit v. U. S.*, (1892) 160 Fed. 687.

Where *ad valorem* and specific rate applicable.—The provision in section 7, that merchandise to which "two or more rates of duty shall be applicable . . . shall pay duty at the highest of such rates," has been held not to apply in a case where one paragraph provides an *ad valorem* and the other a specific rate. *Loggie v. U. S.*, (C. C. A. 1905) 137 Fed. 813.

Conclusiveness of findings of general appraisers.—Findings by the board of general appraisers as to the fact of similitude will not be disturbed on appeal to the courts, unless clearly contrary to the evidence, or further evidence of a material character is presented. *U. S. v. Komada*, (C. C. A. 1908) 162 Fed. 465, *reversing* (1906) 148 Fed. 125.

Articles made wholly or chiefly of agate or onyx.—Articles, such as paper cutters, paper weights, knife handles, and pen or pencil holders or handles, made wholly or chiefly of agate or onyx, were dutiable by similitude to "precious stones cut, but not set," under Act Oct. 1, 1890, sec. 5, laying on "every non-

enumerated article which bears a similitude . . . to any article enumerated" "the same rate of duty which is levied and charged on the enumerated article which it most resembles," etc. *Hahn v. U. S.*, (1903) 121 Fed. 152.

Artificial horsehair.—Within the meaning of the similitude clause in this section artificial horsehair resembles cotton yarn in material, because each is composed almost entirely of cellulose, and in use, because both are largely used in making braids, etc. *Eckstein v. U. S.*, (C. C. A. 1909) 167 Fed. 802, *reversing* (1908) 160 Fed. 287.

Extract of nutgalls, containing a considerable percentage of tannic acid, which can be obtained therefrom in its commercial form only by a long series of chemical combinations and precipitations, was held not to be sufficiently "similar in material" to tannin or tannic acid as to be dutiable at the rate applicable to those materials, by virtue of the similitude clause in section 7. *U. S. v. Proctor*, (C. C. A. 1906) 145 Fed. 126, *affirming* (1905) 139 Fed. 586.

Ramie sliver.—Within the meaning of the similitude clause in this section ramie sliver resembles cotton sliver (1) in "material," because it is a vegetable fibre; (2) in "quality," because it has reached the same degree of purity, or freedom from objectional substances; (3) in "texture," because the fibres are in the same form, and (4) in "use," because, like cotton sliver, it is spun into yarn and thread, so as to be manufactured into fabrics. *Vandegrift v. U. S.*, (C. C. A. 1909) 173 Fed. 609, *affirming* (1908) 164 Fed. 65. See also under this title, vol. 2, p. 441, par. 302.

Salted fish in wooden packages.—In *Meyer v. U. S.*, (1900) 124 Fed. 293, it was held that the provision in paragraph 258, for "fish in packages containing less than one-half barrel," and the provision in paragraph 261, for "fish . . . salted or otherwise prepared for preservation," are, as to salted fish (sardels) in wooden packages, equally specific, and that under section 7 the merchandise in question is properly dutiable at whichever of the rates specified in the two provisions is the higher.

Artificial silk hats.—See under this title, vol. 2, p. 464, par. 390.

"Bok ale" or barley brew base.—See under this title, vol. 2, p. 440, par. 297.

Cherries in alcohol.—See under this title, vol. 2, p. 434, par. 263.

Coffee essence.—See under this title, vol. 2, p. 437, par. 283.

Composition pumice stone.—See under this title, vol. 2, p. 403, par. 92.

Concentrated fruit juice.—See under this title, vol. 2, p. 441, par. 299.

Feather boas.—See under this title, vol. 2, p. 473, par. 425.

Ferroalloys.—See under this title, vol. 2, p. 410, par. 122.

Ferrochrome and similar substances.—See under this title, vol. 2, p. 410, par. 122, FERROALLOYS.

Fish roe, or caviar.—See under this title, vol. 2, p. 433, par. 258.

Ground corundum ore.—See under this title, vol. 2, p. 473, par. 419.

Horsehair goods.—See under this title, vol. 2, p. 470, par. 409.

Loose pearls.—See under this title, vol. 2, p. 475, par. 436.

Mixture of boracic acid and borax.—See under this title, vol. 2, p. 392, par. 1.

"Nearsilk."—See under this title, vol. 2, p. 441, par. 302.

Pulverized corundum.—See under this title, vol. 2, p. 473, par. 419.

Retort settings.—See under this title, vol. 2, p. 402, par. 87.

Saks.—See under this title, vol. 2, p. 440, par. 296.

Silk powder.—See under this title, vol. 2, p. 465, par. 391.

Talc in the form of cubes.—See under this title, vol. 2, p. 394, par. 13.

Truffles in tins.—See under this title, vol. 2, p. 431, par. 241.

Welsh quarry tiles.—See under this title, vol. 2, p. 402, par. 87.

## Vol. II, p. 509, sec. 15.

Removal and destruction of merchandise held in bond.—Articles of merchandise imported into the United States and held in a bonded warehouse for use in the manufacture of articles for exportation in accordance with this section may be removed from such ware-

house and destroyed in the presence of an officer designated by the collector of the port, and accounted for as waste, and the manufacturer relieved from the payment of duty thereon. (1902) 24 Op. Atty.-Gen. 58.

## Vol. II, p. 512, sec. 29.

Method of determining amount of pure metal.—Under the proviso in this section "that each day a quantity of refined metal equal to ninety per centum of the amount of imported metal smelted or refined that day shall be set aside, . . . and the exportation of the ninety per centum of metals . . . shall entitle the ores and metals imported under" said section to admission without payment of duty, it was held in regard to

importations of lead bullion containing lead and antimony, that this proviso means ninety per cent. of the pure metal contained in the crude metal as imported, as determined by assay at the time of importation, and not of the pure metal recovered by smelting and refining. *In re Guggenheim Smelting Co.*, (C. C. A. 1903) 126 Fed. 723, reversing 121 Fed. 153.

## Vol. II, p. 512, sec. 30.

The general purpose of this section was to provide that whenever materials are brought into the United States under such circumstances that they are subject to the payment of duty and used here in the manufacture of finished articles, upon the subsequent exportation of such manufactured articles to a foreign country a drawback shall be allowed upon the material on which duty has been paid. (1907) 26 Op. Atty.-Gen. 355.

The word "appear," as used in this section, does not require that the imported materials should appear in the sense of being seen in the completed articles, but only in the sense of being proven to be present in the completed articles. (1905) 25 Op. Atty.-Gen. 344.

The word "ascertained," as used in the proviso to this section, is obviously used to describe knowledge which is obtained from evidence, and not merely that which is obtained from the exercise of the senses. (1905) 25 Op. Atty.-Gen. 344.

The word "imported," as used in this section, does not necessarily imply that the materials in which drawback is to be allowed must have come from a foreign country in a technical sense. (1907) 26 Op. Atty.-Gen. 355.

The words "export" and "exportation."—*Swan, etc., Co. v. U. S.*, (1903) 190 U. S. 143, 23 S. Ct. 702, 47 U. S. (L. ed.) 984, af-

firming (1901) 37 Ct. Cl. 101, set out in the original note.

Method of computing drawback.—In computing the drawback on the export of flour made from imported wheat, the relative values of the flour and other products at the time and place of manufacture should be used as the basis of calculation. (1905) 25 Op. Atty.-Gen. 374.

Where only a part of the products from imported wheat is exported, the proportionate value of the same for drawback purposes should be determined without allowing anything for the increased price such part would bring in domestic markets because of the privilege of drawback. (1905) 25 Op. Atty.-Gen. 374.

Where, upon the exportation of a product manufactured in the United States from a combination of domestic material and foreign material which has paid duty, the quantity or measure of the foreign material actually present in the completed article can be identified to the satisfaction of the customs officials by the evidence of books of account, or otherwise, the exporter is entitled under this section to drawback of the duties paid upon the imported material thus ascertained to be actually present in the completed article. (1905) 25 Op. Atty.-Gen. 344.

Complete articles contemplated.—The drawback law contemplates the manufacture of a

separate and complete article which is not merely the finished material of a further stage. (1902) 24 Op. Atty.-Gen. 53.

**Apparatus not attached but reshipped in original package.**—In (1904) 25 Op. Atty.-Gen. 125, it appeared that certain brakes, springs, and lighting apparatus were imported into the United States for the purpose of being used as parts of the equipment of certain railroad cars to be manufactured in this country for export. They were not installed in the cars, but were present for inspection and were shipped in their original packages, or were repacked and shipped, with the parts of the cars to which they were subsequently to be attached. It was held that such articles were not used "in the manufacture of articles manufactured or produced within the United States," within the meaning of section 30; and as the articles were removed "from the custody and control of the government," they were within the inhibition of section 3025, Rev. Stat., 2 Fed. Stat. Annot. 733, and were not entitled to drawback under any provision of law.

**Blended flour.**—A drawback is allowable under this section on blended flour produced by thoroughly mixing and aerating an imported flour ground from Manitoba hard spring wheat, containing a high percentage of gluten, with a domestic flour of medium strength of a high color and great keeping qualities, thus producing a superior flour differing from the imported flour in color, texture, and keeping qualities, and having a distinct commercial designation. (1908) 27 Op. Atty.-Gen. 68.

**Burlap on cotton bales.**—Imported burlaps, on which duty has been paid, when used as coverings on the so-called "round lap" bales of cotton, are not, when re-exported, entitled to drawback under this section, for the reason that the bale is not an article manufactured or produced within the meaning of this section. It is merely a package of ma-

terial peculiarly constructed which may be resolved into covering and contents. (1903) 24 Op. Atty.-Gen. 575.

**Camel's hair noils.**—The separation of imported camel's hair into "tops" and "noils" by combing, for the purpose of preparing the material for manufacture, does not result in such "noils" becoming a distinct manufactured article and entitled to drawback within the meaning of section 30. (1902) 24 Op. Atty.-Gen. 53, *following* (1895) 21 Op. Atty.-Gen. 159, set out in the original note.

**Imported corks used in exporting bottled beer.**—Imported bottle corks hand cut in Spain are not "imported materials used in the manufacture or production of articles entitled to drawback of customs duty when exported," within the meaning of the Act Oct. 1, 1890, 26 Stat. L. 617, though they are sterilized, cleansed, softened, and coated by distinct and peculiar processes so as to adapt them to be used in the bottling of beer for exportation. Anheuser-Busch Brewing Co. v. U. S., (1906) 41 Ct. Cl. 389, *affirmed* (1908) 207 U. S. 556, 28 S. Ct. 204, 52 U. S. (L. ed.) 336.

**Materials from Philippines.**—Materials brought into the United States from the Philippine Islands on which duty has been paid under the Philippine Revenue Act of March 8, 1902, 32 Stat. L. 54, 5 Fed. Stat. Annot. 715, are to be regarded as "imported materials" within the meaning of the drawback provision, although not brought in from a foreign country. (1907) 26 Op. Atty.-Gen. 355.

**Sirup from sugar from Philippines.**—Drawback should be allowed under this section upon the exportation to Europe of sirup manufactured from raw sugar which was brought into the United States from the Philippine Islands and upon which duties were paid under the Philippine Revenue Act of March 8, 1902, 32 Stat. L. 54, 5 Fed. Stat. Annot. 715. (1907) 26 Op. Atty.-Gen. 355.

## Vol. II, p. 514, sec. 33.

**Adoption of construction by re-enactment.**—Congress by enacting the proviso to this section, which differs from the proviso to the Act of October 1, 1890, sec. 50, only in substituting the word "entry" for the word "withdrawal," as the date when the weight of merchandise withdrawn from bonded warehouse is to be taken as the basis of the duty, must be deemed to have adopted the construction given to the earlier proviso by the Attorney-General and followed by the executive officers charged with the administration of the law, viz., that such proviso was general in its application, and not restricted to merchandise imported before the Act took effect. U. S. v. Falk, (1907) 204 U. S. 143, 27 S. Ct. 191, 51 U. S. (L. ed.) 411, *reversing* (C. C. A. 1906) 146 Fed. 484, and *affirming* (1904) 145 Fed. 574.

**Construction of proviso.**—In U. S. v. Falk, (1907) 204 U. S. 143, 27 S. Ct. 191, 51 U. S. (L. ed.) 411, *reversing* (C. C. A. 1906) 146 Fed. 484, and *affirming* (1904) 145 Fed. 574,

it was held that the duty upon leaf tobacco which, when withdrawn from a bonded warehouse, has lost in weight through evaporation of moisture, must be assessed on the basis of weight at the time of the original entry, as prescribed by the proviso to this section, which is general in its application and not restricted to merchandise imported before the Act took effect.

**Tender of entry — change of tariff acts.**—In U. S. v. Edwin S. Hartwell Lumber Co., (C. C. A. 1905) 142 Fed. 432, *affirming* (1904) 128 Fed. 306, it appeared that as to merchandise imported shortly before the Tariff Act of 1897 went into effect, the importers tendered entry before the importation was complete. The tender being rejected by the collector, it was not renewed until said Act became operative. It was held that under section 33, requiring that merchandise previously imported for which no entry has been made shall be subject to the provisions of that Act, the importers' failure to renew,

while the old law stood, brought the merchandise within the provisions of said section.

**Time to make entry.**—As to merchandise imported before but entered after the Tariff Act of 1897 became operative, it was held that R. S. sec. 2785, 2 Fed. Stat. Annot. 641, which allows fifteen days for the entry of merchandise after the arrival of the vessel transporting it is reported, did not have the effect of permitting entry to be made under the Tariff Act in force at the time of importation as against the provision in section 38 that "merchandise previously imported, for which no entry has been made, . . . shall be subjected to the duties imposed by" that Act. U. S. v. Edwin S. Hartwell Lumber Co., (C. C. A. 1905) 142 Fed. 432, *affirming* (1904) 128 Fed. 306.

**Effect of Act of Dec. 15, 1902.**—The duty on imports withdrawn from bonded warehouses must be assessed on the basis of weight at the time of original entry, as prescribed by the proviso to this section, notwithstanding the addition by the Act of Dec. 15, 1902, of a proviso to section 20 of the Customs Administrative Act of June 10, 1890, 2 Fed. Stat. Annot. 682, that the same rate of duty shall be collected upon such merchandise as may be imposed by law upon like articles imported at the time of withdrawal, since

this provision refers to the rate of duty, and not to the date at which the weight is to be taken as the basis of such duty. U. S. v. Falk, (1907) 204 U. S. 143, 27 S. Ct. 191, 51 U. S. (L. ed.) 411, *reversing* (C. C. A. 1906) 146 Fed. 484, and *affirming* (1904) 145 Fed. 574.

**"Entry."**—In the provision in this section for "merchandise previously imported, for which no entry has been made," the word "entry" refers to an entry for consumption. *Ellison v. U. S.*, (1905) 136 Fed. 969, *affirmed* (C. C. A. 1906) 142 Fed. 732.

**"Day."**—The word "day," as used in this section, refers to the time or moment when the Act took effect; and merchandise imported on that day would not escape the application of the Act, unless it was also entered before the Act became effective. U. S. v. Edwin S. Hartwell Lumber Co., (C. C. A. 1905) 142 Fed. 432, *affirming* (1904) 128 Fed. 306.

**"On and after" day named.**—The provision in this section that "on and after" that date merchandise previously imported should be subjected to the duties imposed by said Act, is not limited to merchandise imported prior to that date, but applies also to that imported on that day. *Ellison v. U. S.*, (1905) 136 Fed. 969, *affirmed* (C. C. A. 1906) 142 Fed. 732.

## Vol. II, p. 515, sec. 34.

**Effect of offer to entry.**—Where goods were tendered for consumption entry before four o'clock on July 24, 1897, and on refusal of the tender a warehouse entry was made on

the 26th, they were held to be dutiable under the Tariff Act of 1894, and not under the Act of 1897. U. S. v. Perkins, (1902) 119 Fed. 384.

## Vol. II, p. 517, sec. 50.

**Repeal.**—This section was repealed by Act of April 12, 1902, ch. 500, sec. 10, 10 Fed. Stat. Annot. 70.

## Vol. II, p. 517, sec. 2517.

For additional supports of entry in Maine, see Act of April 12, 1904, ch. 1245, 33 Stat. L. 171, 10 Fed. Stat. Annot. 73.

## Vol. II, p. 525, sec. 2529. [*Boston and Charlestown.*]

For additional assistant appraisers at the port of Boston, see Act of April 28, 1904, ch. 1783, 33 Stat. L. 538, 10 Fed. Stat. Annot. 74.

## Vol. II, p. 529, sec. 2533, cl. fifth.

**Amendment.**—This clause was amended by Act of Feb. 2, 1905, ch. 293, 33 Stat. L. 629, 10 Fed. Stat. Annot. 74, and by Act of

Feb. 11, 1908, ch. 21, sec. 1, 35 Stat. L. 7, 1909 Supp. Fed. Stat. Annot. 106.

## Vol. II, p. 529, sec. 2534, cl. fifth.

**Amendment.**—This clause was amended by Act of Feb. 11, 1908, ch. 21, sec. 1, 35 Stat. L. 7, 1909 Supp. Fed. Stat. Annot. 106.



**Vol. II, p. 531, sec. 2535, cl. third.**

For additional subports of entry in the district of Champlain, see Act of Feb. 17, 1905, ch. 580, 33 Stat. L. 718, 10 Fed. Stat. Annot. 74.

**Vol. II, p. 531, sec. 2535, cl. sixth.**

For an additional port of delivery in the district of Oswego, see Act of March 24, 1904, ch. 815, 33 Stat. L. 145, 10 Fed. Stat. Annot. 74.

**Vol. II, p. 532, sec. 2536.**

Amendment.—This section was amended by the Act of Feb. 1, 1907, ch. 444, 34 Stat. L. 874, 1909 Supp. Fed. Stat. Annot. 104.

**Vol. II, p. 536, sec. 2543, cl. first.**

For additional subports of entry in the district of Philadelphia, see Act of Jan. 25, 1904, ch. 35, 33 Stat. L. 9, 10 Fed. Stat. Annot. 74.

**Vol. II, p. 536, sec. 2543, cl. second.**

For additional ports of delivery in the district of Erie, see Act of March 3, 1909, ch. 261, 35 Stat. L. 780, 1909 Supp. Fed. Stat. Annot. 112.

**Vol. II, p. 537, sec. 2544, cl. third.**

Appraiser.—See Act of Jan. 30, 1904, ch. 40, 33 Stat. L. 9, 10 Fed. Stat. Annot. 75.

**Vol. II, p. 538, sec. 2548.**

For additional subports of entry in the district of Delaware, see Act of April 28, 1904, ch. 1785, 33 Stat. L. 539, 10 Fed. Stat. Annot. 75.

**Vol. II, p. 544, sec. 2556, cl. first.**

Deputy collector.—See Act of Feb. 25, 1905, ch. 799, sec. 1, 33 Stat. L. 714, 10 Fed. Stat. Annot. 75. Compensation of collector.—See section 2 of Act referred to in preceding note.

**Vol. II, p. 549, sec. 2566.**

Amendment.—This section was amended by Act of April 22, 1904, ch. 1414, sec. 1, 33 Stat. L. 243, 10 Fed. Stat. Annot. 75.

**Vol. II, p. 550, sec. 2567.**

Amendment.—This section was amended by Act of April 22, 1904, ch. 1414, sec. 2, 33 Stat. L. 243, 10 Fed. Stat. Annot. 75.

**Vol. II, p. 550, sec. 2568, cl. first.**

For additional ports of delivery in the district of New Orleans, see Act of April 12, 1904, ch. 1246, 33 Stat. L. 171, 10 Fed. Stat. Annot. 77.

**Vol. II, p. 557, sec. 2578, cl. first.**

For additional subports of entry in the district of Galveston, see Act of Feb. 17, 1905, ch. 582, 33 Stat. L. 719, 10 Fed. Stat. Annot. 76.

**Vol. II, p. 561, sec. 2582.**

For additional collection districts in the state of California, see Act of May 23, 1908, ch. 187, 35 Stat. L. 245, 1909 Supp. Fed. Stat. Annot. 107.

## Vol. II, p. 567, sec. 2592.

**Amendment.**—This section was amended by Act of April 28, 1904, ch. 1807, 33 Stat. L. 554, 10 Fed. Stat. Annot. 78.

## Vol. II, p. 568, sec. 2595.

For additional supports of entry in Minnesota, see Act of Feb. 27, 1909, ch. 226, 35 Stat. L. 659, 1909 Supp. Fed. Stat. Annot. 112.

## Vol. II, p. 569, sec. 1.

For additional supports of entry in the district of North and South Dakota, see Act of Jan. 22, 1903, ch. 197, 32 Stat. L. 780, 10 Fed. Stat. Annot. 77.

## Vol. II, p. 570, sec. 2599.

For additional supports of entry in Michigan, see Act of May 23, 1906, ch. 187, sec. 7, 35 Stat. L. 245, 1909 Supp. Fed. Stat. Annot. 108.

## Vol II, p. 572, sec. 2601.

For additional ports of delivery in the district of Chicago, see Act of April 28, 1904, ch. 1825, 33 Stat. L. 574, 10 Fed. Stat. Annot. 77.

## Vol. II, p. 574, sec. 2602, cl. first.

**Naval officer.**—See Act of Feb. 6, 1904, ch. 151, 33 Stat. L. 11, 10 Fed. Stat. Annot. 77.

## Vol. II, p. 608, sec. 2746.

**Amendment.**—This section was amended by Act of March 4, 1905, ch. 314, sec. 5, 35 Stat. L. 1065, 1909 Supp. Fed. Stat. Annot. 113.

## Vol. II, p. 611, sec. 1.

**Amendment.**—This Act was amended by Act of Aug. 5, 1909, ch. 6, 36 Stat. L. 11, 1909 Supp. Fed. Stat. Annot. 807.

**Consignee.**—Where a railroad company whose line extended across the boundary between Mexico and the United States, pursuant to authority of its directors, appointed two agents to receive and enter at a customs port of the United States all goods imported by or consigned to the company, and one of such agents made the declaration on a consular invoice of goods as agent of the railroad company, and the other as consignee made the entry, paid the duty with money of the company, and received the goods, it was held that the company might be held as importer or consignee for an additional duty assessed on a liquidation, and that it was error to direct a verdict for the company. *U. S. v. Mexican International R. Co.*, (1907) 151 Fed. 545, 81 C. C. A. 61.

**Shipment of goods not ordered by consignee.**—In *U. S. v. O'Neill*, (1903) 122 Fed. 547, *affirmed* (C. C. A. 1904) 129 Fed. 909, it appeared that the defendants ordered a consignment of waste by sample, which consisted wholly of cotton from a foreign manufacturer, which was entitled to free entry. The manufacturer shipped waste to fill the order consigned to defendant through certain persons, who were not defendant's agents, at

Suspension Bridge, which bill was indorsed to be delivered to N. When the goods arrived N. declared, without authority, that the goods belonged to defendants, and entered them for consumption. On examination it was found that the waste was cotton and woolen mixed, and was therefore taxable for duty at ten cents a pound. The defendants, on notification, refused to accept the waste under the contract, and it was sold for duty, resulting in a large deficiency. It was held that the defendants were not liable for such deficiency under this section, declaring that all merchandise imported shall be deemed and held to be the property of the person to whom it may be consigned.

**Forwarding agents and custom house brokers.**—A custom house broker, who makes the sworn declaration for entry of goods, in which he declares himself the consignee, cannot thereafter deny that he is such as against the government, and becomes liable for the duties under the provision of this section that "all merchandise imported into the United States shall, for the purposes of this Act, be deemed and held to be the property of the person to whom the merchandise may be consigned," including additional duties imposed for undervaluation under section 7 of this Act. *U. S. v. Vandiver*, (1904) 133 Fed. 252.

**Rights of holder of bill of lading.**—Under this section it has been held that where a consignee of goods, as appeared from the ship's sworn manifest and from a certified invoice, paid the duty and received the goods from the collector, the latter was not liable to a transferee of the bill of lading, holding the same as collateral for a draft drawn on the consignees for the price of the goods,

which they refused to pay on presentation. *Derobert v. Stranahan*, (1903) 126 Fed. 581.

**Estoppel.**—This section simply provides that the government may act on the faith of the bill of lading, but is not precluded from going behind it to show the facts, in order to determine the forfeitability of importations. *U. S. v. One Bag Crushed Wheat*, (1908) 166 Fed. 582.

### Vol. II, p. 611, sec. 3.

**Verification.**—This section does not require the invoices to be verified. *U. S. v. 646 Half-Boxes Figs*, (1908) 164 Fed. 778.

### Vol. II, p. 612, sec. 4.

**Clerical error in invoice.**—In *Gillespie v. U. S.*, (1900) 124 Fed. 106, it appeared that the importers of certain sugar in hogsheads made entry on an invoice which included by mistake the value of the hogsheads in that of the sugar, but before the entry was liquidated they produced a corrected invoice, showing the proper deduction for the hogsheads. It was held that it was not, under the circumstances, necessary for the importers to make entry on a *pro forma* invoice, and give a bond for the production of a corrected invoice, in the method prescribed in section 4,

and that the collector should have made allowance for the hogsheads.

**Effect of exception of personal effects.**—The provision in this section that "except in case of personal effects, no importation of any merchandise" shall be entered without invoice, is equivalent to an exception of articles not personal effects from the provision relative to the declaration of "baggage" in R. S. sec. 2799, 2 Fed. Stat. Annot. 644. *U. S. v. One Trunk*, (1909) 175 Fed. 1012.

### Vol. II, p. 613, sec. 5.

**Goods purchased with right to return.**—In *U. S. v. Ninety-nine Diamonds*, (1904) 132 Fed. 579, *affirmed* (C. C. A. 1905) 139 Fed. 961, it appeared that on entering an importation of certain merchandise, the importer made "the declaration of owner in cases where merchandise has been actually purchased," which is set forth in section 5, but it later appeared that the importation was made pursuant to an agreement under which the importer might, after examination, retain and pay for, or return, any part or all of the goods, and the importer admitted that he did not consider himself the actual owner, but made the entry as an accommodation to the parties who caused the goods to be shipped to him. It was held that as he had full dominion over the property, with the

right to sell or otherwise dispose of it without accountability to any one, he should be considered the "owner," and might properly make the declaration aforesaid.

**False certification.**—Under this section, providing that on the entry of imported merchandise the importer shall make certain sworn statements in regard to the importation, it has been held that the practice of having such declarations signed in blank by an importer, to be filled in later by a customs broker, and the practice of notaries public in falsely certifying such declarations as having been made and sworn to in their presence, are illegal, and to be condemned in law as in morals. *U. S. v. Cohn*, (1904) 128 Fed. 615, *affirmed* (C. C. A. 1905) 145 Fed. 1.

### Vol. II, p. 615, sec. 7.

**Notice to importers of advance in value.**—Where an appraiser who has advanced the value of imported merchandise fails to give notice of the advance to the importer as required by the customs regulations, the importer thus being deprived of the right of appeal for reappraisal, the reappraisal is invalid, and does not afford a proper basis for the forfeiture and condemnation of the goods for undervaluation under this section. *The Lace House v. U. S.*, (C. C. A. 1906) 141 Fed. 869.

In *U. S. v. Independent Importing Co.*, (1908) 165 Fed. 63, it appeared that the customs officers sent to the address given by

the importer in his entry a notice of an advance on the invoice value as made by the appraiser. It was held that due diligence had been shown in this regard, and that the importer could not object to the assessment of duty on the basis of the advance, on the ground that he had not received the notice by reason of an error in the address.

**Definiteness of additional entry.**—In making an addition to the invoice value at the time of the entry, in order to equal market value, as permitted by this section, the importer should state the added value with sufficient definiteness to enable the customs officers to ascertain its amount; but refer-

ence to an item, without specifying its amount, is sufficient, if such amount is officially known to the customs officers. *Woodruff v. U. S.*, (1896) 164 Fed. 861.

**Functions of collector.**—In finding the invoice value of imported merchandise, under this section, a collector of customs has no right, after the appraiser has appraised the merchandise and marked an item of commissions as nondutiable, to include such item on the invoice value, and assess duty thereon, upon a mere inspection of the invoice, without inquiry or evidence to justify such action. *U. S. v. Lahey*, (1904) 132 Fed. 181.

**Goods in excess.**—In *U. S. v. Leeming*, (1907) 153 Fed. 489, an importation subject to the additional duty for undervaluation provided by this section was found to consist of a greater quantity than was specified in the invoice. It was held that the additional duty should not be limited to the quantity so specified, but should be imposed also on the excess.

**Necessity for legal appraisal.**—This section is not applicable unless there has been a legal appraisal. *The Lace House v. U. S.*, (1905) 141 Fed. 869, 73 C. C. A. 103.

**Necessity for fraudulent intent.**—Under this section the fraudulent intent of the owner or of his authorized agent in entering the imported merchandise is an indispensable condition of the right of the government to forfeit the goods for undervaluation. But an action to recover the additional duties accruing upon an undervaluation may be maintained against the consignee without proof of any fraudulent intent by the owner, the consignee, or the agent in making the entry. Good faith and innocence constitute no defense to such an action. *U. S. v. Bishop*, (1903) 125 Fed. 181, 60 C. C. A. 123.

**Entered value in excess of appraised value.**—On entry an importer added to the invoice value an amount that he considered necessary to equal actual market value, as permitted by this section. It was decided on reappraisal that this addition had been unnecessary and that the invoice was correct. It was held that the provision in said section that "duty shall not, however, be assessed in any case upon an amount less than the . . . entered value," indicates an intention to bind the importer to the market value as fixed by him, regardless of the value found by the appraisers or of the general rule of the conclusiveness of such finding, and that therefore duty could not be assessed on a less amount than that on which entry was made. *Daloz v. U. S.*, (1909) 171 Fed. 275.

**Invoice value.**—Under the provision in this paragraph forbidding the assessment of duty "on less than the invoice . . . value," it was held, as to an importation of framed paintings which were invoiced as "paintings," that it would not be in violation of the law to treat the invoice value for this item as including the frames, where it appeared that such value was sufficient, and that it was customary so to describe paintings with frames. *U. S. v. Hensel*, (1896) 155 Fed. 645.

**Assessment on less amount than invoice value.**—The provision that duty shall not be assessed on less than the invoice value does not require that the collector should take as the dutiable value an excessive sum erroneously given in a *pro forma* invoice, when he has before him a consular invoice giving the correct value. He conforms to the statute if he assesses on the basis of the value in the latter invoice. *U. S. v. Muller*, (1907) 153 Fed. 405, 85 C. C. A. 515, affirming 152 Fed. 575.

**Entry on pro forma invoice.**—The provision in this section that duty shall not be assessed on "less than the invoice or entered value," does not prevent assessment on less than the value stated in a *pro forma* invoice on which entry is made under section 4, 2 Fed. Stat. Annot. 612; and where a certified invoice is produced in accordance with the latter section, and the value stated therein is approved by the appraiser, duty may properly be assessed on that value, even though less than that given in the *pro forma* invoice. *U. S. v. Commercial Cable Co.*, (1905) 141 Fed. 473.

**Clerical error.**—The expression "clerical error" implies negligence or carelessness of a clerk, writer, or copyist, and assumes that the mistake, or negligence, or carelessness is that of one engaged in the subordinate service of transcription, copying, or comparison, labor not requiring original thought. It has been held that where a standard article was incorrectly invoiced at an excessive price, this was a clerical error of a kind of which correction is not harmful to the administration of customs laws, and relief from which should be granted. *Morimura v. U. S.*, (1908) 160 Fed. 280.

In *Lawder v. Stone*, (1901) 125 Fed. 809, it appeared that on entering certain merchandise the importers presented an entry and invoice together, the former of which stated only the value of the merchandise, omitting a dutiable item of packing boxes, but the latter plainly stated both items. The merchandise was appraised at the higher value, as stated in the invoice. It was held that in the absence of circumstances indicating an intention to evade the law, this was a case "arising from a manifest clerical error."

In *U. S. v. Muller*, (1907) 153 Fed. 405, 85 C. C. A. 515, affirming 152 Fed. 575, it appeared that an importer in giving the invoice value of his merchandise stated it in dollars instead of rupees, having mistaken the rupee abbreviation for the dollar mark. It was held that this constituted a clerical mistake.

In *Magnus v. U. S.*, (1908) 160 Fed. 281, affirmed (C. C. A. 1909) 166 Fed. 1020, it appeared that an import was of a more expensive kind than that called for by the invoice, owing to an alleged error on the part of the shipper in failing to conform to an order for the cheaper kind. It was held that this was not a clerical error for which relief should be given, and that, owing to the facility with which such apparent errors might be fraudulently arranged by collusion between importer and shipper, it would be establish-

ing a dangerous precedent to excuse an error of this kind.

**Lemon boxes.**—Boxes containing lemons, which are treated in the Tariff Act as a dutiable entity by themselves, being subjected to a separate classification from the lemons they

contain, are within the provision in section 7 for the undervaluation of "any article of imported merchandise," and, when undervalued, are subject to the penalties provided by said section. *Phelps v. U. S.*, (1892) 142 Fed. 213.

## Vol. II, p. 619, sec. 9.

**Construction of statute.**—An indictment indorsed as based on R. S. sec. 5445, 2 Fed. Stat. Annot. 773, charging defendants with having effected an entry of goods at less than their true weight, and by payment of less than the legal duty thereon, by means of a false invoice and the bribery of an officer, is sustainable under section 9, conceding that such section supersedes said section 5445. *U. S. v. Rosenthal*, (1903) 126 Fed. 766, *affirmed* (C. C. A. 1905) 145 Fed. 1.

The first part of section 9, relating to fraudulent or false invoices, statements, practices, or appliances, has application only when such means are employed in connection with goods the importation of which is not concealed. *U. S. v. 218½ Carats Loose Emeralds*, (1907) 153 Fed. 643, *affirmed* (C. C. A.) 154 Fed. 839.

**"False."**—The word "false," as used in this section, means more than incorrect or erroneous. It implies wrong or culpable negligence, and signifies knowingly or negligently untrue. *U. S. v. Ninety-Nine Diamonds*, (C. C. A. 1905) 139 Fed. 961.

**When entry begins.**—While it is a condition to the entry of merchandise that invoices should be carried before an American consul, this is not necessarily a part of the entry within the meaning of this section relating to "illegal entry." At the earliest, entry does not begin until the owner, after the goods reach this country, begins that series of acts through which, by application to the customs officials, he gains possession of the goods. *U. S. v. One Trunk*, (1909) 171 Fed. 772.

Where the defendant was charged with having withdrawn certain imported beans from the warehouse for exportation upon bond and permit, all on Jan. 15, 1902, and the indictment then alleged that the goods were not exported "then and there," but were withheld and concealed with the knowledge of the defendants, it was held that the goods would be regarded as "entered," and the duties therefrom due when the owners or the truckmen to whom the custody was intrusted disregarded the limitations put on them and introduced the goods into the unrestricted commerce of the country, though the time within which the goods might be properly exported had not arrived; and that the indictment was not objectionable because it did not allege that defendants concealed or withheld the goods, not only at the time of their removal, but for all the period which was allowed to export them. *U. S. v. Ehr Gott*, (1910) 182 Fed. 267.

**"Other person."**—An employee in the custom service of the United States who makes and returns false weights in connec-

tion with an entry of imported merchandise is comprehended by the words "other person" as used in this section. *U. S. v. Meacall*, (1909) 215 U. S. 26, 30 S. Ct. 19, 54 U. S. (L. ed.) 77, *reversing* (1908) 104 Fed. 580.

**Fraud must result in deprivation of duties.**—Under this section the falsification must be such that if consummated it would deprive the United States of lawful duties. But if by itself, without further wrongful acts, it could not, in the regular course of procedure, produce such result, forfeiture is not incurred, even though there may have been wrongful intent. *U. S. v. Ninety-Nine Diamonds*, (C. C. A. 1905) 139 Fed. 961; *U. S. v. Twenty Boxes Cheese*, (1908) 163 Fed. 369.

It is not essential that there should be a completed fraud upon the United States, but it is enough if the act or attempt is of a character calculated to deprive the United States of duty. *U. S. v. Sixty-Six Cases Cheese*, (1908) 163 Fed. 367.

**Necessity for fraudulent intent.**—In order to incur the penalty of forfeiture under this paragraph there must be a guilty scienter and intent. *U. S. v. Ninety-Nine Diamonds*, (1904) 132 Fed. 579, *affirmed* (C. C. A. 1905) 139 Fed. 961; *U. S. v. One Silk Rug*, (1908) 158 Fed. 974, 86 C. C. A. 178.

Where an entry was made on an invoice falsely made out by the foreign shipper, but there was an entire absence of fraudulent intent on the part of those concerned in making the entry, it was held that there could be no forfeiture, though the shipper had a financial interest in defrauding the revenue. *U. S. v. One Silk Rug*, (1908) 158 Fed. 974, 86 C. C. A. 178.

A mere mistake in the description of imported merchandise, unaccompanied by acts from which an intent to defraud may be presumed, is insufficient to justify a forfeiture. *U. S. v. Seventy-Five Bales of Tobacco*, (1906) 147 Fed. 127, 77 C. C. A. 353.

**Abandonment of illegal intent.**—In *U. S. v. One Trunk*, (1909) 171 Fed. 772, it appeared that an importer swore to a false invoice value before an American consul, but on importation presented at the custom house an invoice to which had been added a sum sufficient to make the true value. It was held that the case was not within this section, as the illegal intent was abandoned before any "attempt" was made to make entry of the goods.

To the same effect see *U. S. v. One Trunk*, (1909) 175 Fed. 1012.

But in *U. S. v. One Bag Crushed Wheat*, (1908) 166 Fed. 562, it appeared that laces

and silks were packed and invoiced as preserved fruits, but before entry the invoice was corrected to show the true nature and value of the goods so concealed. It was held that if the original plan under which the goods were shipped and brought into the United States, as shown by the manner in which they were packed and invoiced, showed a purpose on the part of the consignee to smuggle the goods, they were forfeitable, notwithstanding said correction of the invoice.

**Illegal entry by absentee.**—Forfeiture for illegal entry under this section does not accrue against a party who was in another country when the entry was made, where it does not appear that the person making the entry at the custom house was his agent. *U. S. v. 646 Half-Boxes Figs*, (1908) 164 Fed. 778.

**False invoice.**—Where the foreign shippers of goods to the United States, who were the agents of the merchandise, attempted to make entry of the merchandise by a false invoice and a false declaration of shipment, it was held that the goods were liable to forfeiture. *U. S. v. One Bag Crushed Wheat*, (1908) 166 Fed. 562.

**False statement of ownership.**—This section covers a case where a person who is the consignee falsely describes himself as the owner of the merchandise. *U. S. v. One Bag Crushed Wheat*, (1908) 166 Fed. 562.

**False statements as to weights.**—Under this section the offense is committed by presenting an invoice containing false statements as to the weight of the merchandise, knowing that, under the practice of the office, such invoice would be used for the purpose of the first entry, and it is immaterial whether or not a statement of such weight was required by law. *U. S. v. Rosenthal*, (1903) 126 Fed. 766, *affirmed* (C. C. A. 1905) 145 Fed. 1.

**Failure to specify goods.**—The fact that three lace dresses in a package by themselves were found in a case of laces and embroideries, but were not mentioned in the invoice, did not by itself warrant the infliction of the penalties provided in this section for entering merchandise by means of a false or fraudulent invoice. *The Lace House v. U. S.*, (C. C. A. 1905) 141 Fed. 869.

**False statement by shipper—innocence of person making entry.**—Where merchandise is innocently entered by a person on an invoice fraudulently made out by the foreign shipper, it is not liable to forfeiture under this section, providing such penalty where an importer "or other person" makes a customs entry of imports "by means of any fraudulent or false invoice," etc. *U. S. v. Twenty Boxes Cheese*, (1908) 163 Fed. 369.

**Erroneous description of goods.**—In *U. S. v. Seventy-Five Bales Tobacco*, (1906) 147 Fed. 127, 77 C. C. A. 353, it appeared that an importation of tobacco, a part consisting wholly of wrapper, a part of filler, and a part of wrapper and filler mixed, was invoiced and entered as "tobacco fillers." Filler tobacco was subject to a lower rate of duty than mixed tobacco or wrapper tobacco. It was

held that in the absence of circumstances indicating a fraudulent intent on the part of the importers, the entry could not be considered to have been made "by means of a fraudulent or false invoice," by reason of which the tobacco should be forfeited under section 9.

**Wilful act or omission.**—The penalty of forfeiture prescribed by section 9, where any importer is "guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties," is incurred where a passenger on a steamer wilfully omits to mention to the customs officials merchandise in his possession. *U. S. v. 218½ Carats Lopse Emeralds*, (1907) 153 Fed. 643, *affirmed* (C. C. A.) 154 Fed. 839.

**Limitation of action.**—The provision in this section for a forfeiture of undervalued merchandise is penal in its nature and is therefore subject to the three-year limitation provided in section 22, Act of June 22, 1874, ch. 391, 18 Stat. L. 190, 2 Fed. Stat. Annot. 761. *U. S. v. Wittemann*, (1907) 152 Fed. 377, 81 C. C. A. 503.

**Exaction of regular duties.**—Regular duties may be exacted on an importation of foreign goods, notwithstanding the goods have been seized and forfeited for a violation of this section, and the whole of the proceeds from their sale applied to the use of the United States. (1902) 24 Op. Atty-Gen. 1.

**Sufficiency of indictment.**—In an indictment under the provision of this section it is not necessary to aver that the United States was in fact deprived of duties by the acts of defendants. *U. S. v. Rosenthal*, (1903) 126 Fed. 766, *affirmed* (C. C. A. 1905) 145 Fed. 1.

**Sufficiency of information.**—Where, in an information for forfeiture, allegations are united from which it might be inferred that the matter could be brought under various sections of the law, but which are insufficient for the ground of forfeiture intended by the government, and where no sufficient ground is actually stated, exceptions to the sufficiency of the information should be sustained. *U. S. v. 646 Half-Boxes Figs*, (1908) 164 Fed. 778.

**Burden of proof.**—In proceedings for the forfeiture of imported merchandise, the burden of proving that the importation was legal rests upon the claimant. *U. S. v. One Bag Crushed Wheat*, (1908) 166 Fed. 562.

**Plea in bar.**—A verdict for defendants, indicted for smuggling certain diamond rings into the United States, was ground for a plea in bar to a libel by the United States for the forfeiture of the rings. *U. S. v. Rosenthal*, (1909) 174 Fed. 652, 98 C. C. A. 406.

**New trial.**—In *U. S. v. Two Bales Rugs*, (1908) 167 Fed. 689, it appeared that at a trial for the forfeiture of imported merchandise, a foreign shipper, who was charged with fraudulent conduct, was not heard. It was held that he was entitled to a hearing and that, where he seasonably appeared and asked for a new trial, the request should be granted.

## Vol. II, p. 620, sec. 10.

**Method of procedure.**—In *The Lace House v. U. S.*, (1905) 141 Fed. 869, 73 C. C. A. 103, it appeared that an appraising officer, having no knowledge as to the value of certain imported articles, sent samples to the appraiser at the port of New York for information. It was held that this was legal, and that the right so to do or to use any other available means was conferred by section 10, authorizing appraising officers to use "all reasonable ways and means" in their power in ascertaining the value of merchandise.

**Pro forma invoice.**—In *U. S. v. Bennett*, (1909) 176 Fed. 580, it appeared that entry was made on a *pro forma* invoice and the value stated therein was approved by the appraiser, who also, however, approved the lower value given in a consular invoice subsequently produced by the importer. It was held that duty should have been assessed on the basis of the latter value.

**Must be examination of goods advanced in**

**value.**—An appraiser may not legally advance the value of imported merchandise not actually before him, or not represented by sufficient samples, even though he have before him one package in ten, as prescribed by section 2901, R. S., 2 Fed. Stat. Annot. 680. If these packages do not represent every variety of goods, such representation must be had by securing further packages or samples for examination. *U. S. v. Beer*, (C. C. A. 1906) 150 Fed. 566, *affirming* (1905) 142 Fed. 199.

**Failure to appraise at true value.**—Merchandise having been erroneously invoiced at an excessive value, the appraiser merely accepted that value as being sufficiently high, without making any effort to ascertain the true value, as required by section 10. It was held that the appraisement was therefore invalid. *U. S. v. Muller*, (1907) 158 Fed. 405, 85 C. C. A. 515, *affirming* 152 Fed. 575.

**Right to remove from district for examination.**—See under page 712, sec. 2.

## Vol. II, p. 622, sec. 13.

**Jurisdiction.**—In *U. S. v. Taylor*, (1909) 171 Fed. 152, it appeared that part of the evidence was taken before one general appraiser and part before another, who decided the case later, but by oversight failed to consider the evidence taken before the first general appraiser. It was held that this oversight was only an error of procedure, and did not deprive him of jurisdiction.

**Right to reappraisement of seized goods.**—The fact that goods have been seized for undervaluation does not deprive the consignee or owner of the right of reappraisement given under this section. *The Lace House v. U. S.*, (C. C. A. 1905) 141 Fed. 869.

**Not limited to proceedings under this Act.**—A District Court of the United States has jurisdiction of an action of debt to recover duties due from an importer to the United States, which through accident, mistake, or fraud have not been paid, the government not being limited to its remedy by summary proceedings against the goods under sections 13 and 14, or other provisions of the tariff laws for the collection of duties, which are not only a charge against the goods, but also a personal debt of the importer. *U. S. v. National Fibre Board Co.*, (1904) 133 Fed. 596.

**Reviewability of reappraisement.**—Under this section, providing that decisions by the Board of General Appraisers in reappraisement cases shall be "final and conclusive," it was clearly intended that such decisions shall not be open to judicial review, except to inquire whether the appraisers have exceeded the authority conferred upon them by law or have otherwise acted illegally or fraudulently; and where there was no charge that the Board of Appraisers had acted illegally in denying the importers a hearing and opportunity to produce testimony in the matter, and there was some evidence to support the

board's conclusions as to value, its reappraisement was conclusive under said section. *Grubnau v. U. S.*, (C. C. A. 1910) 176 Fed. 904, *affirming* (1909) 171 Fed. 284.

The provisions of this section making decisions of appraising officers final and conclusive does not prevent inquiry as to whether such officers acted legally; and evidence is admissible to show that items independent of the actual value have been included in the appraised value. Appraisers may not cut off all inquiry into their action by merely stating that an item was added "to make market value." *Erlanger v. U. S.*, (C. C. A. 1907) 154 Fed. 949, *affirming* 152 Fed. 576.

Where the Board of General Appraisers misinterprets a portion of the evidence, a legal error is committed, making it necessary to see if the error works injustice, and proceedings for review may be initiated by protest under section 14. *U. S. v. Haviland*, (1909) 167 Fed. 414, *affirmed* (1910) 177 Fed. 175, 100 C. C. A. 637.

**Presumption of correctness.**—In the absence of evidence to the contrary, it will be presumed that an appraisement by a local appraiser, under section 13, was in conformity with law and was valid. *U. S. v. Curnen*, (1906) 146 Fed. 45, 76 C. C. A. 503, *reversing* (1904) 136 Fed. 807; *Vandiver v. U. S.*, (1907) 156 Fed. 961, 84 C. C. A. 522.

**Invalid reappraisement — dutiable value.**—In *U. S. v. Curnen*, (1906) 146 Fed. 45, 76 C. C. A. 503, *reversing* (1904) 136 Fed. 807, it appeared that the value of certain imported merchandise was advanced by the local appraiser, and the importers brought reappraisement proceedings before a general appraiser and a Board of General Appraisers, as provided in section 13. The reappraisements being defective and void, but the appraisement by the local appraiser being valid, it was held that duty should be assessed on

the value found by the local appraiser, rather than the invoice value.

**Reliquidation — duty of collector.** — The Board of General Appraisers sustained an importer's protest directing that the collector should reliquidate the duties at the rates appearing to be applicable "from the invoices, samples, or record," or, in the absence of sufficient data, should reliquidate at the rate of forty per cent. *ad valorem*. It was held that the terms of this decision did not require the collector to consider data outside of the record made before the board. *U. S. v. Hunter*, (1907) 153 Fed. 873, 83 C. C. A. 55.

**Failure to examine goods on reappraisement.** — In *U. S. v. Murphy*, (1898) 136 Fed. 811, it appeared that on appeals from appraisements by the local appraiser of imported merchandise taken by the collector of customs under section 13, the general appraiser who made the reappraisements did not have before him the merchandise in ques-

tion, nor samples thereof, as the merchandise had passed out of the possession and control of the importers, and the collector had not ordered its return, in accordance with the terms of a bond which had been given by the importers under R. S. sec. 2899, 8 Fed. Stat. Annot. 679. It was held that the reappraisements were void, and that the duties should be assessed on the basis of the values found by the local appraiser, and not those found by the general appraiser.

**Mode of correcting errors in procedure.** — Where a general appraiser through oversight failed to consider a portion of the evidence in a reappraisement case which he decided, it was held that the remedy of the aggrieved party was by appeal for reappraisement by a Board of General Appraisers, as provided in section 13, rather than by protest as provided in section 14. *U. S. v. Taylor*, (1909) 171 Fed. 152.

**Necessity for certificate of appraisement.** — See under this title, vol. 2, p. 693, sec. 2950.

## Vol. II, p. 624, sec. 14.

**Amendment.** — This section was amended by Act of May 27, 1908, ch. 205, 35 Stat. L. 403, 1909 Supp. Fed. Stat. Annot. 109.

**Protest.** — A protest against the assessment of duty which does not point out distinctly and specifically the proper rate of duty is not sufficient. *In re Solvay Process Co.*, (1905) 134 Fed. 678; *Fuld v. U. S.*, (1906) 143 Fed. 920.

A protest is not sufficient that claims that the merchandise is free of duty under a certain paragraph of the Tariff Act, though as a matter of fact it is free of duty under another paragraph of the free list of the same Act, to which the attention of the collector is not called in the protest. *U. S. v. Knowles*, (C. C. A. 1903) 126 Fed. 737, *reversing* 122 Fed. 971.

A protest is sufficient which, though imperfectly expressed, may be understood when read in connection with the statute referred to therein; and the fact that the collector understood the protest is relevant. *Lothrop v. U. S.*, (1908) 164 Fed. 99.

Where, in reliquidating an entry pursuant to a decision of the Board of General Appraisers rendered under this section the collector fails to allow the importer all he is entitled to under such decision, the importer may legally file a protest against the action of the collector, as provided in this section. *U. S. v. Dickson*, (C. C. A. 1905) 139 Fed. 251, *affirming* (1904) 131 Fed. 573.

While alternative grounds of dissatisfaction may properly be stated in protests against decisions by collectors of customs, this rule does not permit the enumeration of a long list of paragraphs, many of which are entirely remote, with the purpose of covering everything. Under the provision in section 14, that protests shall set forth "distinctly and specifically" the "importers' grounds of objections, it is not enough that the provision ultimately relied upon can be found somewhere in the protest. *Lichtenstein v. U. S.*, (1909) 175 Fed. 1016.

**Protests held sufficient.** — A protest claiming free entry of an importation of tapioca flour under paragraph 646 of the Tariff Act of Aug. 27, 1894, which provided for the free entry of tapioca, was held to be sufficient to advise the collector that the exemption from duty was in fact claimed under paragraph 677 of the Act of July 24, 1897, which contains an identical provision, where such act was the one then in force and which governed the importation. *Shaw v. U. S.*, (1903) 122 Fed. 443, 58 C. C. A. 425, *reversing* (1902) 117 Fed. 366, set out in the original note.

In *Fuld v. U. S.*, (1907) 152 Fed. 165, 81 C. C. A. 417, an importer's protest read: "Protest is hereby made against . . . your decision assessing duty at thirty-five per cent. *ad valorem*, or other rate or rates, on lithographic prints, krippen, mechanical cards, etc., covered by entries below named. . . . This protest is intended to apply separately and collectively to every part of goods assessed under paragraph 418, as well as to all other goods assessed at thirty-five per cent. *ad valorem*." It was held that the protest was not insufficient because no part of the importation in question was assessed at the rate of thirty-five per cent. under paragraph 418, or elsewhere, but should be construed as relating to lithographic prints and booklets assessed at other rates and under another paragraph than were mentioned in the protest.

In *Woodruff v. U. S.*, (1896) 154 Fed. 861, it appeared that importers protested against the action of a collector of customs in considering a certain amount as the entered value, and asserted that he had erred in failing to regard the fact that said amount included some nondutiable items. It was held that this statement of objections was sufficiently distinct and specific to satisfy the requirements of section 14.

In *U. S. v. Leerburger*, (C. C. A. 1908) 160 Fed. 651, *affirming* (1907) 155 Fed. 146, materials dutiable at fifty cents per pound as



"woven fabrics . . . in the gum," under the first clause of a tariff paragraph, were asserted in an importer's protest to be dutiable "at sixty cents per pound . . . under the first clause, . . . being woven fabrics in the piece, dyed." This rate and description ("dyed") pertained to the second clause, and not the first. It was held that the protest referred sufficiently to the first clause.

In *Helmuth v. U. S.*, (1904) 135 Fed. 912, *affirmed* (C. C. A. 1906) 145 Fed. 36, it appeared that an importer protested against the payment of duty on ninety-nine skins, classified as hides, in regard to which he stated in his protest, "each of which weighs under twelve pounds; and looking to you for the refund of duty on these ninety-nine skins, I remain," etc. It appeared that twelve pounds is the dividing line between hides and skins, and that paragraph 664 is the only paragraph authorizing the admission of such skins free of duty. It was held that the protest was sufficient.

In *Weil v. U. S.*, (1900) 124 Fed. 1006, it appeared that certain long-haired Russian callskins were classified as dutiable as "hides of cattle," under paragraph 437, when they should have been classified as free of duty, under paragraph 664 of said Act covering "skins of all kinds, raw." The importers' protest against the assessment of the collector did not refer to the proper paragraph (664), but only to paragraphs 561 and 562 of said Act, which relate respectively to "furs, undressed," and "fur skins." It was held that this was a sufficient compliance with the requirement in section 14.

In *U. S. v. Leerburger*, (C. C. A. 1908) 160 Fed. 651, *affirming* (1907) 155 Fed. 146, goods dutiable under one paragraph of a Tariff Act were asserted by an importer in his protest to be dutiable under another paragraph, but the language of the protest indicated an intention to cite the former. It was held that the protest should be construed as referring to the former.

*Protest held insufficient.*—In *Boker v. U. S.*, (1905) 140 Fed. 115, *affirmed* (C. C. A. 1906) 145 Fed. 1022, it appeared that certain importers protested against the assessment of duty on an importation, stating in their protest merely the contention that the merchandise was dutiable under a certain paragraph of the Tariff Act, with no mention of the grounds of their objections or of the rate of duty claimed to be applicable, and the paragraph cited was the one under which duty had been assessed, and was a long one, containing many subdivisions and different rates of duty. It was held that the protest was insufficient, under the rule in section 14 that protests must be specific and distinct in the statement of objections to the assessment of duty.

In *U. S. v. Hartley*, (1905) 140 Fed. 969, it appeared that certain imported merchandise, covered by an entry embracing three invoices, was all subjected to the same rate of duty, which, it appeared, was excessive as to one of the invoices. In protesting against the rate of duty the importer specified one of the two invoices on which duty was cor-

rectly assessed. It was held that the protest should be considered restricted to the invoice which it specified.

In *U. S. v. Bayersdorfer*, (C. C. A. 1903) 126 Fed. 732, *reversing* 122 Fed. 968, it appeared that an importer filed a protest against the assessment of duty by a collector of customs, claiming therein that the merchandise was either dutiable at a less rate or was free of duty, under certain paragraphs of the dutiable and free lists of the Tariff Act, which he specified in his protest. The board of general appraisers decided that the assessment was erroneous, and that the merchandise should have been classified as free of duty under another paragraph than those cited in the protest, but that the protest should be overruled on the ground that, in not referring to the proper paragraph, it failed to satisfy the requirements of section 14, which prescribes that an importer shall set forth in his protest "distinctly and specifically . . . the reasons for his objections" to the assessment. It was held that this action was correct.

In *Corbitt, etc., Co. v. U. S.*, (1907) 153 Fed. 648, it appeared that goods which should have been classified free of duty under a paragraph relating to "jute bagging" were asserted in the importers' protest to be free under a paragraph relating to "burlaps," and there was no suggestion that the importers at the time of filing the protest had in mind the former provision. It was held that the protest did not set forth the importers' objections "distinctly and specifically," within the meaning of section 14.

Where an importer protests against the assessment of duty on the ground of an alleged application of the similitude clause of the Tariff Act, unless the protest contains reference to said provision it is not sufficiently distinct and specific to meet the requirements of section 14. *U. S. v. Dearberg*, (C. C. A. 1905) 143 Fed. 472, *reversing* (1904) 135 Fed. 245.

A protest referring to "hats made from so-called artificial silk" cannot be construed as relating to hats made from real horsehair. *U. S. v. Wanamaker*, (1910) 175 Fed. 900, 99 C. C. A. 390, *reversing* (1909) 169 Fed. 664.

In *Rosenberg v. U. S.*, (1906) 146 Fed. 84, it appeared that certain imported merchandise was erroneously classified as wool wearing apparel, instead of as manufactures in chief value of fur. The importers, in protesting against the classification, stated as reasons for their objection merely that the merchandise was "dutiable at the appropriate rate and under the proper paragraph according to the component material of chief value." It was held that this did not meet the requirement of section 14 that an importer in protesting shall set forth "distinctly and specifically . . . the reasons for his objections."

Certain importers, in protesting against the assessment of customs duty, based their objections on an inapplicable paragraph of the Tariff Act, but named the correct rate of duty, it happening that the rate provided in

said paragraph was the same as in the paragraph that should have been referred to in the protest. There was nothing in the terms of the protest to direct the attention of the collector of customs to the proper paragraph or to suggest that the importers had inadvertently referred to the wrong paragraph and had intended to refer to the right one. It was held that the protest was not sufficiently distinct and specific. *U. S. v. Fleitmann*, (1905) 137 Fed. 476, 69 C. C. A. 624, *affirming* (1904) 131 Fed. 396.

*Construction of protest.*—In *U. S. v. Bayersdorfer*, (C. C. A. 1903) 126 Fed. 732, *reversing* 122 Fed. 968, it appeared that the Board of General Appraisers had before it several protests relating to the classification of certain merchandise, one of which stated objections to the collector's assessment that were not stated in the other protests. It was held that the presence of the former protest was of no moment as affecting the construction of the latter protests.

*Time for lodging.*—This section, permitting protests against decisions of collectors of customs to be filed "within ten days after but not before" liquidation of the entries, fixes definitely the time within which a protest must be filed; and, if not filed within this period, a protest is invalid. *U. S. v. Wyman*, (1907) 156 Fed. 97, 84 C. C. A. 128.

In *Sogbel v. Robertson*, (1893) 126 Fed. 577, it appeared that at the time of the original liquidation of duty on an importation of merchandise, the importers failed to protest against the exaction of duty on certain charges; but later, on the reliquidation of the entry solely to include a damage allowance, they filed a protest against the duty on the charges, which had not been affected in any way by the reliquidation. It was held that the protest was within the requirement of section 2931, R. S. U. S. [repealed by Act of June 10, 1890, sec. 29, 2 Fed. Stat. Annot. 935] that protests against excessive exactions of duty shall be filed "within ten days after the ascertainment and liquidation of the duties."

Where, under instructions of the Secretary of the Treasury, and upon due notice to the importers, an entry of imported merchandise was tentatively liquidated, while the final liquidation was held in abeyance over a year, pending the possibility of a change of rates, it was held that the final liquidation was the liquidation within ten days after which the importers might legally file a protest. *U. S. v. Franklin Sugar Refining Co.*, (1905) 137 Fed. 677.

In *Frost v. Saltonstall*, (1887) 129 Fed. 481, it appeared that notice was posted in a custom house that it would be closed June 17th—a holiday observed by local custom, but not established by law. Certain importers having notice of the closing of the custom house on that day, which was the tenth day after the liquidation of their entry, filed a protest on the day following. It was held that the protest was filed in accordance with the requirements of R. S. sec. 2931, providing that protests shall be made within ten days

after the ascertainment and liquidation of the duties.

For the purpose of ascertaining the date for filing protests, importers are bound to take notice of the dates given in the liquidation bulletin publicly posted as prescribed by the customs regulations; and, in case of a conflict between the bulletin and notations on the entry, they should be governed by the former. *U. S. v. Wyman*, (1907) 156 Fed. 97, 84 C. C. A. 123.

*Pay duty as well as file protest.*—In *U. S. v. Tiffany*, (C. C. A. 1906) 151 Fed. 473, *reversing* (1905) 137 Fed. 971, it appeared that a collector of customs reliquidated the duty on imported merchandise at an increased rate, and brought an action for the amount thus becoming due. The importers defended on the ground that the rate assessed was illegal. It was held that questions as to rate could not be raised in such proceedings; that the Board of General Appraisers was created as a special tribunal having, subject to review by the courts, exclusive jurisdiction over controversies as to the rate of duty on importations; that the importers' only remedy was to pay under protest the duties found due by the collector; and that unless they did this the collector's decision was "final and conclusive," as provided in said section.

*Amendment of protest.*—In *U. S. v. Bayersdorfer*, (C. C. A. 1903) 126 Fed. 732, *reversing* 122 Fed. 968, it appeared that in appealing from a decision of the Board of General Appraisers, an importer set forth in his petition a claim based on a paragraph of the Tariff Act not referred to in his protest filed with the collector and passed on by said board. It was held that this was not permissible.

*Waiver of defect.*—On appeal by the United States from a decision of the Board of General Appraisers, which reversed the assessment of duty by a collector of customs, where no statement of error was made by the appellant in regard to the sufficiency of the protest on which the proceedings before said board were based, it was held that this fact constituted a waiver by the United States of an alleged defect in the protest. *U. S. v. Brown*, (1903) 127 Fed. 793, 62 C. C. A. 473, *affirming* 121 Fed. 605.

*Abandonment of protest.*—Where importers abandoned protests before the Board of General Appraisers without taking testimony, it was within the sound discretion of the board to refuse to reopen the cases or restore them for hearing; and on appeal to the Circuit Court the importers were not entitled to introduce further evidence. *Strohmeyer, etc., Co. v. U. S.*, (1910) 180 Fed. 636.

*Duty of collector to transmit protest.*—It is a breach of duty for a collector of customs to refuse to forward to the Board of General Appraisers protests which have been filed under section 14, and for this breach the protestant is entitled to damages. *Kendall v. Lyman*, (1908) 161 Fed. 652.

But a collector of customs is not liable to importers for the failure of his predecessor to send the importers' protests to the Board

of General Appraisers. *Gulbenkian v. Stranahan*, (1907) 158 Fed. 838.

**Damages for failure to forward protest.**—Only nominal damages are recoverable for a breach of the duty of a collector of customs to forward an importer's protest to the Board of General Appraisers, where the breach is technical, and actual damage has not been sustained. *Kendall v. Lyman*, (1908) 161 Fed. 652.

**Liability of government for delay in forwarding protest.**—Where there was a delay of several years by customs officers in forwarding an importer's protests to the Board of General Appraisers for decision, and during this period the value of the importer's evidence became impaired, it was held that no right against the government arose by reason of this delay, particularly when not intentional or negligent. *Franklin Sugar Refining Co. v. U. S.*, (1907) 153 Fed. 653.

**Jurisdiction.**—The jurisdiction of the Circuit Courts of the United States in respect to customs duties is concurrent with that given to the Board of United States General Appraisers. *U. S. v. Johnson*, (1906) 145 Fed. 1018.

The Board of General Appraisers, under the authority given in this section to "examine and decide the case" submitted to it by a collector of customs, is required first of all to determine its jurisdiction, including the validity of the protest. *U. S. v. Brown*, (1903) 127 Fed. 793, 62 C. C. A. 473, affirming 121 Fed. 605.

The Board of General Appraisers has jurisdiction over cases relating to the exaction of fees on packed packages, though no entry of such packages may ever have been made at the custom house. *U. S. v. American Express Co.*, (1907) 154 Fed. 996.

**Surrender of jurisdiction once acquired.**—Where a board of three general appraisers has, as provided in section 14, acquired jurisdiction over a case through the transmission by the collector of the papers in the case, it is then the duty of that board to "examine and decide the case thus submitted," as prescribed by said section; it may not afterward surrender its jurisdiction to another board; and a rule adopted by the general appraisers is invalid which, in order to prevent conflicting decisions, provides for the transfer of a case from one board to another when the majority of all the general appraisers is of opinion that a proposed decision in the case by one board conflicts with a previous decision. *Prosser v. U. S.*, (C. C. A. 1907) 158 Fed. 971, reversing 154 Fed. 721.

**Evidence.**—In *Knauth v. U. S.*, (1907) 155 Fed. 144, the Board of General Appraisers admitted as evidence in a case testimony taken previously in another case. This was done over the objection of counsel, who had not appeared in the previous case nor had opportunity of cross-examining the witnesses therein; and the articles involved in the two cases were not shown to be the same. It was held that such evidence should not have been admitted.

**Decision in conflict with previous court decision.**—Where there is conflict between a

decision of the Circuit Court on appeal from the Board of General Appraisers, and a subsequent decision of the board, the Secretary of the Treasury should give greater consideration to the decision of the court. (1903) 25 Op. Atty-Gen. 81.

**How far binding on Treasury Department.**—The Secretary of the Treasury and collectors of customs are bound by classification decisions of the Board of General Appraisers, when unappealed from, only so far as such decisions affect the goods immediately before the board for classification. (1903) 25 Op. Atty-Gen. 81.

**Default on hearing of appeal—waiver by government.**—Where importers who failed through inadvertence to appear on the hearing of an appeal taken by them to the Board of General Appraisers, which entered a default, and affirmed the action of the collector, afterward applied for and obtained an order from the Circuit Court directing further testimony to be taken, and the government made no objection to such order, and appeared pursuant thereto, and cross-examined the witnesses, it waived the right to raise the objection thereafter that the appellants were concluded by the default before the board of appraisers. *In re Myers*, (1903) 123 Fed. 952.

**"Decision" of collector.**—Under this section which confers upon the Board of General Appraisers power to review decisions of the collector, it has been held that the board had jurisdiction to review the action of the collector in reliquidating an entry although it was done pursuant to an order of the Secretary of the Treasury. *U. S. v. Beebe*, (1903) 122 Fed. 762, 58 C. C. A. 562.

**Correction of decision.**—In *U. S. v. Leeming*, (1907) 153 Fed. 489, it appeared that two months after a reappraisal decision had been made by a Board of General Appraisers, the board amended it in order to correct an error. It was held that the correction was illegal.

**Suspension of trial until payment of duties.**—In an action against an importer for unpaid duties, the Circuit Court has ample power to suspend the trial until the importer, by payment of the duties assessed, may put himself in position to try the question as to classification of the goods before the Board of General Appraisers. *U. S. v. Tiffany*, (1907) 153 Fed. 969, 83 C. C. A. 81; *U. S. v. Tiffany*, (1907) 154 Fed. 740.

**Mere delay in the payment of duties on imported merchandise does not deprive the Board of General Appraisers of power to pass upon the question of the proper classification of imported merchandise under this section, where a protest has been filed within the time prescribed in said section.** *U. S. v. Tiffany*, (1907) 154 Fed. 740.

**Recovery of duties in Court of Claims.**—Where importers had failed to proceed for the recovery of excessive duties by filing protests, and thus securing a decision by the Board of General Appraisers, as provided by this section, it was held that they were precluded from recovery in the Circuit Court as a Court of Claims under the Tucker Act

(Act of March 3, 1887, ch. 359, 24 Stat. L. 505, 2 Fed. Stat. Annot. 80). *Gulbenkian v. U. S.*, (1909) 175 Fed. 860.

**What constitutes record.**—Reappraisal proceedings under section 13 are separate and distinct from protest proceedings under section 14, and where the legality of a reappraisal is challenged by proceedings under the latter section, the entire reappraisal record does not become a part of the record in the latter proceedings, unless expressly admitted. *Harris v. U. S.*, (1910) 177 Fed. 475.

**Custom house error.**—In *U. S. v. Wyman*, (1907) 156 Fed. 97, 84 C. C. A. 123, it appeared that by a custom house error the date of liquidation was stated in an entry as being later than it was in fact, and a representative of the importer was thereby misled; but the correct date was given in both a notice sent to the importer and the liquidation bulletin posted for inspection by importers. It was held that the error did not have the effect of extending the period for filing protests, prescribed by section 14.

**Conclusiveness of findings.**—Findings of the Board of General Appraisers, unless unsupported or against the weight of evidence, or additional evidence has been taken, will not be disturbed by the courts on appeal. *Vandiver v. U. S.*, (1907) 156 Fed. 961, 84 C. C. A. 522.

**Conclusiveness of reliquidation.**—A reliquidation of duties by a collector, like an original liquidation, is conclusive on the owner or importer under section 14, unless notice of objection is given within ten days. *U. S. v. Mexican International R. Co.*, (1907) 151 Fed. 545, 81 C. C. A. 61.

**Illegal reappraisal not conclusive.**—To the general rule that an reappraisal by the local appraiser is final and conclusive, unless revived by reappraisal proceedings, there is an exception in case the appraiser proceeded on a wrong principle, as by advancing the value of merchandise not examined by him. In such case the importer may pursue the remedy prescribed in this section. *U. S. v. Beer*, (C. C. A. 1906) 150 Fed. 566, *affirming* (1906) 142 Fed. 199.

**Mandamus of general appraisers.**—In the event that a Board of General Appraisers, after acquiring jurisdiction of a case under this section, refuses to "examine and decide," as prescribed in said section, an importer would be entitled to apply to the proper court for a mandamus to require the board to exercise its jurisdiction. *Prosser v. U. S.*, (C. C. A. 1907) 158 Fed. 971, *reversing* 154 Fed. 721.

**Duty on repairs—review of assessment by general appraisers.**—The action of a collector of customs in assessing duty on the cost of repairs of vessels, as provided in R. S., sec. 3114, 2 Fed. Stat. Annot. 763, is subject to review by the Board of General Appraisers, under the provisions of this section giving said board jurisdiction to review decisions of collectors of customs "as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and

exactions of whatever character (except duties on tonnage)." *U. S. v. Geo. Hall Coal Co.*, (1905) 134 Fed. 1003, *affirmed* (C. C. A. 1906) 142 Fed. 1039.

**Duty of collector to reliquidate.**—Where, under this section, the Board of General Appraisers sustains an importer's protest against the assessment of duty by a collector of customs, it becomes the duty of the collector to reliquidate the entry in accordance with the board's decision. *U. S. v. Dickson*, (C. C. A. 1905) 139 Fed. 251, *affirming* (1904) 131 Fed. 573.

**Finality of assessment.**—In an action by a collector of customs against an importer for a balance of duties found due on reliquidation of an entry, it was held that the importer could not defend on the ground that the assessment was incorrect, because section 14 provides that the decision of the collector shall be final and conclusive against the importer, unless reviewed by the Board of General Appraisers. The importer could seek his remedy for erroneous assessment only through the method prescribed in said section, which requires that the duties shall be paid under protest and the matter brought before the Board of General Appraisers for decision. *Louisville Pillow Co. v. U. S.*, (C. C. A. 1906) 144 Fed. 386.

A reliquidation has all the validity of the original liquidation, and, when made, becomes the liquidation in lieu of the original, and must be treated as such, under this section, providing that protests against the assessment of duty must be filed within ten days after "liquidation." *Louisville Pillow Co. v. U. S.*, (C. C. A. 1906) 144 Fed. 386.

**Action in court for recovery bars appeal to general appraisers.**—In an action by importers against the collector of customs, in a Circuit Court, for the recovery of excessive duties, a verdict was directed for the importers for a part of the claims made, and against them for the remainder, judgment being rendered and satisfied on that basis. It was held that the entire matter thus became *res adjudicata*, and the importers could not by subsequent proceedings before the Board of United States General Appraisers have a further recovery on the merchandise as to which said verdict had been adverse. *U. S. v. Johnson*, (1906) 145 Fed. 1018.

**Voluntary satisfaction of protest by collector.**—In *Gulbenkian v. Stranahan*, (1907) 158 Fed. 836, it appeared that a collector of customs sustained an importer's protest against the assessment of duty, instead of transmitting the protest to the Board of General Appraisers for decision, under section 14. It was held that the provisions of the Act were as well complied with by this action as they would have been by transmission of the case to the board.

**Protest against tentative liquidation.**—Where an importer filed a protest against a tentative liquidation of an entry, it was held that this action did not preclude him from filing another protest against the final liquidation subsequently, regardless of whether at the time of making the first protest he regarded the first liquidation as final, and not

tentative. *U. S. v. Franklin Sugar Refining Co.*, (1905) 137 Fed. 877.

**Review of finding of fact.**—In *Neresheimer v. U. S.*, (1904) 136 Fed. 86, 68 C. C. A. 654, *reversing* (1903) 131 Fed. 977, findings of fact by a Board of General Appraisers were

reviewed by the court on appeal, where it appeared that the decision was made by general appraisers who did not hear the testimony, which was all taken before another general appraiser, who did not himself sign the decision.

## Vol. II, p. 627, sec. 15.

**Amendment.**—This section was amended by Act of May 27, 1908, ch. 205, 35 Stat. L. 403, 1909 Supp. Fed. Stat. Annot. 109.

**Time for filing applications for review.**—The provision in this paragraph that applications for review of decisions of the Board of General Appraisers should be filed "within thirty days next after such decision, and not afterwards," is mandatory; and a delay of one day beyond the period prescribed is as fatal as a longer period. An application filed after thirty days must be dismissed for want of jurisdiction. *Carriere v. U. S.*, (1908) 163 Fed. 1009.

**Finding of fact.**—On appeal from the Board of General Appraisers the Circuit Court should not disturb the board's findings on doubtful questions of fact, especially as to questions which turn upon the intelligence and credibility of witnesses produced before the board. *Balaban v. U. S.*, (1909) 174 Fed. 832. *Compare U. S. v. Proctor*, (C. C. A. 1906) 145 Fed. 126, *affirming* (1905) 139 Fed. 586.

Where, on appeal from a classification for duty, the testimony as to the commercial designation of the article was not only conflicting, but so closely balanced as to render it difficult to say on which side the weight of evidence lay, it was held that the finding of the board of appraisers on such issue would not be disturbed. *Gabriel v. U. S.*, (C. C. A. 1903) 123 Fed. 296.

The rule that, in reviewing decisions of the Board of General Appraisers under section 15, courts should not disturb the board's findings on doubtful questions of fact, does not extend to a case where there is no express evidence or express finding on the subject. *Gallenkamp v. Wyman*, (1906) 178 Fed. 460.

A finding of the Board of General Appraisers upon legitimate evidence will not be reversed, where the sole substantial statement relied upon for reversal consists of an informal acknowledgment made by a foreign merchant. *Baldwin v. U. S.*, (1905) 139 Fed. 1005.

**Effect of failure to give evidence before appraisers.**—The importers, in a protest case pending before the Board of General Appraisers, having failed, after due notice, to introduce the evidence necessary to sustain their contention, the board thereupon overruled the protest, and the importers appealed to the Circuit Court. It was held that the decision of the board should be affirmed, though it appeared that the contention of the importers was correct. *Donat v. U. S.*, (1900) 124 Fed. 463.

**Sufficiency of petition.**—Under this section prescribing that petitions for review of

decisions of the Board of General Appraisers shall contain "a concise statement of the errors of law and fact complained of," a petition alleging that imported merchandise should have been held to be covered by a certain paragraph of the free list of a Tariff Act is not sufficient when in fact the merchandise comes within another paragraph of such list. *Vandegrift v. U. S.*, (1907) 154 Fed. 923.

**Evidence—Competency.**—Though this section makes competent evidence admitted by the board, the court may attach very slight weight to such evidence. *Knauth v. U. S.*, (1907) 155 Fed. 144.

**Ex parte evidence.**—There is no provision for any relaxation of the ordinary rules of evidence in taking proofs before United States general appraisers, and *ex parte* affidavits are not admissible before a general appraiser sitting as referee for the introduction of evidence in the Circuit Court as provided in section 15. *White v. U. S.*, (1896) 154 Fed. 175; *U. S. v. Zucca*, (1909) 175 Fed. 578.

**Additional evidence.**—Where importers appeared before the Board of General Appraisers and submitted their protests, without introducing any evidence in support of their allegations, it was held that on appeal to the Circuit Court they would not be allowed to introduce any evidence. *Allen v. U. S.*, (1904) 127 Fed. 777; *Plummer v. U. S.*, (C. C. A. 1908) 166 Fed. 730, *affirming* (1907) 160 Fed. 284.

The rule that no evidence may be introduced on appeal from the Board of General Appraisers by the importer, where he offered none before the board, has been held to apply even though he failed to receive the board's notice of hearing, where the failure was due to his own fault. *Maurer v. U. S.*, (1907) 160 Fed. 228.

The court will permit the importer to introduce evidence on the appeal, if it appears that it was not the importer's fault that the evidence was not presented to the board. *Cowl v. U. S.*, (1900) 124 Fed. 475.

An importer is not precluded from introducing new evidence in the Circuit Court, on appeal from the Board of General Appraisers, if he introduced some new evidence before the board. *Mendelson v. U. S.*, (C. C. A. 1907) 154 Fed. 33, *reversing* (1906) 146 Fed. 78; *Wolff v. U. S.*, (1909) 168 Fed. 970.

Where a decision of a collector of customs as to the dutiability of imported merchandise is under review by the Board of General Appraisers or the courts, his findings of fact, when based on no other evidence than that afforded by the articles themselves, may be reversed without any further evidence. The

collector, the board, and the courts are all equally entitled to avail themselves of such information as may be derived from an inspection of the articles in connection with the facts of common knowledge and experience, of which judicial notice may be taken. *U. S. v. Strauss*, (C. C. A. 1905) 136 Fed. 185.

**Objection to additional evidence — when taken.** — On appeal from the Board of General Appraisers, under this section, the importers had taken some evidence in the Circuit Court, when the government objected to the introduction of further evidence because none had been offered before the board. It was held that the fact that this objection might have been raised at an earlier stage of the proceedings did not estop the government from relying on it when raised. *Plummer v. U. S.*, (C. C. A. 1903) 166 Fed. 730, *affirming* (1907) 160 Fed. 284.

**Further cumulative evidence.** — Importers should present to the Board of General Appraisers all the evidence which they can produce, and on appeal to the Circuit Court little weight should be given additional cumulative evidence which could easily have been laid before the board. *Bromley v. U. S.*, (1907) 154 Fed. 399.

**Excluded evidence.** — Under section 15, where it is desired that evidence excluded by the Board of General Appraisers should, on appeal to the Circuit Court, be passed on by the court, it is requisite either that an exception should be taken to the board's ruling excluding the evidence, and the matter brought before the court in the assignments of error, or that the evidence should be offered as additional evidence in the manner provided in said section. *Harris v. U. S.*, (1910) 177 Fed. 475.

**Hearing de novo.** — Under this section a Circuit Court has power, on appeal from a decision of the Board of General Appraisers, to direct additional testimony to be taken and to hear the case *de novo*; and this may be done notwithstanding the entry of a default against the importers, who were the appellants, by the Board of Appraisers, where such default has been waived. *In re Myers*, (1903) 123 Fed. 952.

**Assignments of error.** — On appeal from the Board of General Appraisers the Circuit Court will not consider whether a protest decided by the board was sufficient, unless the question of insufficiency is raised by the assignment of errors. *U. S. v. Hempstead*, (1910) 180 Fed. 956.

In *U. S. v. Hempstead*, (1910) 180 Fed. 956, on an appeal from the Board of General Appraisers, error was assigned on the point that the board had erred in holding the merchandise in question to be free of duty. It was held that this assignment related to the merits, and was not sufficiently comprehensive to include the point of the sufficiency of the protest passed on by the board.

On appeal from the Board of General Appraisers an importer made eight assignments, in none of which was the point ultimately relied upon referred to more specifically than by two general assignments — that the board had erred "in overruling the protests" and

"in not sustaining the protests." It was held that as the protests did not contain the point relied upon, there had been a sufficient compliance with the requirement in section 15, of "a concise statement of the errors of law and fact complained of." *U. S. v. Loewenthal*, (1909) 175 Fed. 777, 99 C. C. A. 349.

In *U. S. v. Hatters' Fur Exch.*, (1907) 153 Fed. 595, it appeared that the board sustained the more favorable of the two alternative contentions made in an importer's protest. The government appealed to the Circuit Court, asserting in the assignment of errors that the board's decision was erroneous, and that the merchandise should have been held to have been properly assessed. It was held that the court might decide the merchandise to be dutiable in accordance with the importer's alternative contention, notwithstanding the absence of a specific assignment on that point by the government.

In making the assignments of error, on appeal from a decision of the Board of General Appraisers, under section 15, an importer omitted from his specific assignments a reference to the provision of law under which his merchandise should have been classified, though such provision had been referred to in his protest, which was passed on by the board; but he added a general assignment that "the protest should be sustained and the collector's decision reversed." It was held that said general assignment did not raise any questions additional to those raised by the specific assignments, and that it did not, by referring to the protest, have the effect of making the protest a part of the petition so as to remedy the omission of the correct contention. *Vandegrift v. U. S.*, (1907) 154 Fed. 923.

In *U. S. v. Brown*, (1903) 127 Fed. 793, 62 C. C. A. 473, *affirming* 121 Fed. 605, it appeared that on an appeal from a decision of the Board of General Appraisers, a statement of twenty-one errors was made, nineteen of them relating to the merits, while the last two were general, alleging only that the "board erred as a matter of law." It was held that these two assignments should be construed with reference to the preceding nineteen, and not as raising the question of the validity of the protest on which the proceedings before the board were based; it was held also that statements so general in form were not in compliance with the requirements for appeals under this section wherein "a concise statement of the errors of law and fact complained of" is prescribed.

**Amendment of assignments of error.** — On appeal from a decision of the Board of General Appraisers under this section, in which the time for taking further evidence has expired and which has come to trial in the Circuit Court, the assignments of error may not be amended. *Vandegrift v. U. S.*, (1907) 154 Fed. 923.

**Shifting membership in board of general appraisers.** — On review of a decision of the Board of General Appraisers the regularity of the board's procedure may not properly be challenged on the ground of the presence or absence of different general appraisers while

the testimony is being taken. *U. S. v. Pierce*, (1905) 140 Fed. 962, *affirmed* (C. C. A. 1906) 147 Fed. 199.

**No evidence against classification of appraisers.**—Where, on appeal from the decision of the Board of General Appraisers affirming the collectors' classification of imported merchandise, there is no evidence to overthrow the classification, the decision of the board must stand. *Bailey v. U. S.*, (1903) 122 Fed. 751.

**Taking testimony beyond jurisdiction of court.**—Where a referee has been appointed by the Circuit Court to take further testimony on appeal from the Board of General Appraisers, under this section, the court is without authority to direct the referee to take testimony beyond its territorial limits, irrespective of the referee's willingness to go. *Nordlinger v. U. S.*, (1900) 174 Fed. 833.

**Return of record.**—The provision in this section that on appeal to the Circuit Court the Board of General Appraisers shall return "the record and the evidence taken by them," does not require the return of evidence which was excluded. *Harris v. U. S.*, (1910) 177 Fed. 475.

**Weight given opinions of general appraisers.**—The opinions of experts like the General Appraisers, who are especially familiar with such controversies, should in close cases be given considerable weight by the courts in reviewing decisions of the Board of General Appraisers. *U. S. v. Leigh*, (1908) 159 Fed. 314.

## Vol. II, p. 630, sec. 19.

**Remedies are exclusive.**—Under this and the preceding sections, containing a system for the correction of errors in the exaction of import duties, and providing that when the duty on imported merchandise is based on the value thereof the duty shall be assessed on the actual market value or wholesale price in the principal markets of the country from whence imported, an importer of wool subject to a duty under Schedule K, dividing wool into classes and fixing a duty based on valuation, must conform to the statutory method, on the appraiser's increasing the valuation over the amount stated in the invoice, and thereby subjecting the importer to a higher duty, and where he fails to take the requisite steps to secure a correction of the errors. If any, the decisions of the appraisers and collector as to value, classification, rate, and amount are final, and the importer may not recover excessive duties paid. *Gulbenkian v. U. S.*, (C. C. A. 1911) 186 Fed. 133, *affirming* (1909) 175 Fed. 860.

**Apportionment of cost of coverings.**—This section provides no method for apportioning the cost of the coverings when they contain merchandise of different kinds. In *Rice v. U. S.*, (1892) 123 Fed. 195, it was held that such method of apportionment must be adopted as seems most equitable and just, and that with regard to hosiery in lots of different values, contained in the same outside cases, where each dozen of the hosiery

**Rulings in other circuits.**—In suits of the character of customs litigation, uniformity in the judgments of the courts of first instance, as well as in those of the appellate tribunals, is desirable, and where no direct attack has been made upon a prior adjudication by a Circuit Court of the questions subsequently sought to be raised in a similar suit in the Court of Appeals in another circuit, such prior adjudication should be followed, unless clearly erroneous. *Hill v. Franklyn*, (1908) 162 Fed. 880, 89 C. C. A. 570.

**Burden of proof.**—Where an importer challenges by legal proceedings the correctness of the assessment of duty by a collector of customs, the question to be decided is not whether the collector was wrong, but whether the importer is right, and therefore the burden is on him to establish the correctness of his contention. *Legg v. U. S.*, (C. C. A. 1908) 163 Fed. 1006, *affirming* (1907) 154 Fed. 858.

**Review of findings when record incomplete.**—Where, on review by a Circuit Court of a decision of the Board of General Appraisers, under this section, the record returned by the board was defective by reason of the loss of the evidence on which the board's findings were based, it was held that no other evidence being presented, it must be conclusively presumed that the findings by the board were proper and justifiable. *Schoellkopf v. U. S.*, (1906) 147 Fed. 855.

occupied about the same space, the cost of the cases should be distributed among the different lots according to the number of dozens of the hosiery, and not according to value.

Under this section it has been held as to importations of goods in bottles, which are dutiable under one provision of the Tariff Act and the bottles under another, that the value of the cases containing the goods should be distributed between the bottles and their contents according to the value of each, the value of the bottles for this purpose being inclusive of the cost of their fittings, consisting of corks, caps, capsules, labels, and wiring. *Leggett v. U. S.*, (1905) 138 Fed. 970.

**Presumption as to inclusion of coverings.**—A reappraisal return by a Board of General Appraisers as to the value of imported chocolate failed to state whether the value of the coverings was included in the value stated in the return. It was held that under this section it should be presumed that such value was included, notwithstanding that paragraph 281 provides that the dutiable value of chocolate shall not include the value of plain wooden coverings. *U. S. v. Leeming*, (1907) 153 Fed. 489.

**Converters' commissions.**—Under this section requiring appraised value to include, besides coverings, etc., "all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States," an invoice item described as a "converter's commission" was

so included. It was held that this inclusion was proper, so far as it covered converters' services in having the goods dyed and finished, and in the absence of evidence to the contrary it would be presumed to be correct as to any other elements of the item. *Erlanger v. U. S.*, (C. C. A. 1907) 164 Fed. 949, *affirming* 152 Fed. 576.

**Excessive invoice value.**—The provisions in sections 7, 19, that "duty shall not . . . be assessed . . . upon less than the invoice . . . value," and that "duty shall be assessed upon the actual market value . . . at the time of exportation," when construed together, mean that the dutiable value shall in no case be fixed at less than the purchase price of the goods; and where subsequently to the purchase of goods for import to the United States the market value of such goods decreases, the goods are nevertheless dutiable on the basis of the price paid. *Ullmann v. U. S.*, (1910) 177 Fed. 567.

**Market value.**—In *U. S. v. Downing*, (1904) 131 Fed. 653, *affirmed* (C. C. A. 1905) 139 Fed. 1, 3, it was held in regard to merchandise imported from France, that its "market value," as defined in this section, does not include the amount of certain internal revenue imposts of that country known as the "octroi tax" and the "droit de ville," which are not general in their application, but vary with the locality, and which are not collected if the merchandise is exported.

**"Condition."**—Where practically all the output of a china manufacturer was sold to the United States, it was held that special classes manufactured for European trade could not be said to be in "condition" to supply the American trade, within the meaning of section 19, providing that dutiable value shall be determined according to the "condition in which . . . merchandise is there bought and sold for exportation to the United States." *U. S. v. Haviland*, (1909) 167 Fed. 414, *affirmed* (1910) 177 Fed. 175, 100 C. C. A. 637.

**Principal market.**—In *U. S. v. Haviland*, (1909) 167 Fed. 414, *affirmed* (1910) 177 Fed. 175, 100 C. C. A. 637, it appeared that the entire output of a china manufacturer in Limoges was exported to the United States directly from Limoges, except a small amount of special classes, which was disposed of in Paris to European trade; the wholesale business in Paris being less than four per cent. of said exportations to the United States. It was held that for the goods shipped to America, Limoges, and not Paris, was the "principal market," within the meaning of section 19.

**Mixed wools purchased at same price.**—In *Gulbenkian v. U. S.*, (1907) 153 Fed. 858, 83 C. C. A. 40, it appeared that white and colored wools were sold together in the Bagdad market at one price, without any distinction as to color; this being in accord with immemorial practice in that market. It was held that in finding "the actual market value . . . in the principal markets of the country whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United

States," under section 19 both kinds of wool should be appraised at the same price, in accordance with the manner of purchase, without regard to any difference in value which may attach to each kind in any other country.

**Unusual coverings — Duties additional.**—The "additional duty" provided for in this section for unusual coverings is not a substitute for the usual duty on coverings which accrues by including their cost in the dutiable value of their contents, as also provided in this section; but both duties should be imposed, the latter because the coverings subserve a use in transportation, and the former because they subserve an additional use after transportation. *U. S. v. Park*, (C. C. A. 1907) 152 Fed. 142, *reversing* (1905) 142 Fed. 202.

**Tea caddies.**—Certain patent tin cases or chests known as "Toohey's Patent Excelsior Tea Caddies," which are used as coverings in the transportation of tea, and which, after having subserved that purpose, are used, and are designed to be used, for other purposes, are subject to the additional duty provided in section 19, "for any unusual article or form designed for use otherwise than in the *bona fide* transportation" of merchandise to the United States. *Jackson v. Siegfried*, (1901) 126 Fed. 837.

**Needle cases.**—Furnished needle cases, consisting of books or cases for holding needles during transportation and while the needles in them are being used, are not usual coverings, being used otherwise than in *bona fide* transportation of the needles, within the meaning of this section. *Guthman v. U. S.*, (1906) 148 Fed. 332; *U. S. v. Dieckerhoff*, (C. C. A. 1908) 160 Fed. 449, *affirming* (1907) 151 Fed. 957.

**Cases and similar coverings.**—The provision in this paragraph that the value of "cases . . . and similar coverings" shall be added to the dutiable value of their contents, includes tin cans and stoneware receptacles. *Austin v. U. S.*, (C. C. A. 1909) 171 Fed. 79.

**Filled bottles.**—That part of this section which prescribes that the dutiable value of imported goods subject to an *ad valorem* rate of duty shall include the cost of the coverings, and other expenses incident to preparing the goods for exportation, does not apply to filled bottles containing olive oil, which is subject to a specific duty though filled bottles are specifically enumerated as subject to an *ad valorem* duty in paragraph 99. *Hayes v. U. S.*, (C. C. A. 1906) 150 Fed. 63.

**Gelatin capsules** containing a medicine are not "coverings," within the meaning of the tariff laws, not being for transportation, but an essential part of the article. *U. S. v. Lehn*, (1909) 172 Fed. 171.

**Stone bottles.**—The value of stone bottles filled with *ad valorem* goods (ink) should not be added to the dutiable value of their contents, to make up the dutiable value of the imported merchandise, under section 19, such bottles not being "coverings," within the meaning of the Act. *Kimpton v. U. S.*, (C. C. A. 1909) 171 Fed. 78, *reversing* (1908) 165 Fed. 236.



## Vol. II, p. 632, sec. 20.

**Rate of duty applicable.**—The provision in section 20, that merchandise in bonded warehouses may be withdrawn for consumption "on payment of the duties and charges to which it may be subject by law at the time of said withdrawal," means such payment as the merchandise would be subject to if imported at the time of withdrawal. *Mosle v. Bidwell*, (C. C. A. 1904) 130 Fed. 334, *reversing* (1902) 119 Fed. 480.

**Importations from Porto Rico—Foraker Act.**—In *De Pass v. Bidwell*, (1903) 124 Fed. 615, it was held that section 5 of the Foraker Act, providing a temporary government and revenues for Porto Rico (Act April 12, 1900, ch. 191, 31 Stat. L. 77, 5 Fed. Stat.

Annot. 764), which provides that on and after the day of its taking effect all goods, wares, and merchandise previously imported from Porto Rico, for which no entry has been made, or entered without payment of duty, and under bond for warehousing, etc., shall be subject to the duties imposed by the Act upon the entry or withdrawal thereof, is constitutional; and therefore that goods brought from Porto Rico after its cession, and when there was no duty thereon in force, and voluntarily placed and allowed to remain in a bonded warehouse by the owner until after such Act went into effect, became subject to the duty thereby imposed when withdrawn for consumption.

## Vol. II, p. 632, sec. 22.

**Fees on packed packages.**—Under this section abolishing "all fees exacted . . . upon the entry of imported goods and the passing thereof through the customs," it is not legal to require the payment of a fee on packed

packages to defray the expense of administering the law relating to such packages. *U. S. v. American Express Co.*, (1907) 154 Fed. 996.

## Vol. II, p. 633, sec. 23.

**Measurement of damage.**—In *Courtin v. U. S.*, (1906) 143 Fed. 551, it appeared that for the purpose of ascertaining the percentage of decay in importations of fruit, the importers opened at least one package in ten of the consignments from each shipper; and the percentage thus estimated was assumed to prevail throughout the other packages, and was accepted by the bidders at the auction sales held immediately on the dock. It was held that this method of averaging constituted a reasonably certain and sufficient mode of proof, and should be accepted by the customs officers as a proper basis for making allowance for the decayed fruit.

In *Denunzio Fruit Co. v. U. S.*, (1908) 164 Fed. 909, the evidence as to the amount of decay in imported rotten fruit consisted merely of proof as to the percentage of decay in five per cent. of the packages imported. It was held that as the exact facts relative to the entire importation might have been ascertained, the evidence as to the packages examined should not be extended to the packages not examined.

In proof of the amount of decay in an importation of fruit in packages, evidence was given as to the percentage of decay in certain sample packages which represented each of the lots in question, had been used as the basis of auction sales, and consisted of at least ten per cent. of all the packages. It was held that the percentage thus shown for the sample packages might be taken as showing the amount of decay in the other packages also. *U. S. v. Villari*, (1907) 160 Fed. 77, 87 C. C. A. 233, *affirming* (1906) 147 Fed. 766, on opinion in *Stone v. Shallus*, (1906) 143 Fed. 486, 74 C. C. A. 506.

**Fruit in packages.**—The rule that fruit imported in a rotten and wholly worthless

condition does not constitute dutiable merchandise applies as well to fruit in packages as to fruit in bulk, and in the assessment of duty on fruit imported in packages allowance should be made for the decayed portions. *Stone v. Shallus*, (C. C. A. 1906) 143 Fed. 486, *affirming* (1905) 137 Fed. 674; *Courtin v. U. S.*, (1906) 143 Fed. 551; *U. S. v. Villari*, (1907) 160 Fed. 77, 87 C. C. A. 233, *affirming* (1906) 147 Fed. 766, on opinion in *Stone v. Shallus*, (1906) 143 Fed. 486, 74 C. C. A. 506.

**Rotten fruit condemned by health officers.**—In *U. S. v. Courtin*, (1907) 153 Fed. 594, it appeared that before being unladen, but after being free from customs supervision, certain imported fruit was condemned by local health authorities whenever a considerable portion of any crate appeared to be decayed, and the entire contents of such crates were condemned and required to be dumped in the sea, no portion thereof becoming a subject of commerce within the United States. It was held that such condemned fruit should be treated as a nonimportation, and as not dutiable.

**Breach of bond for return of unexamined packages.**—Breach of a bond given under section 2899 R. S., 2 Fed. Stat. Annot. 679, for the return of goods not examined by customs officials, does not affect the right of the importer to an allowance for damaged merchandise. No other or different penalty is contemplated by the bond or by said section than the damages provided by the bond. *Habicht v. U. S.*, (1909) 171 Fed. 441.

**Time for examination.**—In *Cuccio Di G. v. U. S.*, (1909) 172 Fed. 304, it appeared that an importation of lemons was not entered until six days after arrival, and was not examined until they had lain on the dock for a

week. It was held that as much loss probably occurred by rotting during that period, the loss discovered at such examination was not a sufficient basis for determining the condition of the fruit at the time of importation.

**Goods destroyed before importation.**—Where portions of an importation were so damaged on the voyage as to be entirely valueless, there was nothing left to abandon, under the provision of section 23. *Stone v. Shallus*, (C. C. A. 1906) 143 Fed. 486, *af-*

*firming* (1905) 137 Fed. 674; *Habicht v. U. S.*, (1909) 171 Fed. 441.

In *Villari v. U. S.*, (1906) 147 Fed. 766, the importers in ascertaining the quantity of decay in imported fruit did not avail themselves of the provisions of regulations prescribed by the Secretary of the Treasury under section 23. It was held that they were not obliged to do so, as that section relates to abandonment, and not to cases of allowance for nonimportation, as for fruit worthless on importation.

## Vol. II, p. 634, sec. 24.

**Voluntary payment.**—In *Flint Eddy, etc., Trading Co. v. Bidwell*, (1903) 123 Fed. 200, it was held that the owner of a cargo of sugar brought from the Philippine Islands, who voluntarily paid the duty assessed thereon as imported merchandise, without objection or protest, could not maintain an action against the collector to recover the same on the ground that the sugar was not imported, and the duty was therefore wrongfully and illegally exacted.

**Mistake of law.**—Where excessive customs duties are paid under a mistake of law and without protest, the payment is voluntary and there can be no recovery. *Gulbenkian v. U. S.*, (1909) 175 Fed. 860.

**Clerical error.**—Where, in liquidation, the clerk miscalculated the number of square yards in an imported fabric, it was held that it constituted a "manifest clerical error," within the meaning of section 24. *U. S. v. Vandegrift*, (C. C. A. 1909) 175 Fed. 772, *af-firming* (1908) 166 Fed. 1017.

In *Delapenha v. U. S.*, (1909) 175 Fed. 311, it was held that allowance should have been made in the dutiable value of an importation on the ground of clerical error, where it appeared that the shippers had failed to note on the invoice that the value included certain nondutiable charges.

Inasmuch as this section, relating to the correction of "manifest clerical errors," is the latest deliverance on that subject and relates most specifically thereto, it controls over Act June 22, 1874, ch. 391, sec. 21, 18

Stat. L. 190, 2 Fed. Stat. Annot. 760, relative to the "settlement of duties," and Act March 3, 1875, ch. 136, sec. 1, 18 Stat. L. 469, 2 Fed. Stat. Annot. 729, relative to the "correction of errors in liquidation." *U. S. v. Vandegrift*, (C. C. A. 1909) 175 Fed. 772, *af-firming* (1908) 166 Fed. 1017.

**Reliquidation after one year.**—A manifest clerical error in a liquidation made within one year after original entry cannot be corrected more than one year after such entry, because not within the provision in this section authorizing the Secretary of the Treasury to correct such errors "within one year of the date of such entry," as the term "entry," as here used, refers to the document filed by the importer on entry. *U. S. v. Vandegrift*, (C. C. A. 1909) 175 Fed. 772, *af-firming* (1908) 166 Fed. 1017.

**Acceptance of principal — waiver of interest.**—On the refund of duties that had been improperly exacted, interest was withheld on the ground that there was no appropriation for payment of interest, so that the sum repaid was the exact equivalent of the principal. It was held that the acceptance of this sum by the importer was tantamount to a waiver of the claim of interest, and could not be considered as a general payment on account, which the payee was entitled to apply, first to the extinguishment of the interest, and next to part payment of the principal. *Bidwell v. Preston*, (C. C. A. 1908) 160 Fed. 653.

## Vol. II, p. 636, sec. 30.

**New section.**—See Act of May 27, 1908, ch. 205, sec. 3, 35 Stat. L. 403, 1909 Supp. Fed. Stat. Annot. 111.

## Vol. II, p. 636, sec. 2766.

**Placer gold.**—The word "merchandise," defined in section 2766, includes placer gold. *Six Parcels Placer Gold v. U. S.*, (1904) 8 Ariz. 389, 76 Pac. 473.

## Vol. II, p. 636, sec. 2767.

**"Port of Chicago" defined.**—The statutes of Illinois provide that the city of Chicago shall have jurisdiction over Lake Michigan for a distance of three miles beyond the city limits, and the ordinances of that city give the city harbor master control over lake water

outwardly for the same distance, between the north and south lines of the city. It was held as to certain barges in tow, which had reached a place within these limits, within the outer harbor works, where it was usual for such a tow to be broken up so the barges might be

taken to their separate docks, that they should be considered as in the port of Chicago, for the purpose of fixing the time their cargoes became dutiable, though the arrival

had not been reported at the barge office. *Hartwell Lumber Co. v. U. S.*, (1904) 128 Fed. 306, *affirmed* (C. C. A. 1905) 142 Fed. 432.

## Vol. II, p. 638, sec. 2774.

Open gasoline launch.—See under this title, vol. 2, p. 762, sec. 3097.

## Vol. II, p. 641, sec. 2785.

**Innocent buyer of smuggled merchandise.**—The innocent buyer of smuggled merchandise is under no liability to enter it for the payment of duty. Such payment would not relieve a forfeiture already incurred, nor would failure to pay revive it when once barred. *U. S. v. One Dark Bay Horse*, (1904) 130 Fed. 240.

**Time of entry.**—In *Ellison v. U. S.*, (1905) 136 Fed. 969, *affirmed* (C. C. A. 1906) 142 Fed. 732, it appeared that certain merchandise was imported at the port of New York July 24, 1897, and there entered for immediate transportation to the port of Philadelphia; and before the Tariff Act of that date had become operative the importer sought to enter the merchandise under the Tariff Act of Aug. 27, 1894, ch. 349, 28 Stat. L. 509, and tendered an entry in due form

to the collector at the latter port, which was refused on the ground that the goods had not reached that port. It was held that the action of the collector was justified.

**Refusal of tender—estoppel.**—Where, at the time of tendering entry of merchandise, there is no existing right on the part of the importers to have it accepted, nor duty on the part of the collector of customs to accept, no estoppel against the government arises through the fact that the collector's refusal may have been on wrong grounds, the statement of which may have misled the importers into failing to renew the tender on the proper occasion. *U. S. v. Hartwell Lumber Co.*, (C. C. A. 1905) 142 Fed. 432, *affirming* (1904) 128 Fed. 306.

**Rights of holder of bill of lading.**—See under this title, vol. 2, p. 611, sec. 1.

## Vol. II, p. 641, sec. 2787.

**Amendment.**—This section was amended by Act of March 2, 1906, ch. 1306, 33 Stat. L. 826, 10 Fed. Stat. Annot. 78.

**General bonds of sufficiently large an amount may, in special cases, be lawfully accepted by collectors of customs, in lieu of the special bonds of \$1,000 each required by this section from agents making entries of imported merchandise for others, requiring them to produce the declaration of the owner in every case where goods may thereafter be**

imported without the same during a specified period. (1904) 25 Op. Atty.-Gen. 177.

**Penal bond of agent.**—This section requires collectors of customs to take from an agent or person other than the owner making an entry of imported merchandise, a bond in the penal sum of \$1,000, with condition that the actual owner or consignee of the merchandise shall deliver a full and correct account thereof according to the terms and specifications of that section. (1903) 25 Op. Atty.-Gen. 66.

## Vol. II, p. 642, sec. 2788.

**Rights of holder of bill of lading.**—See under this title, vol. 2, p. 611, sec. 1.

## Vol. II, p. 642, sec. 2789.

**Rights of holder of bill of lading.**—See under this title, vol. 2, p. 611, sec. 1.

## Vol. II, p. 642, sec. 2795.

**Sea stores.**—Under the Navigation Act of March 3, 1897, ch. 389, sec. 17, 29 Stat. L. 691, permitting "sea stores" to be transferred from one vessel to another of the line

without payment of duties, coal is not "sea stores." *U. S. v. Hawley*, (1908) 160 Fed. 734.

## Vol. II, p. 644, sec. 2799.

**Merchandise imported by passenger.**—Congress having prescribed two independent systems of formalities for the importation of personal effects and merchandise not personal effects, each complete in itself, under this

section and the Customs Administrative Act (Act of June 10, 1890, ch. 407, sec. 4, 26 Stat. L. 131, 2 Fed. Stat. Annot. 612), respectively, it could not have been intended that both should be applicable to merchandise which

was imported by a passenger arriving in the United States, but which was not attempted to be concealed by dressing it up as baggage. *U. S. v. One Trunk*, (1909) 174 Fed. 1012.

**False statement as to articles not baggage.**—Inasmuch as articles for sale which accompany a person arriving in the United States are not required to be declared at the same time as the passenger's personal baggage, an intentional misstatement of the value of such articles does not make the articles forfeitable, because the importer was under no obligation to enter them or declare their value at that time, under section 2799, relating to "baggage." *U. S. v. One Trunk*, (1909) 175 Fed. 1012.

## Vol. II, p. 645, sec. 2802.

**Sufficiency of declaration.**—In *U. S. v. One Pearl Chain*, (C. C. A. 1905) 139 Fed. 513, it appeared that a person coming into the United States and having in possession a valuable pearl chain, silk wearing apparel, and other articles, had made a declaration on board the vessel as to certain "wearing apparel, value not known," had proceeded to the portion of the dock adjacent to the vessel that had been roped off for convenient examination of passengers' effects, and was there awaiting opportunity to give the information necessary for completing the entry; but before this opportunity had been given, the pearl chain was seized as illegally imported. It was held that the phrase "wearing apparel," as used in the declaration, was a sufficient mention of the chain within the meaning of section 2802, and that the seizure was illegal.

In *U. S. v. One Trunk*, (C. C. A. 1911) 184 Fed. 317, *affirming* (1909) 171 Fed. 772, it appeared that at the time of the arrival of claimant at the port of New York as a passenger from a foreign country, a Treasury regulation provided that merchandise intended for sale and of the value of \$500 or over could not be examined on the pier, but must be regularly entered at the custom house and appraised. Claimant in her declaration made on landing listed certain articles and "one trunk for public stores;" that being the place where imported merchandise goes for examination and appraisal. Later she filed a regular written entry at the custom house, and with it a duplicate consular invoice of the contents of the trunk, which consisted of dutiable merchandise of over \$500 in value. It was held that the description in the claimant's declaration was sufficient, and that her filing of the invoice at the custom house later was a compliance with R. S. sec. 2802.

A passenger arriving in the United States, on filling out the printed form furnished by the customs officers for the declaration and entry of baggage, struck out the clause referring to the itemized description that is required of the various articles of baggage, and inserted instead a description of the pieces of baggage he had, as consisting of certain numbers of trunks, valises, etc., and said nothing as to what articles were contained therein.

**Jewelry worn upon the person.**—Where a passenger on a steamer purchased a pearl necklace before her departure from Paris, and by reason of its value wore the same about her neck when she made her declaration for duty, instead of having the same among her baggage, and the necklace was visible on her person, it was held to be subject to declaration under the statutes and rules regulating passengers' baggage, and not under the regulations providing for the importation of merchandise. *One Pearl Chain v. U. S.*, (C. C. A. 1903) 123 Fed. 371.

**Merchandise for sale is not baggage within the meaning of this section.** *U. S. v. One Trunk*, (1909) 175 Fed. 1012.

It was held that this was not sufficient to put the customs officers on inquiry as to the dutiable character of the contents of the packages, so as to constitute a sufficient "mention" of the articles, within the requirement of section 2802, that dutiable articles in imported baggage shall be "mentioned" on making the customs entry. *Harts v. U. S.*, (C. C. A. 1905) 140 Fed. 843, *affirming* (1904) 131 Fed. 886.

**Entry after accrual of forfeiture.**—In *U. S. v. One Purple Cloth Costume*, (1907) 158 Fed. 899, it appeared that dutiable articles in the baggage of a person arriving in the United States from abroad became forfeitable under this section because not mentioned to the collector of customs at the time of entry; but before they were seized their owner was permitted to make a lawful entry and pay the proper duty. It was held that such occurrences subsequent to the accrual of the right of forfeiture could not waive such right, nor estop the United States from asserting it.

**Entry of "trunk" covers contents.**—Though a passenger's baggage declaration specifies only a "trunk," without any mention of its contents, it sufficiently complies with section 2802, requiring that if such baggage contains any dutiable article it shall be "mentioned." The specification of the "trunk" is equivalent to mention of its contents. *U. S. v. One Trunk*, (1909) 171 Fed. 772.

**Fraudulent intent is not necessary to a forfeiture.**—Under this section it is not necessary that there should have been an intent to defraud the revenue in order to incur the penalties there prescribed. *U. S. v. Harts*, (1904) 131 Fed. 886, *affirmed* (C. C. A. 1905) 140 Fed. 843.

**Appraisement of forfeited baggage.**—The statute does not contemplate that in an action to enforce the forfeiture or penalty prescribed by this section the court shall be required to make an appraisement of the value of such articles for the purpose of ascertaining what portion would have been entitled to admission free of duty if a proper declaration and entry thereof had been made. *U. S. v. Harts*, (1904) 131 Fed. 886, *affirmed* (C. C. A. 1905) 140 Fed. 843.

**Articles in clothing.**—In *Two Hundred and Eighteen and One-Half Carats Loose Emeralds v. U. S.*, (1907) 154 Fed. 839, 83 C. C. A. 475, it was held that articles in the clothing are "baggage," within the meaning of this section, and that a package of precious stones found in the pocket of a passenger is forfeitable under said provision.

**Misdemeanor when fraudulently done.**—A violation of this section, imposing a penalty where any dutiable article is found in the baggage of a person arriving within the United States, which was not at the time of making entry therefor mentioned to the col-

lector, becomes the misdemeanor denounced by R. S. sec. 3082, 2 Fed. Stat. Annot. 748, when done fraudulently or knowingly. *U. S. v. Chesbrough*, (1910) 176 Fed. 778.

**Applicable to Philippine Islands.**—This section, providing penalties for the failure to make due entry of articles in passengers' baggage, is applicable to articles brought from the Philippine Islands. *Harts v. U. S.*, (C. C. A. 1905) 140 Fed. 843, affirming (1904) 131 Fed. 886.

**Duty of making entry of exempted articles.**—See under this title, vol. 2, p. 499, par. 697.

## Vol. II, p. 645, sec. 2804.

**Release of cigars subject to forfeiture.**—The Secretary of the Treasury may release cigars imported in violation of this section

on payment of a fine equal to the duty, when in his opinion the importation does not involve fraud. (1903) 24 Op. Atty.-Gen. 588.

## Vol. II, p. 647, sec. 2809.

**Remission of fines, penalties, and forfeitures.**—The Treasury Department has jurisdiction of the remission of fines, penalties, and forfeitures imposed by this section and of

the issuing of instructions relating to the execution of sections 2779 to 2784, inclusive. (1905) 26 Op. Atty.-Gen. 535.

## Vol. II, p. 662, sec. 2864.

**Sufficiency of petition.**—The petition in a proceeding by the government for the forfeiture of goods imported into the country contrary to law, which alleged that the goods were imported without being invoiced or entry made with any collector of customs, and without declaration to the proper revenue officer, and that some person fraudulently brought into the country from a foreign country goods which should have been invoiced, declared,

and entered according to the law, with intent to defraud the government, sufficiently charged a violation of section 2851 *et seq.*, providing that all merchandise imported into the country must be invoiced, which invoice shall be produced to the consul, and requiring that a declaration shall be filed with the collector of the port at the time of the entry. *Six Parcels Placer Gold v. U. S.*, (1904) 8 Ariz. 389, 76 Pac. 473.

## Vol. II, p. 664, sec. 2865.

**Acts by importer.**—In *U. S. v. 646 Half-Boxes Figs*, (1908) 164 Fed. 778, it was alleged that an exporter had caused a false and fraudulent invoice to be made out, signed, verified, and left with a consul to be transmitted to the collector of customs at an American port, and had then caused the merchandise covered by the invoice to be shipped to said port; but it was not charged nor shown that he had been concerned in importing the goods. It was held that the case was not brought within section 2865, forbidding any person to "make out or pass, or attempt to pass, through the custom house any false, forged, or fraudulent invoice."

**Elements of offense.**—Where a defendant, having dutiable goods secreted on his person, knowingly passed the customs office at the dock where he entered the United States and ignored three distinct calls of the customs officer before his further progress was arrested and the goods disclosed, when he stated for the first time that he expected to enter the goods at the main custom house, some distance away, instead of at the dock, it was held that a finding that he intended to evade entering the goods or paying the duty

at all, and that he was guilty of smuggling, was justified under the rule that a person becomes guilty of that offense by avoiding the first opportunity given to make a customs' declaration and pay the duty. *Rogers v. U. S.*, (1910) 180 Fed. 54, 103 C. C. A. 408.

**Smuggling** is the actual passage of dutiable goods through the lines of the customs house without paying or securing the payment of the duties thereon. (1903) 24 Op. Atty.-Gen. 583.

**Illegal entry.**—This section does not include a case where merchandise is fraudulently entered at a custom house. *U. S. v. 646 Half-Boxes Figs*, (1908) 164 Fed. 778.

**Indictment sufficient.**—An indictment for smuggling, charging that defendant did "bring into the country clandestinely" certain dutiable goods, was held to be synonymous with the provision of this section making it an offense to "clandestinely introduce" dutiable goods into the country with intent to avoid payment of duty. *Rogers v. U. S.*, (1910) 180 Fed. 54, 103 C. C. A. 408.

An indictment alleging that accused at Sault Ste. Marie, Mich., "did unlawfully, knowingly, and fraudulently import and bring

into the United States certain merchandise, to wit, 3½ yards of black woolen suiting cloth of the value of, to wit, \$10, contrary to law; that is to say, clandestinely and without entering the same at the United States customs office and port of entry with the United States collector of customs . . . and paying the duty

thereon—the same being foreign merchandise subject to an import duty as provided in Act July 24, 1897, ch. 11," 30 Stat. L. 151, was held to sufficiently charge "smuggling," denounced by section 2865. *Rogers v. U. S.*, (1910) 180 Fed. 54, 103 C. C. A. 408.

## Vol. II, p. 664, sec. 1.

**Fees on packed packages.**—See under this title, vol. 2, p. 632, sec. 22, and p. 687, sec. 2926.

## Vol. II, p. 668, sec. 2871.

**Amendment.**—This section was amended by Act of June 30, 1906, ch. 3909, 34 Stat. L. 633, 1909 Supp. Fed. Stat. Annot. 103.

## Vol. II, p. 679, sec. 2899.

**Amount recoverable on bond.**—*U. S. v. Dieckerhoff*, (1906) 202 U. S. 302, 26 S. Ct. 604, 50 U. S. (L. ed.) 1041, *reversing* (1905) 136 Fed. 545, 69 C. C. A. 255, and *affirming* (1900) 103 Fed. 789, set out in the original note.

**Validity of redelivery bond.**—The authority of the collector under this section to require a bond from an importer for double the value of the merchandise imported, to be forfeited for the nonreturn unopened of any package of the invoice upon demand, includes the right to take a less stringent undertaking, such as a bond which provides for the return of any required package unopened or the payment of double its value as a condition of being discharged from the full penalty of the bond. *U. S. v. Dieckerhoff*, (1906)

202 U. S. 302, 26 S. Ct. 604, 50 U. S. (L. ed.) 1041.

**Enforcement of redelivery bond.**—The enforcement of the penalty prescribed in a redelivery bond taken by a collector under the authority of this section for the nonreturn unopened of any required package of an invoice of imported merchandise, is not precluded by the provision of R. S. sec. 961, 4 Fed. Stat. Annot. 604, that in suits to recover the forfeiture annexed to a bond or other specialty where the forfeiture, breach, or non-performance appears by default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff for so much as is due according to equity. *U. S. v. Dieckerhoff*, (1906) 202 U. S. 302, 26 S. Ct. 604, 50 U. S. (L. ed.) 1041.

## Vol. II, p. 680, sec. 2901.

**Framed paintings.**—The provision in this paragraph that if appraisers find in an imported package "any article not specified in the invoice," its value shall be added to the entry, has been held not to apply to an importation of framed paintings invoiced as

"paintings," where it appeared that the invoice value was sufficient to include the frames, and that it was customary so to describe paintings with frames. *U. S. v. Hensel*, (1906) 158 Fed. 645.

## Vol. II, p. 684, sec. 2910.

**Different values subject to same rate of duty.**—In an importation of a number of crates of glassware which were consolidated on one invoice at a lump sum, where the several crates were of different values, but chargeable with the same rate of duty, it was held that the assessment of duty should not be made upon the basis of the highest

valued goods, but that all the glassware was chargeable with the same rate of duty, and similarly with regard to a number of cases of pickles imported at the same time which were also placed on one invoice though of different values, but subject to the same rate of duty. (1907) 26 Op. Atty-Gen. 119.

## Vol. II, p. 684, sec. 2912.

**Application of rule.**—This section applies where it does not appear that the wool was mixed for the purpose of obtaining a lower rate of duty. If such purpose is shown, the

case is brought within the provisions of Schedule K, paragraph 356. *Stone, etc., Co. v. U. S.*, (1906) 147 Fed. 603.

**Vol. II, p. 687, sec. 2926.**

**Modification of section.**—Act May 1, 1876, ch. 89, 19 Stat. L. 49, 2 Fed. Stat. Annot. 664, permitting the entry of packed packages without the production of an invoice, modified section 2926, prescribing that merchandise may be stored at the expense of the owner, when an "incomplete entry has been made, or an entry without the specification of particulars, either for want of the original invoice or for any other cause," and the latter provision does not apply to such packages. *U. S. v. American Express Co.*, (1907) 154 Fed. 996.

**Fees on packed packages.**—A fee charged by a collector of customs on packed packages to defray expense incurred in administering the law relative to such packages is not such as is authorized by section 2926, prescribing that merchandise of which incomplete entry has been made shall be conveyed to and stored in a warehouse "at the expense and risk of the owner." *U. S. v. American Express Co.*, (1907) 154 Fed. 996. See also under this title, vol. 2, p. 632, sec. 22.

**Vol. II, p. 689, sec. 2930.**

This sentence was construed in *Erhardt v. Ballin*, (1906) 150 Fed. 529, 80 C. C. A. 271.

**Vol. II, p. 693, sec. 2950.**

**Necessity for certificate of appraisement.**—Under this section and Act June 10, 1890, ch. 407, sec. 13, 26 Stat. L. 136, 2 Fed. Stat. Annot. 622, relating to certificates of officers appraising imported goods, it is intended that the appraisement should be reduced to writ-

ing. The certificate of the appraising officer is the legal evidence of appraisement, and if it is not made the appraisement is illegal. *The Lace House v. U. S.*, (C. C. A. 1905) 141 Fed. 869.

**Vol. 2, p. 693. [Counsel for U. S. before Board of General Appraisers.]**

**Amendment.**—This Act was amended by Act of June 30, 1906, ch. 3914, 1909 Supp. Fed. Stat. Annot. 104.

**Vol. II, p. 698, sec. 2970.**

**Change of Tariff Acts.**—In *U. S. v. Am-sinck*, (1905) 140 Fed. 96, it was held that merchandise imported while Tariff Act Oct. 1, 1890, ch. 1244, 26 Stat. L. 567, was in

effect, but not withdrawn from warehouse until after Tariff Act Aug. 27, 1894, ch. 349, 28 Stat. L. 509, became effective, was subject to the provisions of the latter Act.

**Vol. II, p. 701, sec. 2977.**

**Drawback on fuel coal.**—This section and sections 2978 and 3025, R. S., 2 Fed. Stat. Annot. 702 and 732, relate exclusively to drawback or return of duties on exported

merchandise, and have no application to the allowance of drawback on fuel coal under paragraph 415. (1908) 26 Op. Atty-Gen. 581.

**Vol. II, p. 702, sec. 2979.**

**Treasury regulations.**—In *U. S. v. Ehrgott*, (1910) 182 Fed. 267, it was held that since by Treasury Department Articles 834, 838, 841, and 842, providing a system of licensed truckmen to whom a limited custody of the goods is intrusted for the purpose only of transfer from warehouse to hold, the

Treasury Department has construed the words "under the inspection of proper officers" to mean that the goods are to be under the constant surveillance of such officers from the time they leave the warehouse until they reach the ship, such construction should be regarded of weight by a federal court.

**Vol. II, p. 704, sec. 2982.**

**Amendment.**—This section was amended by Act of Aug. 5, 1909, ch. 6, 36 Stat. L. 11, 1909 Supp. Fed. Stat. Annot. 804.

**Vol. II, p. 704, sec. 2984.**

**Authority of the Secretary of the Treasury.**—Under section 2984, the secretary may not refuse to allow the refund arbitrarily or

capriciously. Where all the facts enumerated in said section are presented to him undisputed, it would be assumed that that would

satisfy him that the case was within the terms of the section. *U. S. v. Cornell Steamboat Co.*, (1905) 137 Fed. 455, 69 C. C. A. 603, *affirmed* (1906) 202 U. S. 184, 26 S. Ct. 648, 50 U. S. (L. ed.) 987.

**Salvage for goods saved from fire.**—Where imported merchandise while in customs custody on board a vessel was saved from destruction by fire, it was held that these facts brought the case within section 2984, under which the government would have been liable

to refund the duties already paid on the merchandise if it had been destroyed; that the government had an interest which should respond to those whose services prevented the loss which it would have sustained through refund; and that the salvors were entitled to a salvage award on the basis of the amount that had been thus put at risk. *U. S. v. Cornell Steamboat Co.*, (1905) 137 Fed. 455, 69 C. C. A. 603, *affirmed* (1906) 202 U. S. 184, 26 S. Ct. 648, 50 U. S. (L. ed.) 987.

## Vol. II, p. 705, sec. 2987.

**Construction of statute.**—The offense created by this section is complete on the removal of goods subject to duty, on which duty has not been paid, from the warehouse; and subsequent concealment outside a warehouse after removal, while admissible, in proof of the fraudulent intent in the removal, does not constitute a substantive offense, nor add anything to the removal which preceded it. *U. S. v. Ehr Gott*, (1910) 182 Fed. 267.

**Construction of indictment.**—Where an indictment for removing merchandise from a public warehouse without paying the duty thereon alleged that the goods had been deposited in Brooklyn in a warehouse under bond, and then alleged that on a given day the importer withdrew them under a false pretense that they were to be exported, the term "false pretense" should be construed to mean at least that the defendant did not mean to export the goods when he removed them. *U. S. v. Ehr Gott*, (1910) 182 Fed. 267.

**Place of violation.**—An indictment alleging that certain beans subject to duty had been deposited in a warehouse in Brooklyn, and that on a given day the defendant withdrew them under bond on the false pretense that they were to be exported, and that he removed the goods from the warehouse and concealed them in Manhattan, was held not to charge a crime committed in the southern district of New York. *U. S. v. Ehr Gott*, (1910) 182 Fed. 267.

The word "fraudulently," as used in this section, means that the acts must be done with an intent to evade the law. *U. S. v. Ehr Gott*, (1910) 182 Fed. 267.

**"Warehouse."**—Where dutiable goods are removed from a warehouse without payment of duty and subsequently concealed, the truck on which the goods are removed cannot be considered to be a warehouse within this section. *U. S. v. Ehr Gott*, (1910) 182 Fed. 267.

## Vol. II, p. 712, sec. 1.

**Amendment.**—This section was amended by Act of Jan. 22, 1903, ch. 197, 32 Stat. L. 780, 10 Fed. Stat. Annot. 77; by Act of Feb. 17, 1905, ch. 580, 33 Stat. L. 718, 10 Fed. Stat. Annot. 74; by Act of Feb. 17, 1905, ch. 582, 33 Stat. L. 719, 10 Fed. Stat. Annot. 76; by Act of Feb. 6, 1907, ch. 470, 34 Stat. L. 880, 1909 Supp. Fed. Stat. Annot. 105; by Act of Feb. 11, 1908, ch. 22, 35 Stat. L. 7,

1909 Supp. Fed. Stat. Annot. 106; by Act of Feb. 24, 1908, ch. 36, 35 Stat. L. 35, 1909 Supp. Fed. Stat. Annot. 107; by Act of May 23, 1908, ch. 187, secs. 4, 7, 35 Stat. L. 245, 1909 Supp. Fed. Stat. Annot. 108; by Act of Feb. 23, 1909, ch. 171, sec. 1, 35 Stat. L. 643, 1909 Supp. Fed. Stat. Annot. 111; by Act of Feb. 27, 1909, ch. 226, 35 Stat. L. 659, 1909 Supp. Fed. Stat. Annot. 112.

## Vol. II, p. 712, sec. 2.

**Right to remove from district for examination.**—The collector at the port of entry of imported goods is made by law the custodian of such goods until the payment of the duties thereon, and his duty as such custodian is to be performed within his own district. His duties are prescribed by statute, and an order from the Treasury Department instructing him to send or remove the goods out of his district, "for submission to trade experts," is without legal authority, and will

not justify a removal of the goods from the collector's district. The importer, having the right to a speedy appraisal by the officers designated by law and to withdraw the goods on payment of the duties, has a substantial right to have them remain in the custody of the collector at the port of entry, and may invoke the power of the courts by injunction to prevent their removal. *Bruhl v. Wilson*, (1903) 123 Fed. 957.

## Vol. II, p. 715, sec. 7.

**Amendment.**—This section was amended by Act of March 2, 1903, ch. 982, 32 Stat. L. 955, 10 Fed. Stat. Annot. 78; by Act of March 18, 1904, ch. 715, 33 Stat. L. 85, 10 Fed. Stat.

Annot. 77; by Act of March 24, 1904, ch. 815, 33 Stat. L. 145, 10 Fed. Stat. Annot. 74; by Act of April 27, 1904, ch. 1627, 33 Stat. L. 362, 10 Fed. Stat. Annot. 79; by Act of



April 28, 1904, ch. 1825, 33 Stat. L. 574, 10 Fed. Stat. Annot. 77; by Act of March 1, 1905, ch. 1300, 33 Stat. L. 822, 10 Fed. Stat. Annot. 79; by Act of Feb. 11, 1908, ch. 20, 35 Stat. L. 7, 1909 Supp. Fed. Stat. Annot. 715; by Act of Feb. 24, 1908, ch. 35, 35 Stat. L. 35, 1909 Supp. Fed. Stat. Annot. 107; by Act of

April 6, 1908, ch. 135, 35 Stat. L. 58, 1909 Supp. Fed. Stat. Annot. 107; by Act of May 23, 1908, ch. 187, sec. 6, 35 Stat. L. 245, 1909 Supp. Fed. Stat. Annot. 108; by Act of March 3, 1909, ch. 261, 35 Stat. L. 780, 1909 Supp. Fed. Stat. Annot. 112.

## Vol. II, p. 726, sec. 962.

**Interest.**—Interest is recoverable by the United States on unpaid duties, where the amount due is liquidated and clearly ascertained, and demand has been duly made on the importer. *U. S. v. Mexican International R. Co.*, (1907) 154 Fed. 519; *U. S. v. Urmoston*, (1907) 154 Fed. 522; *U. S. v. Tiffany*, (1907) 154 Fed. 740.

**Rate of interest.**—Interest recoverable by the United States on unpaid duties should be

computed at the rate allowed by the laws of the state into which the importation is made. *U. S. v. Mexican International R. Co.*, (1907) 154 Fed. 519.

**Period of computation.**—On the reliquidation of duties at a higher rate interest on the additional amount assessed should be computed from the date of demand on the importer. *U. S. v. Mexican International R. Co.*, (1907) 154 Fed. 519.

## Vol. II, p. 729, sec. 1.

**Restricted to mistake of fact.**—The authority of the Secretary of the Treasury to refund duties erroneously collected, on the ground of mistake, is to be restricted to

mistake of fact. (1902) 24 Op. Atty-Gen. 34.

**Clerical error.**—See under this title, vol. 2, p. 634, sec. 24.

## Vol. II, p. 734, sec. 3030.

**Merchandise entitled to drawback.**—The words "entitled to drawback" apply only to imported goods on which the duties have been paid, and which have been entered for export, and having the benefit of drawback under the preceding sections, are entitled to

drawback for such drawback. Such section does not authorize a change of packages of imported merchandise remaining in bond and intended for sale and consumption in this country. *Thomas v. Barnett*, (C. C. A. 1906) 144 Fed. 338, *affirming* (1905) 135 Fed. 172.

## Vol. II, p. 741, sec. 17.

**Section not repealed.**—This section was not repealed by section 7 of the Act of Aug. 27, 1894, 28 Stat. L. 509, 548, or section 12 of the Act of July 24, 1897, 30 Stat. L. 207, 2 Fed. Stat. Annot. 508, but continues in force. (1909) 27 Op. Atty-Gen. 228.

The amount of drawback is regulated by the Act of July 24, 1897, sec. 30, 30 Stat. L. 211, 2 Fed. Stat. Annot. 512, and is ninety-nine per cent. of the duties paid. (1909) 27 Op. Atty-Gen. 228.

**Applicable to vessels leaving on own bottoms.**—The drawback provision of section 17 applies not only to vessels exported on the decks of other vessels but applies also to vessels leaving the United States on their own bottoms. (1909) 27 Op. Atty-Gen. 228.

**Appliances.**—Those appliances which are permanently attached to a vessel and which would remain on board were the vessel to be laid up for a long period are parts of the

vessel itself. (1909) 27 Op. Atty-Gen. 228.

**Appliances purchased abroad.**—Drawback should not be refused because the materials which compose the appliance in question were not assembled after importation but were purchased as a whole abroad. The Act requires only that the vessel be built in the United States and not that each separate attachment or appliance be manufactured in this country. (1909) 27 Op. Atty-Gen. 228.

**A steam pump and steam evaporator imported and used in the construction of a steam dredge are so attached to the vessel and are such essential and permanent parts of it that they are properly material used in the construction of the vessel within the meaning of this section.** (1909) 27 Op. Atty-Gen. 228.

**A dredge is a vessel within the meaning of this section.** (1909) 27 Op. Atty-Gen. 228.

## Vol. II, p. 741, sec. 3058.

**Relation of consignor immaterial.**—The consignee of imported goods is deemed the owner for the purpose of the collection of the duties thereon, under this section, and it is no defense to an action against the consignee for such duties that the consignor or any

other party who, at the request or with the consent of the consignee, procured the importation, failed to obey the latter's instructions or to comply with the terms of the contract between them. *U. S. v. Bishop*, (1903) 125 Fed. 181, 60 C. C. A. 123.

## Vol. II, p. 743, sec. 3062.

**Property of innocent owner.**—A team used in the transportation of smuggled merchandise is forfeitable, regardless of the fact that its owner and its driver did not have knowl-

edge of the purposes for which it was being used. Such knowledge is unnecessary, except in the case of common carriers. *U. S. v. One Black Horse*, (1906) 147 Fed. 770.

## Vol. II, p. 743, sec. 3063.

**Livery.**—This section should be construed as excluding vehicles other than those used by common carriers from its application, and hence a vehicle owned and let by a liveryman, and used wholly within the United States for the purposes of transporting liquor il-

legally brought across the Canadian border, was subject to seizure and forfeiture, though the liveryman had no knowledge of the purpose for which the team was to be used. *U. S. v. One Black Horse*, (1904) 129 Fed. 167.

## Vol. II, p. 746, sec. 3074.

**Appraisalment of smuggled goods.**—When property subject to forfeiture for smuggling or cognate offenses is seized, the appraisalment should be in accordance with section

3074, R. S., and not under section 13 of the Customs Administrative Act, 26 Stat. L. 136, 2 Fed. Stat. Annot. 615. (1903) 24 Op. Atty.-Gen. 583.

## Vol. II, p. 748, sec. 3081.

**Home value.**—The purpose of the law as to smuggled or unentered goods requires the exaction of the so-called "home value" as the condition of release on payment of the appraised value, but not as implying the assessment of duties on such goods. (1903) 24 Op. Atty.-Gen. 583.

**Extent of power to release.**—The power of the Secretary of the Treasury to release and remit fines, penalties, and forfeitures under sections 3081 and 5293, R. S., and under sections 17 and 18 of the Act of June 22, 1874, 18 Stat. L. 189, now subject to the restriction of section 7 of the Customs Administrative Act as amended (2 Fed. Stat. Annot. 615), relates only to civil liability and consequences where the value of the property seized or the amount of the fine or forfeiture incurred does not exceed \$1,000; but does not include penalties "accrued" or "incurred" which have been "adjudged" as part of the punishment under an "indictment." (1903) 24 Op. Atty.-Gen. 583.

**Failure of Secretary of Treasury to promulgate regulations.**—On proceedings under

this section for the forfeiture of merchandise imported contrary to law, which would have been admissible free of duty on compliance with regulations which the Secretary of the Treasury is authorized by law to prescribe, it may not be maintained in defense that the regulations have not been promulgated, and that therefore the importer was justified in importing the merchandise according to his own convenience, independently of the requirements of law. Such an importation would be "contrary to law" under said section. *U. S. v. Fifty Waltham Watch Movements*, (1905) 139 Fed. 291.

**More intent to smuggle not sufficient.**—It is immaterial that a person bringing goods to the United States intends to smuggle them. If the time has not passed when it is his duty to make the necessary declaration, and there remains an opportunity for him to change his mind, the goods are not subject to forfeiture under section 3082. *U. S. v. One Pearl Chain*, (1904) 139 Fed. 510; *U. S. v. One Pearl Chain*, (C. C. A. 1905) 139 Fed. 513.

## Vol. II, p. 748, sec. 3082.

**Necessity for intent to defraud.**—Proceedings for forfeiture of merchandise illegally imported may be sustained under this section, though the United States has not been defrauded of any sum, and there has been no intent to defraud. *U. S. v. Fifty Waltham Watch Movements*, (1905) 139 Fed. 291.

**"Contrary to law."**—It has been held that the words "contrary to law," as used in this section, relate to legal provisions other than those found in such section. *Rogers v. U. S.*, (1910) 180 Fed. 54, 103 C. C. A. 408.

**"Import or bring."**—This section imposes a penalty on any person who shall fraudulently or knowingly import or bring into the United States any merchandise contrary to law. Section 2802, 2 Fed. Stat. Annot. 645,

imposes a penalty whenever any article subject to duty is found in the baggage of a person arriving within the United States which was not at the time of making entry therefor mentioned to the collector. It was held that the term "import or bring" does not require that the offense designated in section 3082 should be complete before the merchandise is landed, so as to exclude cases within section 2802, where the entry is not made till after the baggage is landed, but includes the whole act of bringing dutiable articles into the United States. *U. S. v. Chesbrough*, (1910) 176 Fed. 778.

**Merchandise—scope of meaning.**—In this section, prescribing a penalty for importing or bringing into the United States any mer-

chandise contrary to law, the term "merchandise" is not restricted to general merchandise as distinguished from personal baggage, especially in view of section 2766, 2 Fed. Stat. Annot. 636, declaring that the word "merchandise" may include goods, wares, and chattels of every description capable of being imported, and sections 2799, 2 Fed. Stat. Annot. 644, and 2802, 2 Fed. Stat. Annot. 645, showing that wearing apparel and other personal baggage are embraced within the term. *U. S. v. Chesbrough*, (1910) 176 Fed. 778.

**Burden of proof.**—On a suit by the United States, under this section, to forfeit articles found in the baggage of a person arriving in the United States, and seized as fraudulently imported, the burden of proof is not upon the claimant of the articles, unless the court finds that there is probable cause for seizing them. If at the close of the government's case there is not enough evidence to go to the jury, there is not such probable cause as to put the burden of proof upon the claimant. *U. S. v. One Pearl Chain*, (1904) 139 Fed. 510.

**Action in rem for forfeiture.**—Where it was charged that certain precious stones and jewelry were imported with intent to defraud the United States of duty thereon, it was held that a proceeding *in rem* to forfeit the same was properly brought under this section. But such proceeding *in rem* does not lie under said section to forfeit money arising from the sale in this country of goods fraudulently imported. *U. S. v. A Lot Precious Stones*, (C. C. A. 1905) 134 Fed. 61.

**Bar of former acquittal.**—Where a person charged to have fraudulently imported certain merchandise with intent to defraud the United States of duty legally payable thereon was tried and acquitted, it was held that such acquittal was a bar to a further proceeding to forfeit the merchandise as against him. *U. S. v. A Lot Precious Stones*, (C. C. A. 1905) 134 Fed. 61.

**Effect of nolle prosequi.**—An information having been filed to forfeit certain merchandise and money for fraudulent importation, with intent to defraud the United States of duty, indictments were found against the alleged importer and his wife; and on trial thereof the importer was acquitted, after which the indictment against the wife was *nolled*. It was held that such *nolle prosequi* was not a judgment of acquittal, and was,

therefore, no bar to the proceeding to forfeit as against the wife. *U. S. v. A Lot Precious Stones*, (C. C. A. 1905) 134 Fed. 61.

**Failure to enter free goods.**—An importer, for the purpose of serving his own pecuniary interests, intentionally omitted to meet the requirements of the customs laws of the United States, in that he failed to enter certain imported articles at any custom house, and to comply otherwise with the law. If duly imported, the articles would have been free of duty. It was held that this was an offense which rendered the merchandise liable to forfeiture, under section 3082, as imported "knowingly . . . contrary to law." *U. S. v. Fifty Waltham Watch Movements*, (1905) 139 Fed. 291.

**Waiver.**—That the claimant, in an action to recover property seized for failure to declare the same for duty, moved the court to direct a verdict in her favor, was held not to constitute a waiver of her right to reserve exceptions to the refusal of her request to send the case to the jury after the denial of her motion to direct. *One Pearl Chain v. U. S.*, (C. C. A. 1903) 123 Fed. 371.

**Jewelry worn upon the person.**—In *One Pearl Chain v. U. S.*, (C. C. A. 1903) 123 Fed. 371, it appeared that when custom house officers boarded a steamship on which claimant was a passenger, a blank for the declaration of articles liable to duty was presented to her for execution. She declined to execute it, but appeared before the officer for examination, and informed him that she had bought wearing apparel abroad, but was unable to state the amount. No further specific questions were asked her, and the collector filled up the blanks with the words "wearing apparel, value not known," which she signed. In the blank, under the head of "wearing apparel," "jewelry" was included, and the plaintiff testified that she understood that wearing apparel covered her jewelry. At the time of landing, and before examination of her baggage, she wore a pearl necklace, purchased abroad, which was visible to the officers, and which was subsequently seized before claimant's baggage had been passed. It was held that such facts were insufficient to warrant a finding as a matter of law that claimant had done nothing to advise the government of her possession of such article before landing to justify a forfeiture thereof under section 3082, authorizing forfeiture of articles fraudulently imported.

## Vol. II, p. 751, sec. 3087.

**Jurisdiction.**—Jurisdiction of a proceeding for the forfeiture of smuggled goods exists only in the district of seizure, which is the district in which the goods, if on land, are found; a collector cannot, by carrying them

into another district and there making the formal seizure, confer jurisdiction of the proceeding on the court in such district. *U. S. v. Larkin*, (1907) 153 Fed. 113, 82 C. C. A. 247.

## Vol. II, p. 755, sec. 4.

**Chief officer of customs.**—A deputy collector of customs, with headquarters in the customs district of Vermont, but stationed for service at Montreal, Canada, was held to

be a "chief officer of customs" within the meaning of this section. (1902) 24 Op. Atty.-Gen. 91.

**Interest of informant.**—Under this para-

graph the Secretary of the Treasury is the sole judge as to whether there is an informer who is entitled to a reward, so that until the secretary acts the informer has merely an expectancy of reward. *In re Ghazal*, (1909) 174 Fed. 809, 98 C. C. A. 517, reversing 169 Fed. 147.

**Absence of certificate.**—Notwithstanding the absence of the certificate provided for by

section 6 of this Act (3 Fed. Stat. Annot. 107) the Secretary of the Treasury was authorized, under section 4, to award compensation to a Canadian customs official who furnished information which resulted in a forfeiture of certain diamonds for violation of section 3082, R. S., 2 Fed. Stat. Annot. 748. (1902) 24 Op. Atty-Gen. 61.

## Vol. II, p. 758, sec. 17.

**Necessity for declaring forfeiture.**—No application for remission of the penalty of forfeiture of imported merchandise can be instituted, under this section, until a forfeiture has been declared. *U. S. v. 150 7-12 Dozen Long Gloves*, (1909) 168 Fed. 1010.

**Effect of failure to appear as claimant in forfeiture proceedings.**—An applicant, under

this section, for remission of the penalty of forfeiture, is not, though charged with due notice of the forfeiture proceedings, debarred from making such application by reason of failure to appear as claimant in those proceedings. *U. S. v. 150 7-12 Dozen Long Gloves*, (1909) 168 Fed. 1010.

## Vol. II, p. 760, sec. 21.

**Pendency of protest as to part of importation.**—The presence of a protest relating to a portion of an importation does not give the collector the right to reliquidate as to another portion to which the protest does not relate. *Cassel v. U. S.*, (1906) 146 Fed. 146.

**Time from which year runs.**—The entry referred to in this paragraph does not mean the entire transaction leading up to the liquidation, but the act of the importer in presenting to the collector the document known as an "entry." *Cassel v. U. S.*, (1906) 146 Fed. 146.

**Sufficiency of protest.**—With no protest other than an oral complaint, importers acquiesced in a customs ruling that involved an increase in the duties on their goods. It was held that there had not been such a "protest" as is contemplated by section 21, making the settlement of duties final "in the absence of protest." *Gulbenkian v. U. S.*, (1909) 175 Fed. 860.

**Effect of filing protest.**—The filing of a protest suspends the running of the statute until the protest is decided. *Klumpp v. Thomas*, (1908) 162 Fed. 853, 89 C. C. A. 543.

**Excessive or illegal duties.**—This section applies to actions to remove from the government alleged excessive or illegal duties. *Gulbenkian v. U. S.*, (1909) 175 Fed. 860.

**Change in method of assessing duties.**—Under this section it is not fraud by the government, where subordinate customs officers, without notice to importers or instructions from their superior officers, make a change in the method of assessing duties, after years of uniform practice. *Gulbenkian v. U. S.*, (1909) 175 Fed. 860.

**Reliquidation.**—Under this section a collector may reliquidate an entry and assess increased duties at any time before the expiration of a year, although the duties first assessed have been paid and the goods withdrawn for consumption. *U. S. v. Mexican International R. Co.*, (1907) 151 Fed. 545, 81 C. C. A. 61.

**Reliquidation at increased rate.**—Under this section it has been held that, within one year after entry, the duties may be reliquidated at a higher rate, though they may have been paid and the merchandise have been withdrawn for consumption. *Louisville Pillow Co. v. U. S.*, (C. C. A. 1906) 144 Fed. 386.

**Reliquidation after protest.**—This prohibition does not apply where a protest has been filed, even though it has been sustained, and is no longer pending. *Gulbenkian v. Stranahan*, (1907) 158 Fed. 836; *Kendall v. Lyman*, (1908) 161 Fed. 652.

**Clerical errors.**—See under this title, vol. 2, p. 634, sec. 24.

## Vol. II, p. 761, sec. 22.

**Limitation of prosecution.**—In proceedings for the forfeiture of certain merchandise imported without the payment of duty it appeared by the averments in the pleadings that the claimant of the property had owned it for more than five years, without knowing or having reason to suspect that it had been imported, that he had never concealed it, and that neither he nor it had since been out of the United States, and that the importation of the merchandise was not known to the customs officers until about six years after the forfeiture accrued. It was held that the pro-

ceedings were barred, under R. S. sec. 1047 (3 Fed. Stat. Annot. 100, 4 Fed. Stat. Annot. 465) and this section, which prescribe, respectively, (1) that proceedings for forfeiture shall be brought within five years after the forfeiture accrued, provided the offender or the property shall, within the same period, be found within the United States; and (2) that proceedings for forfeiture accruing under the customs revenue laws shall be commenced within three years after the forfeiture accrued, provided the time of the absence from the United States of the person

subject to such forfeiture, or of any absence or concealment of the property, shall not be reckoned within the period of limitation. *U. S. v. One Dark Bay Horse*, (1904) 130 Fed. 240.

**Concealment.** — In *U. S. v. One Stradivarius Violin*, (1911) 188 Fed. 542, it appeared that one H., in January, 1906, purchased a violin in London, to be delivered in New York or Boston free of all expense. It was delivered shortly thereafter without duty being paid thereon. H. thereafter habitually kept it in his drawingroom, where it was used, displayed, and admired by various artists at Sunday afternoon concerts held by H. It was never absent but always present in the house of H., though the revenue officers acquired no information concerning its wrongful importation until July, 1910. It was held that

such lack of information by government officers, and the fact that H. knew or had reason to believe the instrument had been imported without paying duty, did not constitute "concealment" so as to bar limitations prescribed by this section.

**Five-year statute of limitations.** — Section 1047 R. S., 3 Fed. Stat. Annot. 100, 4 Fed. Stat. Annot. 865, which provides a five-year statute of limitations for suits for "any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply to customs revenue cases, which are subject to the three-year limitation for similar proceedings "accruing under the customs revenue laws of the United States," which is provided in section 22. *U. S. v. Wittemann*, (1907) 152 Fed. 377, 81 C. C. A. 503.

## Vol. II, p. 762, sec. 3095.

**Amendment.** — This section was amended by Act of April 27, 1904, ch. 1625, 33 Stat. L. 362, 10 Fed. Stat. Annot. 79.

## Vol. II, p. 762, sec. 3097.

**Open gasoline launch.** — In *U. S. v. One Gasoline Launch*, (1904) 133 Fed. 42, 66 C. C. A. 148, it was held that an "open, clinker-built gasoline launch, about eighteen and a half feet long," arriving at Seattle from a port of British Columbia, and not shown to be a foreign vessel or to contain merchandise, was not required to report to the customs officer of the port, under the provision of R. S. sec. 2774, 2 Fed. Stat. Annot. 638, requiring

vessels from foreign ports generally to report, but was within section 3097, relating to commerce with contiguous countries, which require only vessels carrying dutiable merchandise, arriving at ports on the northern and northwestern frontier adjacent foreign territory to report, nor was she required to report by section 3109, 2 Fed. Stat. Annot. 767.

## Vol. II, p. 767, sec. 3109.

**Open gasoline launch.** — See under this title, vol. 2, p. 762, sec. 3097.

## Vol. II, p. 768, sec. 3114.

**Duty on repairs — review of assessment by general appraisers.** — See under this title, vol. 2, p. 624, sec. 14.

## Vol. II, p. 773, sec. 5444.

**"Entry."** — This section does not refer merely to the act of filing at the custom house the document known as an "entry," but comprises the transaction of entering the goods into the body of the commerce of the country; that is, the whole process of passing the goods through the custom house, which cannot be deemed complete until liquidation has been had. *U. S. v. Mescall*, (1908) 164 Fed. 584.

**Aid in the illegal admission of imports.** — This section includes aid given both before and after the fact; and where a customs officer aids one who has made wrongful entry, by concealing the falsity of the entry, or by supporting it by false official returns, he is within the prohibition of the section. *U. S. v. Mescall*, (1908) 164 Fed. 584.

## Vol. II, p. 773, sec. 5445.

The term "entry," as used in this section, is not limited to the paper so known in the customs service, nor to the making and filing of it, nor the process of filing it and thereby entering the goods. *U. S. v. Mescall*, (1908) 164 Fed. 587.

**"Effects, or aids in effecting."** — The expression "effects, or aids in effecting," an

illegal entry of imports, in section 5445, includes aid in carrying out the fraud, rendered either after or before entry at the custom house. *U. S. v. Mescall*, (1908) 164 Fed. 587.

**Offense by officer while performing duties not within office.** — Under this section an officer is indictable where he knowingly and cor-

ruptly aids an importer in effecting an entry on payment of less than the legal duty, although his action was in the performance of a duty assigned to him by a superior officer, which he was not obligated to perform, and could not legally perform under the statute. *U. S. v. Rosenthal*, (1903) 126 Fed. 766, *affirmed* (C. C. A. 1905) 145 Fed. 1.

**Customs weigher.**—This section, while ordinarily not intended to apply to those individuals—customs officers—covered by the preceding section of the law, does not exclude an officer of the service if the facts bring him within the definition of the “person” at whom this provision is aimed, and may therefore include a customs weigher who aids in the way prohibited. *U. S. v. Mescall*, (1908) 164 Fed. 587.

**Failure of fraudulent entry.**—The penalty provided for illegally effecting the entry of imports, under this section, cannot be avoided on the theory that the fraud would not have been successful until the release of the goods after payment of the duty, and the participants in the wrongdoing might have repented before that time. *U. S. v. Mescall*, (1908) 164 Fed. 587.

**Defense of irregular practice at custom house.**—While an importer cannot be subjected to a forfeiture or penalty unless the practice prescribed by statute has been fol-

lowed in the custom house, one charged criminally with having effected an entry of goods at less than the true weight, and by payment of less than the legal duty, by means of a false invoice, and by the bribing of the examiner to approve such invoice, cannot take advantage of the fact that the practice of submitting the matter to the examiner, instead of to a surveyor, was irregular and unauthorized, and that the examiner had no legal right, under the statute, to do the things in relation to which he was corruptly influenced. *U. S. v. Rosenthal*, (1903) 126 Fed. 766, *affirmed* (C. C. A. 1905) 145 Fed. 1.

**Sufficiency of indictment.**—An indictment under this section, which charges that defendants, on a day named, “with intent . . . that the United States should be wrongfully deprived of a portion of the lawful duties due” on certain imported goods, which were specifically dutiable according to weight, effected an entry thereof at less than their true weight and by payment of less than their legal duty, was held to sufficiently charge that the entry was “knowingly” effected, and also that the entry was a completed entry, on which the duty was liquidated, and not merely the preliminary entry. *U. S. v. Rosenthal*, (1903) 126 Fed. 766, *affirmed* (C. C. A. 1905) 145 Fed. 1.

## Vol. X, p. 70, sec. 2.

“Hereafter.”—Under this section the term “hereafter” was not intended to be retroactive, and does not apply to coal im-

ported before the date named in the section. *Perkins Co. v. U. S.*, (1910) 180 Fed. 935.

## Vol. X, p. 72, sec. 1.

**Time of taking effect of treaty.**—The treaty between Cuba and the United States, signed Dec. 11, 1902, did not go into effect until Dec. 27, 1903, the date proclaimed by the President and imports from Cuba entered prior to that date were not entitled to the twenty per cent. reduction provided for there-

in from the duties imposed by Tariff Act July 24, 1897, ch. 11, 30 Stat. L. 151. *M. J. Dalton Co. v. U. S.*, (1907) 151 Fed. 143; *U. S. v. M. J. Dalton Co.*, (1907) 151 Fed. 144. *Compare Franklin Sugar Refining Co. v. U. S.*, (1906) 144 Fed. 563.

## 1909 Supp., p. 110, sec. 2.

**New trial in Circuit Court.**—The provision in this section that “hereafter” the parties litigant should be required to introduce all their evidence before the Board of General Appraisers cut off the right under said amended Act of a new trial in the Circuit

Court on appeal from the board. It has been held that this provision applied to cases decided by the board after May 27, 1908, even though prior to that date they had arisen and been submitted to the board for decision. *Beer v. U. S.*, (1910) 181 Fed. 402.

## 1909 Supp., Appendix, p. 815, sec. 13.

**Authority to conduct reappraisement.**—Under this section the reappraisement can be conducted only by the appraising officers and not by the collector. *U. S. v. Calhoun*, (1911) 184 Fed. 499.

**Conclusiveness of appraisement.**—The provision in this section that an appraisal of goods by an appraiser shall be final and conclusive against all parties, and shall not be subject to review in any manner for any

cause, in any tribunal or court, does not exclude a reappraisement previously provided for in the same section. *U. S. v. Calhoun*, (1911) 184 Fed. 499.

**Jurisdiction of collector.**—Under this and the two following sections and Act of Cong. June 22, 1874, ch. 391, sec. 21, 18 Stat. L. 190, 2 Fed. Stat. Annot. 760, it is held that where imports have been appraised by an appraiser, the collector has no jurisdiction to

reappraise the same, and though authorized to institute a proceeding within a year to reliquidate the duties, and to examine the importer as a witness for that purpose, he has no jurisdiction in that proceeding to compel the importer to testify with reference to

the value of the goods, and so lay a foundation for reappraisal under the guise of a reliquidation; and this though the original appraisement was induced by fraud. *U. S. v. Calhoun*, (1911) 184 Fed. 499.

## 1909 Supp. Appendix, p. 816, sec. 15.

**Construction of statute.**—The right of a collector to examine an importer in a proceeding for a reliquidation of duties within a year after importation, conferred by this section, is not limited or affected by the fact that the provision for forfeiture in case of default contained in section 16 does not apply to examinations in aid of reliquidation. *U. S. v. Calhoun*, (1911) 184 Fed. 499.

**Production of books.**—Where proceedings were instituted by a collector to reliquidate duties on goods imported by a corporation engaged in business and having books of account, it was held that citation was properly issued therein to the corporation directing

it to appear in such proceedings and produce its books of account. *U. S. v. Calhoun*, (1911) 184 Fed. 499.

**Examination of importer by collector.**—It has been held that since the words "value or classification" include both an appraisal and liquidation, they may also include a reliquidation by the collector by proceedings instituted by him within the year, and hence the collector is entitled within that period to institute reliquidation proceedings, in which the importer may be cited for examination, though there can be no reappraisal by him. *U. S. v. Calhoun*, (1911) 184 Fed. 499.

# DIPLOMATIC AND CONSULAR OFFICERS.

## Vol. II, p. 801, sec. 1723.

**Liability of surety for overcharge of fees.**—The surety on the bond of a consular officer cannot be held liable for the statutory penalty incurred by the principal under this section for charging excessive fees, where

such fees, including the excess, have been charged against him in his account, and paid to the Treasury Department. *U. S. v. Balantine*, (C. C. A. 1905) 138 Fed. 312.

## Vol. II, p. 811, sec. 1745.

**Official and unofficial services.**—The President may prescribe a fee, as provided by this section, for the services of a consul in furnishing inspection cards to steerage passengers on vessels destined to the United States,

as required by the quarantine regulations of April 1, 1903, but he has no authority to declare such a fee unofficial and to permit the consul to retain it as such. (1903) 24 Op. Atty.-Gen. 672.

## Vol. II, p. 818, sec. 4080.

**Arrest by marshal.**—In *Dallemagne v. Moisan*, (1905) 197 U. S. 169, 25 S. Ct. 422, 49 U. S. (L. ed.) 709, it was held that only a federal marshal can make an arrest on the requisition of a French consul, charging a seaman on a French vessel with insubordination, conformably to article 8 of the Treaty with France of Aug. 12, 1853, 10 Stat. L. 992, 996, 7 Fed. Stat. Annot. 551, since this,

being the mode of arrest specified by the Act of Congress of June 11, 1864, 13 Stat. L. 121, ch. 116, enacted to provide for the execution of treaties respecting consular jurisdiction over the crews of foreign vessels in the waters and ports of the United States, and re-enacted in substance in R. S. secs. 4079-4081, must be regarded as the only means proper to be adopted for this purpose.

## Vol. II, p. 818, sec. 4081.

**Length of imprisonment.**—The imprisonment of an insubordinate seaman on a French vessel, pursuant to article 8 of the Treaty with France of Aug. 12, 1853, 10 Stat. L. 992, 996, 7 Fed. Stat. Annot. 551, providing that

such persons may be arrested on the written requisition of the consul, "supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the

port, at the disposal of the consuls," need not end with the departure of the vessel from the port at which the seaman was taken from the vessel, but may last until the expiration of the two months, which is the limit prescribed by the Act of June 11, 1864, 13 Stat. L. 121, ch. 116, carried forward in substance as R. S. secs. 4079-4081, enacted to provide for the execution of treaties respecting consular jurisdiction over the crews of foreign vessels in the waters and ports of the United States. *Dallemagne v. Moisan*, (1905) 197 U. S. 169, 25 S. Ct. 422, 49 U. S. (L. ed.) 709.

Validity of arrest by state officer. — In *Dallemagne v. Moisan*, (1905) 197 U. S. 169,

25 S. Ct. 422, 49 U. S. (L. ed.) 709, it was held that an unauthorized arrest by a state official on a requisition of a French consul, charging a seaman on a French vessel with insubordination, conformably to article 8 of the Treaty with France of Aug. 12, 1853, 10 Stat. L. 992, 996, 7 Fed. Stat. Annot. 551, does not entitle the seaman to his discharge on habeas corpus when brought before a federal District Court, since the objection to the irregularity of the arrest is obviated by the action of that court in examining into the case under the authority conferred upon it by the Act of June 11, 1864, carried forward in substance as R. S. secs. 4079-4081.

## EDUCATION.

### Vol. II, p. 851, sec. 4.

Appropriations to be controlled and administered by state. — This Act and Act Cong. Aug. 30, 1890, ch. 841, 26 Stat. L. 417, 2 Fed. Stat. Annot. 854, granting certain public lands or land scrip to the several states, provide that the proceeds thereof shall be invested to constitute a perpetual fund for the endowment of at least one college where the leading object shall be instruction in mechanic arts and agriculture, and appropriating money arising from the sales of the public lands to the states for the benefit of such schools constituted a grant to the several states, and not to the colleges competent to receive the same in the states to be received through the state as a mere conduit. *State v. Irvine*, (1906) 14 Wyo. 318, 84 Pac. 90.

In *State v. Bryan*, (1905) 50 Fla. 293, 39 So. 929, it was held that the legislature of Florida has the power to prescribe what college or colleges shall be the recipient or recipients of the interest on the fund derived from the sale of lands donated by this Act for the maintenance of at least one college for instruction in agriculture and mechanic arts, or to bestow it for such purpose upon a university of the state, as it may elect, having also the power to withdraw the interest of this fund from any institution of learning which has been the recipient of it, and found another institution, at any time it may elect so to do, and make it the recipient of said interest for such instruction. It was further held that the legislature has the discretionary power to provide proper educational qualifications for admission to such state college or university, to appoint trustees thereof, subject to change, conferring such powers, not in conflict with some constitutional provision, upon them as it may see fit, or to establish a state board of control, as was done by chapter 5384, Laws Florida, 1905; said trustees or said state board of

control being simply public agents to manage a public property.

Teaching military tactics. — In *State v. Bryan*, (1905) 50 Fla. 293, 39 So. 929, it was held that chapter 5384 of the Laws of 1905 of Florida were not unconstitutional or in conflict with this Act, donating to the state a fund for the establishment and maintenance of at least one college as therein specified, because said chapter 5384 provided that the state board of education and the state board of control "shall include military tactics, if the said joint boards deem the same requisite and proper," as one of the branches of education in the University of the State of Florida.

Right to use for other than educational purposes. — In *Nebraska* it has been held that by the terms of this Act, and by the acceptance of the grants by the state, and the pledges contained in the state constitution and statutes with reference thereto, the state became a trustee of the funds derived from such grants, for the sole purpose of applying them to the objects of the grant, and with no power to divert the same to other purposes, or to render them general funds of the state. *State v. Brian*, (1909) 84 Neb. 30, 120 N. W. 916.

Institutions entitled to grants. — No particular institutions are entitled to the grants and appropriations made respectively by this Act, and by the Act of Aug. 30, 1890, 26 Stat. L. 417, ch. 841, 2 Fed. Stat. Annot. 854, appropriating annually certain sums to each state and territory for the more complete endowment and maintenance of such colleges, but the states take the property, charged with the duty to devote it to the purposes named. *Wyoming v. Irvine*, (1907) 206 U. S. 278, 27 S. Ct. 613, 51 U. S. (L. ed.) 1063.

Selection of beneficiary — duty of state. — See under this title, vol. 2, p. 854, sec. 1.



## Vol. II, p. 854, sec. 1. [Act of Aug. 30, 1890.]

**Selection of beneficiary—duty of state.**—The endowment of land and money conferred by Act Cong. July 2, 1862, ch. 130, 12 Stat. L. 503, 2 Fed. Stat. Annot. 851, and this Act, for the benefit of colleges in the several states for the dissemination of learning and agriculture and mechanic arts, being grants to the states for the benefit of a college or colleges situated therein, and the state being required to accept the grant by the legislative

act, it is the duty of the state legislature to select the beneficiary entitled to receive and expend the funds. *State v. Irvine*, (1906) 14 Wyo. 318, 84 Pac. 90.

**Appropriations to be controlled and administered by state.**—See under this title, vol. 2, p. 851, sec. 4.

**Institutions entitled to grants.**—See under this title, vol. 2, p. 851, sec. 4.

## ELECTIVE FRANCHISE.

## Vol. II, p. 864, sec. 5507.

**Constitutionality.**—The provision in this section for the punishment of individuals who, by means of bribery, prevent persons to whom the right of suffrage is guaranteed by U. S. Const., 15th Amend., from exercising that right, cannot be sustained, as an exercise of the power granted to Congress by such amendment, to prevent the denial of such right by state action. *James v. Bowman*, (1903) 190 U. S. 127, 23 S. Ct. 678, 47 U. S. (L. ed.) 979.

**Limiting operation to sustain validity.**—The operation of section 5507, which was manifestly enacted to punish the bribery at all elections, state and federal, of persons guaranteed the right to vote by U. S. Const., 15th Amend., cannot be limited by judicial construction, for the purpose of sustaining its constitutionality, to the bribery of voters at elections for federal officers. *James v. Bowman*, (1903) 190 U. S. 127, 23 S. Ct. 678, 47 U. S. (L. ed.) 979.

## Vol. II, p. 864, sec. 5509.

**Constitutionality.**—In *Rakes v. U. S.*, (1909) 212 U. S. 55, 29 S. Ct. 244, 53 U. S. (L. ed.) 401, it was held that the constitutionality of the provision of this section for such punishment of persons committing any other felony or misdemeanor, when conspiring contrary to the preceding section, as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed, was too well settled to permit the question as to such constitutionality to serve as the basis of a writ of error from the federal Supreme Court to a District Court.

**Former jeopardy.**—An acquittal of murder after a regular trial in a state court having

full jurisdiction in the premises is a bar to so much of an indictment for conspiring criminally in violation of R. S. secs. 5508, 5509, as seeks, by charging defendants with the commission of such murder, to enforce the provision of section 5509, that if, in carrying out such conspiracy, an offense against the state has been committed, the punishment provided for by the state for such offense shall be imposed. *U. S. v. Mason*, (1909) 213 U. S. 115, 29 S. Ct. 480, 53 U. S. (L. ed.) 725.

For another case citing this section see *U. S. v. Powell*, (1907) 151 Fed. 648, *affirmed* (1909) 212 U. S. 564, 29 S. Ct. 690, 53 U. S. (L. ed.) 653.

## ESTIMATES, APPROPRIATIONS, AND REPORTS.

## Vol. II, p. 897, sec. 3678.

**Expenses of railway postal clerks.**—This section declares that all sums appropriated for the various branches of expenditures in the public service shall be applied solely to the objects for which they are respectively made, and for no others. Section 3679, 2 Fed.

Stat. Annot. 898, provides that no department of the government shall expend in any one fiscal year a sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of

such appropriations. The annual appropriations for the post-office department provide for actual and necessary expenses by railway postal clerks while actually traveling on business of the department, and away from their several designated headquarters, etc.

It has been held that under such Acts a railway postal clerk could not recover against the United States as on an implied contract for expenses of bed and board while on his regular run, in addition to his fixed salary. *Parshall v. U. S.*, (C. C. A. 1906) 147 Fed. 433.

## Vol. II, p. 898, sec. 3679.

**Rent in excess of appropriation.**—In *Hooe v. U. S.*, (1910) 218 U. S. 322, 31 S. Ct. 85, 54 U. S. (L. ed.) 1055, it was held that the owners of a building who have received the entire sums which Congress has from year to year appropriated as full compensation for the rent of quarters secured for the Civil Service Commission by the Secretary of the Interior, in the discharge of his duty under the Act of Jan. 16, 1883, 22 Stat. L. 403, 405, ch. 27, 1 Fed. Stat. Annot. 812, cannot maintain suit against the government under the Act of March 3, 1887, 24 Stat. L. 505, ch. 359, 2 Fed. Stat. Annot. 80, to recover the difference between such sums and the fair rental value of the building, including the basement, which was used without consent, on the theory that the claim is founded upon a contract, express or implied, or upon the constitutional obligation to make just compensation for private property taken for public use, in view of

R. S. secs. 3679, 3732, providing respectively that "no department of the government shall expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations," and that "no contract or purchase on behalf of the United States shall be made unless the same is authorized by law, or is under an appropriation adequate to its fulfilment," and of the Acts of Congress of June 22, 1874, 18 Stat. L. 133, 144, ch. 388, and March 3, 1877, 19 Stat. L. 363, 370, ch. 106, 6 Fed. Stat. Annot. 120, prohibiting contracts for the rental of property for government purposes until an appropriation therefor shall have been made in terms by Congress.

**Expenses of railway postal clerks.**—See under this title, vol. 2, p. 897, sec. 3678.

# EVIDENCE.

## Vol. III, p. 2, sec. 724.

**Practice in equity.**—This section has no application to suits in equity. *Oro Water, etc., Co. v. Oroville*, (1908) 162 Fed. 975.

**"Parties."**—Where an action was brought against a railroad company alone for alleged violation of the Interstate Commerce Act, it was held that the corporation's officers and agents were not "parties" within this section authorizing federal courts, on notice, to require the "parties" to produce books or writings in their possession or power which contain evidence pertinent to the issue, etc. *Cassatt v. Mitchell Coal, etc., Co.*, (C. C. A. 1907) 150 Fed. 32.

**Objections to admission as evidence.**—Books and papers required by an order of court to be produced by a party on the trial of a cause remain subject to objections to their relevancy as evidence which must be passed upon at the trial. *International Coal Min. Co. v. Pennsylvania R. Co.*, (1907) 152 Fed. 557.

**Review of order.**—An order made by a Circuit Court under this section, requiring a party to an action at law to produce books or writings at the trial, is an interlocutory and not a final order, and is therefore not reviewable on a writ of error prior to final judgment in the cause. *Pennsylvania R. Co. v. International Coal Min. Co.*, (C. C. A. 1907) 156 Fed. 766.

**Statute not exclusive.**—The power of a federal court to require the production of documentary evidence is not limited to an order made on motion, as provided by this section, but it has inherent power, as well as express authority, under section 716 (4 Fed. Stat. Annot. 498), to issue a subpoena duces tecum and to enforce obedience thereto by proceedings for contempt. *American Lith. Co. v. Werckmeister*, (C. C. A. 1908) 165 Fed. 426.

**Photographic copies.**—Where plaintiffs sued on a document alleged to have been signed by defendants' decedent, which defendants claimed was a forgery, and defendants alleged that plaintiffs had in their possession letters purporting to have been signed by deceased, written in the same handwriting as the document sued on, in which reference was made thereto, it was held that the defendants were entitled to an order under this section requiring plaintiffs to produce such letters for defendants' inspection and to permit photographic copies to be made thereof under proper restrictions. *Newcomb v. Burbank*, (1907) 159 Fed. 568.

**Records in possession of others than parties.**—Where a complaint alleged that certain nautical charters and contracts had been sold by defendants to a corporation which was

not a party to the action, it was held that the complainant, in the absence of anything tending to indicate that such charters, etc., had not been transferred to the corporation, was not entitled to an order directing defendants to produce the same, together with the stock book, minute book, and all papers and bank and check books of the corporation, for plaintiff's inspection before trial, under this section. *Ridgely v. Richard*, (1904) 139 Fed. 387.

**Production at and before trial.**—For more than a century trial courts have disagreed as to whether, under this enactment, the procedure is limited to a requirement that the books, documents, and writings be produced at the trial, or, in the discretion of the court, before the trial, for such investigation and examination as the party obtaining the order might desire. The question has at last been

authoritatively settled by the United States Supreme Court, which has decided that a court of law is not empowered to compel one party to an action to produce books and papers in advance of trial for his adversary's examination and inspection, by the provisions of R. S. sec. 724. *Carpenter v. Winn*, (1911) 221 U. S. 533, 31 S. Ct. 683, 55 U. S. (L. ed.) 842, *reversing* (1908) 165 Fed. 636, 91 C. C. A. 301.

To the same effect as the first paragraph of the original note, see *Cameron Lumber Co. v. Dronney*, (1904) 132 Fed. 304; *American Banana Co. v. United Fruit Co.*, (1907) 153 Fed. 943; *Shaefer v. International Power Co.*, (1907) 157 Fed. 896; *Rosenberger v. Shubert*, (1910) 182 Fed. 411.

To the same effect as second paragraph of the original note, see *Cassatt v. Mitchell Coal, etc., Co.*, (C. C. A. 1907) 150 Fed. 32.

### Vol. III, p. 5, sec. 860.

**Repeal.**—This section was expressly repealed by the Act of May 7, 1910, ch. 216, 36 Stat. L. 352. *U. S. v. Mills*, (1911) 185 Fed. 318; *Sire v. Berkshire*, (1911) 185 Fed. 967.

For cases under this section, see *American Lith. Co. v. Werckmeister*, (1911) 221 U. S. 603, 31 S. Ct. 676, 55 U. S. (L. ed.) 873; *Radford v. U. S.*, (C. C. A. 1904) 129 Fed. 49; *Hammond Lumber Co. v. Sailors' Union*,

(1906) 149 Fed. 577; *Johnson v. U. S.*, (C. C. A. 1908) 163 Fed. 30; *Alkon v. U. S.*, (C. C. A. 1908) 163 Fed. 810; *Hammond Lumber Co. v. Sailors' Union*, (1909) 167 Fed. 809; *Cohen v. U. S.*, (C. C. A. 1909) 170 Fed. 715; *Kerreh v. U. S.*, (C. C. A. 1909) 171 Fed. 366; *Foster v. U. S.*, (C. C. A. 1910) 178 Fed. 166; *Com. v. Ensign*, (1910) 228 Pa. St. 400, 77 Atl. 657.

### Vol. III, p. 7, sec. 861.

**Mode of proof.**—Under the express terms of this section, in common-law actions in the United States courts the witnesses must appear in open court, unless the case falls within one of the statutory exceptions. *Compania Azucarera Cubana v. Ingraham*, (1910) 180 Fed. 516.

**Evidence admissible.**—The federal courts are not required by this section to exclude evidence which, although not within the terms of such section or of the following provisions relating to depositions, is still admissible under the principles of evidence recognized by the common law before and at the time of its enactment. *Toledo Traction Co. v. Cameron*, (C. C. A. 1905) 137 Fed. 48.

**Testimony given at former trial.**—In *Toledo Traction Co. v. Cameron*, (1905) 137 Fed. 48, 69 C. C. A. 28, it was held that Rev. Stat. Ohio, sec. 5343a, which authorizes the admission in evidence of the testimony given by a witness on a former trial of the same case when the witness is dead or beyond the jurisdiction of the court, is in conformity with the rule recognized at common law, which permits the use of such evidence generally where it is impossible to obtain a  *viva voce*  examination of the witness, and is not in conflict with R. S. sec. 861, and may properly be applied in an action at law in a federal court sitting within the state, where the witness is without the district and more than one hundred miles distant from the place of trial.

But in a case from the Eighth Circuit it appeared that on a former trial a witness had testified for the plaintiff, and on the record trial on proof that this witness was about two hundred miles distant from the place of trial, but without proof of any effort to procure his attendance, or that it was not practicable to have obtained his testimony by deposition *de bene esse*, or otherwise, as provided by R. S. secs. 863-867, the plaintiff offered the testimony of this witness given on the former trial, to be read from the stenographer's notes. It was held that the evidence was not admissible. *Diamond Coal, etc., Co. v. Allen*, (C. C. A. 1905) 137 Fed. 705.

**Testimony of deceased witness on former trial.**—It is competent for a party, on the second trial of an action in a federal court, under the general rule, to prove the testimony given on the former trial by a witness who has since died, there being no federal statute on the subject. *Nome Beach Lighterage, etc., Co. v. Standard Marine Ins. Co.*, (1907) 156 Fed. 484, *affirming* (C. C. A. 1909) 167 Fed. 119.

**Hearing on rule to show cause.**—This section does not prevent the use of depositions on a hearing of a rule to show cause when there is no local practice forbidding the use of depositions in such cases. *Importers', etc., Nat. Bank v. Lyons*, (1905) 134 Fed. 510.

## Vol. III, p. 22. [Act of March 9, 1892.]

**Relates to manner of taking only.**—This Act merely relates to the manner of taking depositions, and neither enlarges nor restricts the grounds for taking them prescribed by R. S. secs. 863, 866, 3 Fed. Stat. Annot. 8, 20. *Zych v. American Car, etc., Co.*, (1904) 127 Fed. 724; *Magone v. Colorado Smelting, etc., Co.*, (1905) 135 Fed. 846; *Smith v. International Mercantile Co.*, 154 Fed. 786.

**Manner of objection to mode of taking depositions.**—In *Zych v. American Car, etc., Co.*, (1904) 127 Fed. 723, it appeared that suit was brought against the defendant in the state courts of Missouri, and notice was given to the taking of the depositions of certain witnesses before trial, and subpoenas for such witnesses were duly issued and served. The defendant then removed the case to the federal court, and after removal applied for the appointment of a special commissioner before whom such witnesses might be examined, as authorized by Rev. Stat. Mo. 1899, sec. 2883. The federal court made such appointment under Act Cong. March 9, 1892, making it lawful to take depositions for use in the federal court in the mode prescribed by the laws of the state. It was held that defendant, having itself applied for the appointment of the commissioner, waived its right to object that inasmuch as the witnesses intended to remain in St. Louis, and were not aged or in poor health, conditions prescribed by R. S. secs. 861, 863, 866, 3 Fed. Stat. Annot. 7, 8, 20, as conditions precedent to the taking of proof to be used in the federal courts in advance of the trial, did not obtain, and that the witnesses were not therefore required to appear and testify before the commissioner.

**Enforcement of attendance of witnesses.**—Where, prior to the removal of a cause to the federal court, notice of the taking of depositions of witnesses before trial as authorized by Rev. Stat. Mo. 1899, sec. 2883, was given,

and after removal a special commissioner was appointed by the federal court to take such testimony, as authorized by Act of March 9, 1892, ch. 14, it was held that the commissioner was authorized to enforce the attendance of the witnesses by attachment under the authority conferred by the state statute. *Zych v. American Car, etc., Co.*, (1904) 127 Fed. 723.

**Foreign witnesses.**—Under this Act and under the Connecticut law permitting the taking of depositions of nonresidents and providing for their oral examination, direct and cross, it was held that the Circuit Court for the district of Connecticut could grant a *dedimus potestatem* to take depositions in Cuba, where otherwise there would be a failure or delay of justice. *Compania Azucarera Cubana v. Ingraham*, (1910) 180 Fed. 516.

**Following state practice.**—Where the laws of a state in which a court is held provide for the issuance of a commission by the clerk to take depositions of witnesses on interrogatories attached on notice to the adverse party, such practice may properly be followed in the federal court with respect to the taking of depositions of witnesses residing in other districts or state. *Carrara Paint Agency Co. v. Carrara Paint Co.*, (1905) 137 Fed. 319.

The examination of a party before trial, authorized by N. Y. Code Civ. Pro., sec. 870, cannot be required by a federal Circuit Court sitting in that state, by virtue of the declaration of the Act of March 9, 1892, ch. 14, that in addition to the mode of taking the depositions of witnesses in causes pending in the federal District and Circuit Courts it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held. *Hanks Dental Assoc. v. International Tooth Crown Co.*, (1904) 194 U. S. 303, 24 S. Ct. 700, 48 U. S. (L. ed.) 989.

## Vol. III, p. 23, sec. 867.

**Use of depositions taken to perpetuate testimony.**—This section, providing that "any court of the United States may in its discretion admit in evidence in any cause before it any deposition taken in *perpetuam rei memoriam* which would be so admissible in a court of the state wherein such cause is pend-

ing according to the laws thereof," does not limit the use of such depositions to any particular cases, nor to those taken in any particular manner, but leaves such matters to be determined by the laws of the state. *Ohio Copper Min. Co. v. Hutchings*, (C. C. A. 1909) 172 Fed. 201.

## Vol. III, p. 24, sec. 869.

**Sufficiency of application.**—A petition for a subpoena duces tecum is sufficiently definite with respect to the books or documents required, where the description is specific enough to enable the witness to produce them without uncertainty. To entitle a party to a subpoena duces tecum requiring a witness not a party to the action to produce books and

documents in his possession it is not sufficient to allege merely that the documents are material and relevant to the issues in the case; but the facts that will enable the court to determine that there are *prima facie* material and relevant must be set out. *U. S. v. Terminal R. Assoc.*, (1907) 154 Fed. 268.

## Vol. III, p. 26, sec. 882.

The records of the Pension Office are admissible in evidence, equally with the certificate issued, to prove the granting of a pension. *Pooler v. U. S.*, (C. C. A. 1904) 127 Fed. 509.

**Exemplified copies of pension vouchers** executed thirty years before, made pursuant to this section, prove themselves, and are admissible in evidence. *Murphy v. Cady*, (1906) 145 Mich. 33, 108 N. W. 493.

**Presumption of genuineness.**—In *Wynne v. U. S.*, (1910) 217 U. S. 234, 30 S. Ct. 447, 54 U. S. (L. ed.) 748, it was held that the genu-

ineness of the authentication of a copy of a certificate of enrolment offered in evidence to establish the national character of a vessel on a prosecution for a crime committed on shipboard will be assumed, as will also the official character of the purported signer and the signing by him, or one authorized to sign for him, where there is no evidence casting suspicion upon the genuineness of the copy or of the seal, or the signature, and none which challenges in any way the American character of the ship.

## Vol. III, p. 27, sec. 886.

**Transcript prima facie evidence.**—In *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814, it was held that, in the absence of countervailing evidence in an action on the bond of an Indian agent, the introduction of a duly certified transcript of the books and proceedings of the Treasury Department established a *prima facie* case in favor of the government entitling it to judgment.

**Rulings of Treasury Department.**—Where, in an action on the bond of an Indian agent, the transcript of the books and proceedings in the Treasury Department contained a debit and credit statement of the account and a showing of the items in dispute, it was held not to be objectionable because it also contained explanatory memoranda showing the ground of the rulings of the accounting officers concerning the items rejected, and, in some instances, the evidence on which they relied. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814.

**Evidence of receipt of money.**—In *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814, it was held that in an action on the bond of a United States Indian agent a transcript of the books and proceedings of the Treasury Department was not evidence of the receipt by such agent of moneys that did not come to his hands through the ordinary channels of the department.

**Ex parte statement of post-office officials.**—This section contemplates the certification only of a bookkeeper's plain statement of account; and therefore a statement made in a certified copy of a postmaster's account, after showing that a charge was made against him, that it was on account of money paid by him to a laborer "for which no service was performed," was held not to be admissible in evidence against him. *Nagle v. U. S.*, (C. C. A. 1906) 145 Fed. 303.

## Vol. III, p. 28, sec. 17.

**Section not retroactive.**—Where, in an action on the bond of a United States Indian Department agent, a transcript of the books and proceedings of the Treasury Department, certified and authenticated by the Register of the Treasury, as required by R. S. sec. 886, 3 Fed. Stat. Annot. 27, was offered in evidence, it was held to be immaterial that it was not certified by the Secretary or the Assistant

Secretary of the Treasury, as required by Amendatory Act of March 2, 1895, ch. 177, sec. 10, 28 Stat. L. 809, enacted after the transcript was filed as a part of the record, and in force at the time of the trial, but providing expressly that it related to certificates thereafter made. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814.

## Vol. III, p. 31, sec. 889.

**Account from auditor for Post Office Department.**—A certified account from the books of the auditor for the Post Office De-

partment comes within this statute. *U. S. v. McCoy*, (1904) 193 U. S. 593, 24 S. Ct. 530, 48 U. S. (L. ed.) 805.

## Vol. III, p. 32, sec. 891.

**Questions of land titles.**—A certified copy of the records of the General Land Office, including the certificate of local land officers that on the records of their office there were no homestead pre-emption or other valid claims to certain lands within the place limits of the grant to the Atlantic & Pacific Railroad Company, made by the Act of July 27,

1866, and that the land had not been returned or denominated as swamp or mineral land, was held to be competent evidence under this section, on the question of the title of one claiming as grantee from the railroad company. *Howard v. Perrin*, (1906) 200 U. S. 71, 26 S. Ct. 195, 50 U. S. (L. ed.) 374.

## Vol. III, p. 33, sec. 892.

Not proof of genuineness of original. — A certified copy of the record of an assignment of a patent with the acknowledgment thereto, although made evidence where the original would be evidence by this section, does not

prove the genuineness of due execution of the original assignment. *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.*, (1908) 184 Fed. 47.

## Vol. III, p. 37, sec. 905.

Statutes of state or territory. — See *Hewitt v. Indian Territory Bank*, (1902) 64 Neb. 463, 92 N. W. 741.

Attestation by clerk. — In *Henry Invest. Co. v. Semonian*, (1909) 45 Colo. 260, 100 Pac. 425, it was held that a transcript of the proceedings of a court of another state, to which was appended a certificate of the judge alone that the foregoing was a complete transcript of the proceedings of the County Court in a certain county, and in a case specified, was not admissible in evidence.

By deputy. — To the same effect as the original note, see *Edwards v. Smith*, (Tex. 1911) 137 S. W. 1161.

Certificate of judge or magistrate. — To the same effect as the first paragraph of the original note, see *Hagan v. Snider*, (1906) 44 Tex. Civ. App. 139, 98 S. W. 213; *Wolf v. King*, (1908) 49 Tex. Civ. App. 41, 107 S. W. 617; *Edwards v. Smith*, (Tex. 1911) 137 S. W. 1161.

To the same effect as the third paragraph of the original note, see *Dusenberry v. Abbott*, (1901) 1 Neb. (unofficial) Rep. 101, 95 N. W. 466.

As to sufficiency of certification, see *Bohlander v. Helkes*, (C. C. A. 1909) 168 Fed. 886.

Sufficiency of authentication. — See *Seymour v. Du Bois*, (1906) 145 Fed. 1003; *Nadel v. Campbell*, (1910) 18 Idaho 335, 110 Pac. 263; *Brown v. Baxter*, (1908) 77 Kan. 97, 94 Pac. 155, 574; *Halfhill v. Malick*, (1911) 145 Wis. 200, 129 N. W. 1087.

Mode of authentication not exclusive. — To the same effect as the first paragraph of the original note, see *Tomlin v. Woods*, (1904) 125 Ia. 367, 101 N. W. 135.

To the same effect as the second paragraph of the original note, see *Sullivan v. Kenney*, (Ia. 1910) 126 N. W. 349.

Records and proceedings of United States courts. — To the same effect as the first paragraph of the original note, see *Jordan v. McDonnell*, (1907) 151 Ala. 279, 44 So. 101; *Edwards v. Smith*, (Tex. 1911) 137 S. W. 1161.

It seems that this section is not applicable where judicial records of a federal court are offered in evidence in a state court, especially where the federal judgment is of the state in whose court it is offered as evidence. *Edwards v. Smith*, (Tex. 1911) 137 S. W. 1161.

But in *Harmon v. Best*, (Ind. 1910) 91 N. E. 19, it appeared that a federal Circuit Court appointed a receiver for a railroad, and thereafter entered an order in the receivership proceeding appointing a commissioner to hear garnishment suits against employees of the railroad, and providing how such claims could be adjudged. A railroad employee was garnished before the commissioner, and the receiver, pursuant to the order, reported the

amount of the wages due, and the garnishment was satisfied. The employee then sued the receiver in the state court without leave of the federal court, and the order of the federal court, properly authenticated, was introduced in evidence. It was held that under this section the order was entitled to be given full faith and credit in the state court and could not be collaterally attacked, and should have been treated by the state court as conclusive against its jurisdiction.

Records of state courts offered in federal courts. — This statute does not apply to judicial records of state courts where offered in evidence in a federal court. *Edwards v. Smith*, (Tex. 1911) 137 S. W. 1161.

State courts must give full faith and credit. — The effect of the provision regarding full faith and credit is that in the courts of other states the judgment of a court of one state is not impeachable except for fraud or want of jurisdiction; is indisputable proof that it rests upon an unanswerable cause of action; is conclusive evidence that the right to its enforcement is wholly unaffected by a laches or lapse of time which preceded its rendition; and gives a right of action for its enforcement subject to limitation and other laws of the forum which regulate, but do not deny, unreasonably restrict, or oppressively burden the exercise of the right. *Lamb v. Powder River Live Stock Co.*, (1904) 132 Fed. 434, 65 C. C. A. 570.

In *Mutual L. Ins. Co. v. McGrew*, (1903) 188 U. S. 291, 23 S. Ct. 375, 47 U. S. (L. ed.) 480, it was held that a decision of a state court cannot be reviewed in the Supreme Court of the United States on the ground that by it full faith and credit were denied to an Hawaiian judgment, in violation of U. S. Const., art. 4, sec. 1, as carried out by R. S. sec. 905, where the judgment of the trial court was rendered prior to the Act of April 30, 1900, providing a government for Hawaii, and such contention was not brought to the attention of the highest state court in any form.

In *Anglo-American Provision Co. v. Davis Provision Co.*, (1903) 191 U. S. 373, 24 S. Ct. 92, 48 U. S. (L. ed.) 225, it was held that full faith and credit was not denied an Illinois judgment by N. Y. Code Civ. Pro., sec. 1780, which, as construed by the New York courts, precludes the maintenance of an action on such judgment by one foreign corporation against another, because it is not upon a cause of action which arose within the state.

A judgment of the Supreme Court of the United States to the effect that a policy of fire insurance could not be recovered upon as it stood nor be helped out by any doctrine of

the common law is not denied full faith and credit by an adjudication of a state court that such judgment is not a bar to a suit in equity to reform the policy so that it will express consent to concurrent insurance, and to recover upon such policy as reformed. *Northern Assur. Co. v. Grand View Bldg. Assoc.*, (1906) 203 U. S. 106, 27 S. Ct. 27, 51 U. S. (L. ed.) 109.

In *Fauntleroy v. Lum*, (1908) 210 U. S. 230, 28 S. Ct. 641, 52 U. S. (L. ed.) 1039, it was held that the Mississippi courts cannot deny to a judgment of a Missouri court, based upon an award in arbitration proceedings in Mississippi, the full faith and credit secured by U. S. Const., art. 4, sec. 1, to the judgments of sister states, because the original controversy grew out of a gambling transaction in futures in Mississippi, which is made a misdemeanor by Miss. Annot. Code 1892, secs. 1120, 1121, 2117, which further provide that contracts of that character shall not be enforced by any court.

In order that a judgment or decree shall be conclusive in an action brought thereon in another state, it must not only be conclusive in the jurisdiction where rendered, but also final in character, and establish a fixed and certain liability, and therefore a decree for alimony and costs will support an action in another state in so far as it is for a sum due at the time of its rendition, and which is absolutely awarded, but not with respect to future payments, for which it provides, but as to which it remains subject to modification at any time in the discretion of the court. *Israel v. Israel*, (C. C. A. 1906) 148 Fed. 576, 8 Ann. Cas. 697.

In *Tilt v. Kelsey*, (1907) 207 U. S. 43, 28 S. Ct. 1, 52 U. S. (L. ed.) 95, it was held that the full faith and credit due the probate proceedings of the New Jersey courts do not require that the courts of New York shall be bound by the adjudication of the New Jersey courts on the question of domicile.

In *Andrews v. Andrews*, (1908) 188 U. S. 14, 23 S. Ct. 237, 47 U. S. (L. ed.) 366, it was held that the full faith and credit clause of the Federal Constitution is not violated by the refusal of the Massachusetts courts, acting in accordance with Mass. Pub. Stat., ch. 146, sec. 41, to give effect to a decree of divorce rendered by a court of another state in a suit instituted by one who temporarily left the state of Massachusetts, where he was domiciled, for the purpose of obtaining a divorce for a cause which occurred in that state while the parties resided there, but which was not a ground for divorce in that state.

**Rule of evidence.**—This section providing that the record of a judgment after due notice in one state shall be conclusive evidence in the courts of another state or of the United States of a matter adjudged, etc., prescribes a rule of evidence rather than one of jurisdiction. *Israel v. Israel*, (1904) 130 Fed. 237; *Clifford v. Williams*, (1904) 131 Fed. 160; *Beauchamp v. Bertig*, (1909) 90 Ark. 361, 119 S. W. 75; *De Vall v. De Vall*, (Ore. 1910) 109 Pac. 755.

**Limitations.**—Under this section it was

held that the question whether a judgment dismissing an action on a note in New York on the ground that it was barred by limitations of that state was a determination on the merits of the case, and therefore barred another action on the note in Kentucky, depended on the effect which would be given to such judgment by the courts of New York, and that where under the decisions of New York a judgment based solely on the statute of limitations is held to affect the remedy only, and not the cause of action, such judgment was no bar to the plaintiff's action in Kentucky, where a different statute of limitation prevailed. *Brand v. Brand*, (1903) 116 Ky. 785, 76 S. W. 868.

**Completeness of transcript.**—In *Montgomery v. Consolidated Boat Store Co.*, (1903) 115 Ky. 156, 72 S. W. 816, it was held that a transcript of the judgment of a sister state on which execution had been issued and certified, as required by sections 905-909, so as to entitle the judgment to full faith and credit, would be deemed to contain a complete copy of the judgment, though it differed in form from the form of judgment used in Kentucky.

**Conclusiveness as to jurisdiction.**—Neither the full faith and credit clause of the Federal Constitution (Const., art. 4, sec. 1) nor this section passed in conformity therewith prevents an inquiry into the jurisdiction of the court of a sister state by which a judgment rendered therein is offered in evidence, and a copy of the record, though duly authenticated, may be contradicted as to the facts necessary to give jurisdiction, or where it appears in a collateral proceeding in another state that such facts did not exist, the record is a nullity, though it may contain recitals that the facts did exist. *De Vall v. De Vall*, (Ore. 1910) 109 Pac. 755.

**Not applicable to courts of limited jurisdiction.**—*Strecker v. Railson*, (1907) 16 N. D. 68, 111 N. W. 612.

**Probate of will.**—On proceedings to probate a will which had been admitted to probate in Illinois, where the copy of the will and of the record showing the admission to probate were not authenticated by the attestation of the officer having charge of the record, nor certified by him to have been compared with the original, and to be a true copy thereof, as required by this section, it was held that the County Court of another state had no jurisdiction to admit the will to probate. *In re Box*, (1906) 127 Wis. 264, 106 N. W. 1063.

**Orders in supplementary proceedings.**—In *Orient Ins. Co. v. Rudolph*, (1905) 69 N. J. Eq. 570, 61 Atl. 26, it was held that as supplementary proceedings in the state of New York are not considered special proceedings before a court or officer of limited jurisdiction, but as a new remedy in an action in which the court has general jurisdiction, the production and proof in a New Jersey court of an order by a court of New York appointing a receiver in supplementary proceedings there, and reciting the facts necessary to give the court jurisdiction, furnishes conclusive evidence of the regularity and validity of the

order, and *prima facie* evidence of the jurisdictional facts.

**Record of deeds, etc.**—Copies of the record of deeds and other similar private writings made in a sister state are admissible in evidence in the courts of other states when properly certified and authenticated. But they

will be given such force and effect only as is given thereto by the law of the state from which they are taken, and it must appear that the record was one which was authorized and provided for by the statutes of that state. *Wilcox v. Bergman*, (1905) 96 Minn. 219, 104 N. W. 955.

### Vol. III, p. 39, sec. 906.

**Validity of statute.**—Congress had the power to enact this section, under which territorial legislation must be given, by every court within the United States, the same faith and credit which it has by law or usage in the court of the territory enacting it. *Atchison, etc., R. Co. v. Sowers*, (1909) 213 U. S. 55, 29 S. Ct. 397, 53 U. S. (L. ed.) 695.

**Evidentiary value of copy.**—In the absence of a state statute defining the evidentiary value or effect of a copy of a record from another state, this section is binding upon the courts of the state, at least to the extent of defining the evidentiary value of such a copy. *Milwaukee Gold Extraction Co. v. Gordon*, (1908) 37 Mont. 209, 95 Pac. 995.

**Proof of incorporation.**—In *Milwaukee Gold Extraction Co. v. Gordon*, (1908) 37 Mont. 209, 95 Pac. 995, it was held that as there is no common-law rule for granting charters to corporations, which are the creatures of law, and authorized by private statutes or general laws, and as courts of Montana do not take judicial notice of the statutory law of Arizona, a certified copy of the record of incorporation of a company in Arizona is not evidence in a Montana court of its lawful incorporation in Arizona, in the absence of proof that the laws of Arizona authorized its incorporation.

**Full faith and credit to state statutes.**—In *Atchison, etc., R. Co. v. Sowers*, (1909) 213 U. S. 55, 29 S. Ct. 397, 53 U. S. (L. ed.) 695, it was held that the full faith and credit demanded by this section is given by the Texas courts to the New Mexico Act of March 11, 1903, providing that an action for personal injuries received in that territory will not lie unless certain requirements as to the making of an affidavit and the bringing of suit within a specified time are observed, where a recovery is permitted in those courts subject to such restrictions, although the statute also undertakes to make the suit maintainable only in the District Court of the territory.

But in *El Paso, etc., R. Co. v. Gutierrez*, (1909) 215 U. S. 87, 30 S. Ct. 21, 54 U. S. (L. ed.) 106, it was held that the full faith and credit demanded by this section is not given to the New Mexico Act mentioned in the preceding paragraph, where a recovery is permitted in a state court on such a cause of action, with no showing of a compliance with the preliminaries of notice and demand prescribed by the territorial statute.

**Sufficiency of authentication.**—See *Milwaukee Gold Extraction Co. v. Gordon*, (1908) 37 Mont. 209, 95 Pac. 995.

## EXECUTION.

### Vol. III, p. 46, sec. 988.

**Construction.**—This section gives a right of stay in a federal court only when the defendant has property upon which the judgment, if in a state court, would be a lien, and who by reason of such lien would be entitled under the state law to a stay of such judgment. Thus where a state statute makes judgments liens on real estate, but not on personal property, and gives a right of stay to a defendant owning sufficient real estate without other security, and also a right of stay to other defendants on their giving bail, a judgment defendant in a federal court who has no real estate cannot obtain a stay by virtue of section 988 by giving bail. *The Island Queen*, (1907) 152 Fed. 470.

In *Petrified Bone Min. Co. v. Rogers*, (1908) 159 Fed. 1019, it appeared that the Pennsylvania codifying statute of June 16, 1836, P. L. 762, secs. 3 and 4, 2 Purd. Dig. (Stewart's ed.) 1517, para. 9 and 10, provides that certain judgment defendants may give

security for the sum recovered, with interest and costs, and thereupon be entitled to a stay, to be computed from the first day of the term to which the action was commenced, from six to twelve months, depending upon the size of the judgment. Act Pa. 1873, P. L. 60, 1 Purd. Dig. 1519, par. 16, changed the time from which the stay is to be computed to the return day of the writ by which the action was commenced. No term of state court in Pennsylvania lasts six months. 1 Purd. Dig. (Stewart's ed.) 629, 630, para. 59, 60. It was held that so far as a stay of execution is concerned, defendants in the federal courts in Pennsylvania have the same privilege as those in the state courts, and upon the same conditions, except that the stay cannot last longer than one term, and that either the Pennsylvania Act of 1836 or that of 1873 fixes the time when the stay begins in the federal courts, as well as in the state courts.



**Vol. III, p. 46, sec. 989.**

**Interest.**—Notwithstanding R. S. secs. 989, 3210, 3220, 3226, 3 Fed. Stat. Annot. 593, 597, 601, requiring a collecting officer to immediately pay over gross collections to the Treasury of the United States, and declaring that a certificate of probable cause shall protect him against execution, so that a judgment against him in a suit to recover inher-

itance taxes paid under protest will in fact be paid out of the United States Treasury, the suit does not thereby become a suit in form against the United States, and hence the successful claimant may recover interest. *Kinney v. Conant*, (C. C. A. 1909) 166 Fed. 720, *affirming* (1908) 162 Fed. 581.

**Vol. III, p. 48, sec. 990.**

**Imprisonment of defaulting officer on distress warrant.**—This section has no application to imprisonment under a distress warrant issued by a department under authority of a specific Act of Congress against the prop-

erty and body of a defaulting officer of the government. *U. S. v. Dillin*, (C. C. A. 1909) 168 Fed. 813.

**Contempt.**—See *In re Lacov*, (C. C. A. 1905) 142 Fed. 960.

**Vol. III, p. 50, sec. 991.**

**Jurisdiction of court commissioners.**—Where a judgment debtor is arrested on a writ issued out of the federal court on the ground that he had property which he refused to apply to a judgment against him, all pro-

ceedings to secure his release after commitment other than by petition in bankruptcy must be taken before a United States commissioner. *Johnson v. Crawford*, (1907) 154 Fed. 761.

**Vol. III, p. 54, sec. 1.**

**Statute mandatory.**—This Act, prescribing the manner in which "all real estate or any interest in land sold under any order or decree of any United States court shall be sold," etc., is mandatory and divests such courts of the discretion which theretofore existed of making sales otherwise than by public auction as therein prescribed, and a sale otherwise made is illegal and void and does not bind the purchaser even after confirmation, who cannot be required to pay for and accept a title which might be subsequently impeached for palpable legal defect in the proceeding itself under which the sale was made. *Cumberland Lumber Co. v. Tunis Lumber Co.*, (C. C. A. 1909) 171 Fed. 352.

**Sale of street railroad under mortgage.**—

*In Provident L., etc., Co. v. Camden, etc., R. Co.*, (C. C. A. 1910) 177 Fed. 854, it was held that the fact that the method of advertisement of the property of a street railroad company to be sold under a foreclosure decree did not conform to the method designated in the mortgages was immaterial, as such foreclosure was governed by the provision of this Act.

**Bankruptcy.**—A court of bankruptcy is not limited in its sales of assets of bankrupts by this Act; but the Bankruptcy Act confers upon such courts full equitable powers in the administration of estates, and they may, for good cause shown, order either real or personal property sold at private sale. *In re Edes*, (1905) 135 Fed. 595.

## EXECUTIVE DEPARTMENTS.

**Vol. III, p. 58, sec. 161.**

**Form.**—The regulations mentioned in this section need not be promulgated in any set form, nor in writing, but may consist of established usages and practices which have become a kind of common law of the department. *Haas v. Henkel*, (1909) 216 U. S. 462, 30 S. Ct. 249, 54 U. S. (L. ed.) 569, *affirming* (1906) 167 Fed. 211.

**Regulations of postmaster-general.**—Under this section, pursuant to which the postmaster-general intrusted the determination of matters pertaining to the second class mailing

privilege to the third assistant postmaster-general, it was held to be immaterial to the right of a publisher to have an order excluding his publication from the mails as second-class mail matter reviewed by the courts that the hearing was before the third assistant postmaster-general, if the order was made by the postmaster-general. *Lewis Pub. Co. v. Wyman*, (1907) 152 Fed. 787.

*In Lewis Pub. Co. v. Wyman*, (C. C. A. 1910) 182 Fed. 13, it was held that the postmaster-general was authorized to limit the

number of sample copies a publisher who was entitled to mail his publication at second-class rates might send out under those rates to an amount equal to that of the publisher's legitimate subscriptions; the publisher not being entitled under Act Cong. March 3, 1885, ch. 342, 23 Stat. L. 387, prescribing a one-cent per pound second-class rate, "including sample copies," to mail an unlimited number of sample copies at that rate.

Regulations become a part of the law.—Under the regulations of the Internal Revenue Department promulgated with the approval of

the Secretary of the Treasury, providing that officers of the department "will decline to testify as to facts contained in the records, or coming to their knowledge in their official capacity; and this prohibition is hereby extended to include also internal revenue storekeepers and gaugers and agents"—a storekeeper and gauger stationed at a distillery has no right to divulge information in regard to the business of the distiller obtained by him solely in his official capacity as an internal revenue officer, even when called as a witness in a state court. *Stegall v. Thurman*, (1910) 175 Fed. 813.

### Vol. III, p. 60, sec. 162.

**Saturday afternoons.**—"Every Saturday after 12 o'clock noon" is a holiday for all purposes within the District of Columbia, and is therefore one of the "days declared public holidays by law" within the meaning of the statutes regulating the number of hours

of labor which must be required of all clerks and employees in the executive departments. Consequently, heads of departments are not obliged to require labor of such clerks, etc., after the hour of noon on Saturdays. (1903) 25 Op. Atty.-Gen. 40.

### Vol. III, p. 61, sec. 177.

**Duties regarding Tariff Act.**—Under this section and section 61, providing that the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of the department, and section 245 that "Assistant Secretaries of the Treasury shall . . . perform such . . . duties in the office of the Secretary of the Treasury as may be prescribed by the Secretary or by law," it has been held that the Secretary of the Treasury could require an Assistant Secretary to "ascertain, determine, and declare" the amount of foreign sugar bounties; that being a duty assigned "the Secretary of the Treasury" by Tariff Act of July 24, 1897, ch. 11, sec. 5, 30 Stat. L. 205, 2 Fed. Stat. Annot. 504, and where an Assist-

ant Secretary has issued a declaration under said section it will be presumed, in the absence of evidence to the contrary, that he was performing a duty in accordance with law, and that the declaration was properly issued. *Franklin Sugar Refining Co. v. U. S.*, (1910) 178 Fed. 743.

**Presumption of authority.**—In *re Jem Yuen*, (1910) 188 Fed. 350, it was held that where an appeal from a deportation order was heard and decided by the acting Secretary of Commerce and Labor, it would be presumed, the contrary not appearing, that the acting secretary was at the time lawfully exercising the secretary's powers, as he was authorized to do by this section.

### 1909 Supp., p. 129, sec. 5.

**Construction.**—The language of this Act imports that the persons to which it applies are actually in the departments at the seat of government, or that the performance of duties away from such departments is by direct orders from and under supervision by those departments. (1907) 26 Op. Atty.-Gen. 254.

This section does not apply to employees and subordinates in post offices, pension agencies, customs houses, ordnance establishments, sub-treasuries, navy yards, and quartermasters' establishments. (1907) 26 Op. Atty.-Gen. 254.

The term "department," as used in laws relating to the civil service, is distinguished from "office," "bureau," and "branch;" and subordinates of the several executive departments are distinguished from employees of the last-mentioned governmental agencies. (1907) 26 Op. Atty.-Gen. 209.

**Transfer from independent office to a department.**—It is lawful for the Civil Service Commission to consent to the transfer of a classified employee from an independent office of the government to a department or

another independent office or bureau, although such employee may not have served three years in the office or bureau from which he seeks transfer, as is required by section 5 of clerks and employees of the executive departments. (1907) 26 Op. Atty.-Gen. 209.

The "field force" of an executive department—that is, its classified employees under its immediate control, as inspectors, examiners, and agents, though employed usually or invariably away from the seat of government—are governed by the above-mentioned statutory provision with regard to transfers. (1907) 26 Op. Atty.-Gen. 209.

**Philippine commission.**—Isthmian canal commission.—The provisions of this section are not applicable to the Philippine Commission or to the Isthmian Canal Commission. (1907) 26 Op. Atty.-Gen. 209.

**Employees of forest service.**—Classified employees on the rolls of the forest service, Department of Agriculture, in Washington, are required by the terms of this section to serve three years before their transfer to other departments is permissible. (1909) 27 Op. Atty.-Gen. 421.

**Waiver of three-year limit.**—The Civil Service Commission has authority under clause (a), sec. 8, of Civil Service Rule X., within its discretion and in view of all the circumstances of the case, to waive the three-

year limit of time required by this section for service of clerks in one executive department before transfer to another. (1908) 27 Op. Atty.-Gen. 100.

## EXTRADITION.

Vol. III, p. 68, sec. 5270.

**Construction of treaties.**—In the construction and carrying out of extradition treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent, since an exact correspondence between the laws of the two countries cannot be expected, and the only purpose of extradition is to put the accused on trial under the laws of his own country. U. S. t. Greene, (1906) 146 Fed. 766.

The construction of an extradition treaty, made by the Constitution a part of the supreme law of the land, is for the courts, and they are not bound by the construction placed thereon by the executive or diplomatic branches of the government, or by the construction placed thereon by the foreign country with which the treaty is made. *Ex p. Charlton*, (1911) 185 Fed. 880.

This section and an extradition treaty between the United States and a foreign country must be construed together to determine the requisites of a formal demand for the surrender of a fugitive, except that a treaty, when later, controls where it is in irreconcilable conflict with the statute. *Ex p. Charlton*, (1911) 185 Fed. 880.

If one construction of a treaty assures a reasonable opportunity for each government to furnish the other the proofs necessary to justify the continued detention of suspected criminals, while another construction facilitates the escape of fugitives from justice and tends to impede the punishment of crime, the former is to be preferred in the absence of compelling words to the contrary. (1908) 27 Op. Atty.-Gen. 4.

**Treaty with Italy.**—In *Ex p. Fudera*, (1908) 162 Fed. 591, it was held that article 1 of the extradition treaty of 1868 between the kingdom of Italy and the United States (Act March 23, 1868, 15 Stat. L. 620, 7 Fed. Stat. Annot. 654), which provides for extradition from one country to the other of persons charged with crime in the demanding country, "provided that this shall be done only upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed," does not warrant the return to Italy of a person there charged with murder, where the only evidence presented of his connection with the offense is hearsay.

In *Ex p. Charlton*, (1911) 185 Fed. 880, it was held that the court would not declare that the extradition treaty between the United States and Italy, referred to in the preceding note, is abrogated merely because Italy refuses to surrender its subjects committing crimes in the United States and then fleeing to Italy, where the United States has dealt with the treaty as subsisting, and has honored the requisition of the Italian government for the surrender of its citizens, and that the court would not go behind such acts and say that the treaty has been ended.

**Treaty with Mexico.**—The forty days during which a prisoner may be detained under the terms of article X. of the treaty of February 22, 1899, 31 Stat. L. 1825, 7 Fed. Stat. Annot. 716, with Mexico, "to await the production of the documents upon which the claim for extradition is founded," must be considered as meaning forty days prior to the production of the documents to the state department in the United States, or to the corresponding branch of the Mexican government; and if such documents are thus produced within the forty days, the suspected criminal has no absolute right or release under the treaty, but may be detained for a reasonable additional period to afford time for an investigation into his probable guilt or innocence. (1908) 27 Op. Atty.-Gen. 4.

**Treaty with Great Britain.**—The treaty of July 12, 1889, art. 3, 26 Stat. L. 1509, 7 Fed. Stat. Annot. 604, between the United States and Great Britain, provides that no person surrendered by or to either country shall be tried for any offenses committed prior to his extradition other than the offense for which he was surrendered. Article 6 provides that the extradition of fugitives under the treaty and the treaty of 1842 (7 Fed. Stat. Annot. 582) shall be carried out in conformity to the laws regulating extradition in force in the surrendering state. The Canadian Extradition Act is said to provide that it does not authorize the issue of an extradition warrant to any state or country in which the person may be tried after extradition for any other offense than that for which he was extradited, unless assurance is first given that he shall not be so tried. R. S. sec. 5275, 3 Fed. Stat. Annot. 78, provides for the security against lawless violence of persons extradited into this country, until they have been tried for

the offenses for which they have been extradited, etc., and for a reasonable time thereafter. It has been held that one extradited from Canada is not immune from trial for another offense committed after his extradition, and before given opportunity to return to Canada, and that though the Canadian officials might have refused to surrender him without receiving the assurance referred to in the Canadian Act, as, by surrendering him without such assurance, the right of the United States and the state were limited only by the treaty. *Ex p. Collins*, (1907) 151 Cal. 340, 90 Pac. 827.

**Extradition to Porto Rico.** — Extradition from a state or territory of the United States to Porto Rico is not authorized by the statute relating to extradition to foreign countries. *In re Kopel*, (1906) 148 Fed. 505.

**Indictment — Description of offense.** — An indictment charging a conspiracy to defraud the United States between an officer and agent of the government and his codefendants, which sets out facts showing a corrupt agreement between the defendants and overt acts by means of which the purpose of such agreement was effected and the government defrauded, charges fraud by an agent and participation therein by the other defendants, within the meaning of clauses 4 and 10 of article 1 of the extradition treaty of 1890 (Act March 25, 1890, 26 Stat. L. 1509, 7 Fed. Stat. Annot. 603) between Great Britain and the United States, and is sufficient to warrant their extradition for trial thereunder. *U. S. v. Greene*, (1906) 146 Fed. 766.

An information in extradition proceedings charging accused with "assault with intent to kill and murder" sufficiently brings the offense within article 10 of the treaty with Great Britain, authorizing extradition of persons charged with "assault with intent to commit murder." *U. S. v. Piazza*, (1904) 133 Fed. 998.

**Complaint — Technicality.** — Good faith to the demanding foreign government requires the surrender of the accused in extradition proceedings if there is presented, even in somewhat untechnical form, such reasonable ground to suppose him guilty of crime as to make it proper that he should be tried. *Gluckman v. Henkel*, (1911) 221 U. S. 508, 31 S. Ct. 704, 55 U. S. (L. ed.) 830.

Under article 10 of the extradition treaty with Great Britain of 1842, a complaint for the arrest and examination of an alleged offender is not required to set out the offense with the particularity of an indictment, but is sufficient if it conforms to the requirements of a preliminary complaint under the local law where the accused is found. *In re Herskovitz*, (1901) 136 Fed. 713. Of similar effect see *Ex p. Zentner*, (1910) 188 Fed. 344.

**Necessity for incorporation of foreign record in complaint.** — To give jurisdiction to a United States commissioner of a proceeding to extradite a fugitive from the justice of a foreign state, the record of proceedings before the foreign court, and the depositions of witnesses therein contained, upon which the extradition proceeding is based, need not be attached to the complaint, if they are in

the custody and keeping of the one making the complaint, and the commissioner is possessed of the information which they contain, which is sufficient to satisfy him that the proceeding is based upon real grounds. *Yordi v. Nolte*, (1909) 215 U. S. 227, 30 S. Ct. 90, 54 U. S. (L. ed.) 170, affirming 166 Fed. 921.

**Upon information and belief.** — The irregularity, if any, in making a complaint in extradition proceedings on information and belief, without attaching thereto the record of the foreign court which is the basis of the proceedings, is cured by the production at the hearing of such record, which is sufficient to justify the detention of the accused. *Yordi v. Nolte*, (1909) 215 U. S. 227, 30 S. Ct. 90, 54 U. S. (L. ed.) 170, affirming 166 Fed. 921.

**Verification.** — A complaint sworn to upon information and belief is sufficient in proceedings for the extradition of a person to a foreign country, where it is supported by the testimony of witnesses who are stated to have deposed, and who therefore must be presumed to have been sworn. *Gluckman v. Henkel*, (1911) 221 U. S. 508, 31 S. Ct. 704, 55 U. S. (L. ed.) 830.

**Variance.** — A variance in proceedings for the extradition to a foreign country of a person charged with forgery and uttering forged paper, in that the complaint speaks of bills of exchange, while the evidence shows the forged instruments to have been promissory notes, is not fatal, where the instruments are sufficiently identified. The effect of a variance between the complaint and the evidence in proceedings for the extradition of a person to a foreign country is to be decided on general principles, irrespective of the laws of the state where the proceedings are had. *Gluckman v. Henkel*, (1911) 221 U. S. 508, 31 S. Ct. 704, 55 U. S. (L. ed.) 830.

In proceedings to extradite petitioner for forgery alleged to have been committed in a foreign country, a variance between the complaint and the evidence as to the dates of the instruments alleged to have been forged is immaterial. *Ex p. Zentner*, (1910) 188 Fed. 344.

**Identity of offense charged.** — While the extradition of a person from a foreign country for trial in the United States and the indictment on which he is tried must be for the same criminal acts, it does not follow that the crime must have the same name in both countries, but it is sufficient if the acts in question are criminal in both countries and are within the terms of the treaty under which the extradition is granted. The persons surrendered by Canada to the United States, under sections 4 and 10 of article 1 of the extradition treaty of 1890 between Great Britain and the United States, to be tried for the crime of "participation in fraud by an agent or trustee," were tried for such crime where the indictment charged them with conspiracy with a disbursing officer of the government to defraud the United States by presenting false and fraudulent claims to such officer and by his allowance and payment of the same from public money in his hands, the acts and transactions charged and proved before the extraditi-

tion commissioner and under the indictment being the same. *Greene v. U. S.*, (C. C. A. 1907) 154 Fed. 401, *affirming* (1906) 146 Fed. 803.

**Trial for different offenses — Offense committed subsequent to extradition.** — A person extradited for a particular offense may be tried for a different offense committed subsequent to the time he was extradited without first being given a reasonable time to return to the country from which he was first extradited. *Ex p. Collins*, (1907) 151 Cal. 340, 90 Pac. 827, wherein it was held that a person extradited on the charge of perjury could be tried on a second indictment for perjury committed on the trial of the charge for which he was extradited. The court, after stating the general rule that a person extradited from a foreign country on one charge could not be indicted for a different offense, said: "But no such considerations apply to the case of an offense committed after the surrender and return of the accused. While it may be the policy of a country in which a person has taken refuge to grant him the right of asylum except as against a specific charge of a crime covered by a treaty of extradition, such country, after it has once extradited him, cannot be concerned in securing for him immunity for new crimes committed after his return to the demanding country. The obligation assumed by the country demanding the surrender is that such surrender will not be used for the purpose of putting the prisoner on trial for any other offense which he may be claimed to have committed before he sought the asylum of the foreign country; but we cannot see that there would be any breach of international faith in compelling him, in common with other persons within the jurisdiction, to assume responsibility for any offense which he may commit after his return. In such case there is no possibility of the extradition proceedings being used as a subterfuge to pursue the accused for an offense other than the one for which he was extradited. In the absence of any authority compelling such conclusion, we are not prepared to hold that a person extradited under a treaty may, after his return, and pending his trial upon the extradition charge, commit any crime, however atrocious, with absolute security against prosecution until he shall have had an opportunity to return to the country from which he was taken."

**New indictment for same offense.** — Where a petitioner was extradited from Mexico under an indictment charging an extraditable offense, and thereafter the indictment was quashed in the demanding state, it was held that the petitioner was not entitled to a reasonable time to return to Mexico before being called on to answer a new indictment charging the same facts. *Ex p. Fischl*, (1907) 51 Tex. Crim. 63, 100 S. W. 773.

**Imprisonment under prior conviction or offense.** — The omission of the words "or be punished" from the provision of article 3 of the extradition treaty of July 12, 1889, 26 Stat. L. 1508, 7 Fed. Stat. Annot. 603, with Great Britain, that no person extradited

"shall be triable or be tried" for any crime or offense committed prior to his extradition other than the offense for which he was surrendered until he shall have had an opportunity of returning to the country from which he was surrendered, does not justify the imprisonment, upon a former conviction for another and different offense, of a person extradited from Canada for an offense against the United States, until he has had an opportunity to return to Canada — especially where extradition has been refused for the other offense — since this omission is inadequate to overcome the positive provisions of R. S. secs. 5272, 5275, 3 Fed. Stat. Annot. 77, 78, and the otherwise manifest scope and object of the treaty, and the earlier Ashburton treaty of 1842, which are to limit imprisonment as well as the trial to the crime for which extradition has been demanded and granted. *Johnson v. Browne*, (1907) 205 U. S. 309, 27 S. Ct. 539, 51 U. S. (L. ed.) 816.

**Preliminary examination.** — Under this section an alleged fugitive may be arrested under a warrant issued by the committing magistrate on the complaint of a representative of the foreign country, and the committing magistrate can only determine whether a certificate from the Secretary of State, attesting that a requisition has been made by the foreign government, has been issued, whether the offense charged against accused is extraditable under any treaty, whether the person brought before him is the one accused of crime, and whether there is probable cause for holding accused for trial, and the evidence in that respect must be such as, according to the law of the state in which accused is apprehended, is sufficient to commit him for trial. *Ex p. Charlton*, (1911) 185 Fed. 880.

**Probable cause.** — In order to justify a commissioner in issuing a certificate to the executive authority for the surrender of the accused in extradition proceedings, it is sufficient if the accused is held on competent legal evidence, and if probable cause exists for believing him guilty of the offense charged. The evidence need not be conclusive, nor must the commissioner be absolutely convinced of the guilt of accused. *U. S. v. Piazza*, (1904) 133 Fed. 998.

**Sufficiency of evidence.** — A fugitive from the justice of a foreign government is not entitled to his discharge from arrest in extradition proceedings on habeas corpus for insufficiency of evidence, if the commissioner before whom he was examined had before him competent legal evidence on which to exercise his judgment whether the facts shown sufficiently established petitioner's criminality for purposes of extradition. *Ex p. Zentner*, (1910) 188 Fed. 344.

Under the treaty of 1852 (7 Fed. Stat. Annot. 771) of the United States with Prussia and other states of the Germanic Confederation for extradition of criminals, providing that they shall be delivered on such evidence of criminality as according to the laws of the place where the fugitive was found would justify his apprehension and commitment for trial, it is not necessary, to justify extradi-

tion, to present evidence sufficient to sustain a conviction; evidence justifying a committing magistrate in holding accused by imprisonment or by bail to await subsequent proceedings being sufficient, and the provisions of a state law that conviction cannot be had on the uncorroborated evidence of an accomplice would have no application. *Ex p. Glaser*, (1910) 176 Fed. 702, 100 C. C. A. 254.

Where, in extradition proceedings for murder, the evidence, though circumstantial, was so strong that, if produced before a committing magistrate in the state where petitioner was arrested and applied for habeas corpus, as proof of an assassination committed there, it would have been the commissioner's duty to hold accused to await subsequent proceedings, it is sufficient to sustain an order for his return. *In re Urzua*, (1911) 188 Fed. 540.

In *Elias v. Ramirez*, (1910) 215 U. S. 398, 30 S. Ct. 131, 54 U. S. (L. ed.) 253, reversing (1907) 11 Ariz. 256, 90 Pac. 323, it was held that the evidence was sufficient to justify commitment in extradition proceedings on a charge of forgery of railway wheat certificates purporting to show the true weight of carloads of wheat shipped from the United States to Mexico, where it was shown that the accused was a member of a firm of customs brokers which presented to the Mexican customs authorities certificates showing weights much less than the true weight; that the Mexican government was thereby defrauded of a large amount of import duties; that the accused was the principal, if not the only, beneficiary of the fraud, and that, instead of reparation or explanation, resort was had to flight.

**Sanity of accused.** — On extradition proceedings for the removal to a foreign country of an alleged fugitive from the justice thereof, evidence of the insanity of accused at the time of the commission of the offense, or of the present sanity of the accused, is improper. *Ex p. Charlton*, (1911) 185 Fed. 880.

**Place.** — The preliminary examination of a person sought to be extradited under the treaties of Aug. 9, 1842, 8 Stat. L. 572, 576, 7 Fed. Stat. Annot. 582, and July 12, 1889, 26 Stat. L. 1508, 1510, 7 Fed. Stat. Annot. 603, between the United States and Great Britain, on a conviction of murder, must be had in the state where he was found and arrested, in view of the provision of the 10th article of the earlier treaty, that the alleged fugitive criminal shall be arrested and delivered up only upon such evidence of criminality as, according to the laws of the place where he is found, would justify his apprehension and commitment for trial if the crime had there been committed, and of the proviso in the Sundry Civil Appropriation Act of Aug. 18, 1894, 2 Fed. Stat. Annot. 334, 28 Stat. L. 416, ch. 301, by which it is made the duty of a marshal arresting a person charged with any crime or offense to take him before the nearest Circuit Court commissioner or the nearest judicial officer having jurisdiction, for a hearing, commitment, or taking bail for trial — notwithstanding those parts of the Act of Aug. 12, 1848, ch. 167, 9 Stat. L.

302, and of R. S. sec. 5270, 3 Fed. Stat. Annot. 68, which provides for bringing the accused in extradition proceedings before the justice, judge, or commissioner who issued the warrant of arrest. *Pettit v. Walshe*, (1904) 194 U. S. 205, 24 S. Ct. 657, 48 U. S. (L. ed.) 938, affirming (1903) 125 Fed. 572.

**Certified copy of requisition.** — Failure to produce a certified copy of a requisition from a foreign country before the commissioner in extradition proceedings was held to be cured, where a properly certified copy of the requisition on file in the office of the Secretary of State was submitted to the court at the hearing of a writ of habeas corpus. *In re Urzua*, (1911) 188 Fed. 540.

**Identity.** — A finding that the identity of the prisoner with the person whose extradition to a foreign country is sought is made out cannot be said to be erroneous where in addition to a photograph under seal of the foreign magistrate, which represents the prisoner, there are other facts tending to establish such identity. *Glucksmann v. Henkel*, (1911) 221 U. S. 508, 31 S. Ct. 704, 55 U. S. (L. ed.) 830.

**Offense not included in treaty.** — As to offenses not covered by an extradition treaty between two countries, they stand toward each other as though there were no treaty, and either may exercise its discretion as to the surrender of a fugitive on demand of the other; and where such a demand has been acceded to, either under the obligation of a treaty or as an act of comity, the accused is triable in the courts of the country to which he is returned on the charge upon which he was surrendered. *Greene v. U. S.*, (C. C. A. 1907) 154 Fed. 401, affirming (1906) 146 Fed. 803.

To warrant the extradition of a person to Italy under section 7, article 2 of the treaty of March 23, 1868, with that country (15 Stat. L. 630, 7 Fed. Stat. Annot. 654), which provides for the extradition of persons charged with "the embezzlement of public moneys committed within the jurisdiction of either party by public officers or depositors," where the accused was charged with having as treasurer of a hospital embezzled its funds, it was held that the proof must show that the hospital was a public institution, that the accused, as its treasurer, was a public officer or depositor, and that the money taken was public money. *Ex p. Ronchi*, (1908) 164 Fed. 288.

**Jurisdiction of commissioner.** — The commissioner's jurisdiction over the case ends after he has certified the result of his finding to the Secretary of State and committed the prisoner to the proper jail. He has no authority to order a prisoner transported out of the judicial district in which he was arrested. (1909) 27 Op. Atty.-Gen. 128.

**Demand by foreign government.** — No prior demand by a foreign government is necessary before the arrest of a fugitive from the justice of such government in extradition proceedings. *Ex p. Zentner*, (1910) 188 Fed. 344.

"Request" equivalent to a "demand." — Where an extradition treaty, providing for the surrender of persons committing numer-

ated crimes, exists between the United States and a foreign government, a "request" by the foreign government for the surrender of a fugitive is a sufficient "demand" for the surrender. *Ex p. Charlton*, (1911) 185 Fed. 889.

**Translation of depositions.**—Where certain depositions attached to extradition papers were in the German language, and the translator testified before the commissioner that he had dictated the translation to a typewriter, that he had examined and compared it as written out, and that the translation was correct, there being no claim by petitioner that the translation was in any respect inaccurate, it was held to be no objection to the translation that the typewriter did not also testify with reference thereto. *Ex p. Zentner*, (1910) 188 Fed. 344.

**Ultior purpose in securing extradition.**—Evidence of malice or an ulterior purpose on the part of the prosecuting witness at whose instance a criminal prosecution was instituted in a foreign country will not invalidate a commitment of the accused for extradition from this country. *In re Herskovitz*, (1901) 136 Fed. 713.

Where extradition proceedings for forgery were in the name of the German government under treaty with the United States, it was held that the attitude or motives of the persons alleged to have been defrauded were immaterial. *Ex p. Zentner*, (1910) 188 Fed. 344.

**Surrender of citizens of the United States for trial in foreign country.**—The word "persons" in the extradition treaty between the United States and Italy, entered into in 1868, 24 Stat. L. 1001, 7 Fed. Stat. Annot. 654, providing for the surrender of persons charged with enumerated crimes, is sufficiently broad to embrace citizens and subjects of the contracting parties, and a citizen of the United States, who while in Italy commits an offense, and who then flees to the United States, is within the treaty and may be extradited thereunder, though Italy has always construed the word so as to include its citizens and subjects. *Ex p. Charlton*, (1911) 185 Fed. 880.

**Due process of law.**—Where an extradition treaty subsists with a foreign government under the Constitution and law of the land, a surrender of an alleged fugitive in pursuance thereof is in accordance with the due process of law requirement of the Constitution. *Ex p. Charlton*, (1911) 185 Fed. 880.

**Review of commissioner's decision on habeas corpus.**—Under this section, which vests justices of the Supreme Court, circuit

and district judges and commissioners with concurrent jurisdiction to issue warrants and make examinations and commitments in extradition proceedings, the judgment of a commissioner in such a proceeding cannot be reviewed for error by a District Court on a writ of habeas corpus. *In re Herskovitz*, (1901) 136 Fed. 713.

The court, on habeas corpus for the discharge of an alleged fugitive from the justice of a foreign country, held for removal thereto, may only determine whether the findings of the committing magistrate are based on competent evidence, and whether the foreign government has formally demanded the extradition of the fugitive. *Ex p. Charlton*, (1911) 185 Fed. 880.

**Necessity for certificate of Secretary of State.**—Under this section a certificate of the Secretary of State that application for the extradition of the person named has been made by the foreign government is not necessary to the issuance of such warrant, even where, as in case of Russia, the treaty provides for such certificate. *In re Schluppenbach*, (1908) 164 Fed. 783.

**Bail.**—A Circuit Court of the United States has power independently of statute to admit to bail in a case of foreign extradition pending examination, but such power should be exercised only under the most pressing circumstances. However, where the plaintiff in an action in New York involving his whole fortune was arrested on an extradition warrant from Canada the day before the trial of his case was to begin, at the instance of the adverse party, it was held that the hardship was such that the court was justified in enlarging him on bail until the trial of his case could be completed. *In re Mitchell*, (1909) 171 Fed. 289.

**What amounts to a charge of crime.**—For the purposes of extradition, one who, in his absence, has been convicted in *contumaciam* of a criminal offense in a foreign country, is to be regarded only as charged with, and not convicted of, the offense. *Ex p. Fudera*, (1908) 162 Fed. 591.

**Finality of decision of country on which demand is made.**—The question whether or not a fugitive shall be surrendered by a country in which he has sought asylum must of necessity be decided by the government of such country, and its decision, approved by its courts, that the offense charged is within the terms of an extradition treaty between that country and the one making the demand, is final, and the question cannot be again raised in the courts of the latter country after extradition. *Greene v. U. S.*, (C. C. A. 1907) 154 Fed. 401, *affirming* (1906) 146 Fed. 803.

## Vol. III, p. 76, sec. 5271.

**Authentication of depositions.**—Under this section, providing that, where depositions are offered in evidence in an extradition case, they shall be admitted if they are properly authenticated to be received for similar purposes by the tribunals of the foreign country from which accused shall have escaped,

and the certificate of the principal diplomatic officers of the United States in such country shall be proof that the depositions are so authenticated, depositions so authenticated are properly admitted, though some of them are not sworn to. *Ex p. Glaser*, (1910) 176 Fed. 702, 100 C. C. A. 254.

## Vol. III, p. 78, sec. 5275.

**Prosecution for subsequent offense.**—Immunity from trial for an offense committed by a person after his extradition until he has been afforded an opportunity to return to the country whence he was extradited was not given by the provisions of the treaties with Great Britain of Aug. 9, 1842, 8 Stat. L. 576, 7 Fed. Stat. Annot. 582, and July 12, 1889,

26 Stat. L. 1508, 1509, 7 Fed. Stat. Annot. 603, or of R. S. sec. 5275, under which such immunity as to prior offenses only is secured. *Collins v. O'Neil*, (1909) 214 U. S. 113, 29 S. Ct. 573, 53 U. S. (L. ed.) 933, *affirming* (1907) 151 Cal. 340, 90 Pac. 827, 91 Pac. 397.

## Vol. III, p. 78, sec. 5278.

**Federal authority paramount.**—A state has no sovereign power to surrender fugitives found within its limits to another jurisdiction, and can grant extradition only under the Federal Constitution and statutes. *In re Kopel*, (1906) 148 Fed. 505.

The power of Congress to extend the extradition laws to all places within the territorial jurisdiction of the United States cannot be denied. *In re Gillis*, (1905) 38 Wash. 156, 80 Pac. 300.

**State governors must rely on federal statutes.**—The governor of a state in acting on an application for extradition is bound to follow the procedure specified by this section. *Ross v. Crofutt*, (1911) 84 Conn. 370, 80 Atl. 90.

Under the Washington statute (Pierce's Code, sec. 2035; Ballinger's Annot. Codes & Stat., sec. 7016) making it the duty of the prosecuting attorney or other prosecuting officer to investigate the grounds of a demand for extradition before the issuing of a rendition warrant, it has been held that the governor is not required to have these officers make such investigation before issuing the warrant, as he acts under the Constitution and laws of the United States. *In re Gillis*, (1905) 38 Wash. 156, 80 Pac. 300.

**State legislation in aid of federal enactments.**—The extradition of fugitives from the justice of a state is provided for by Const. U. S., art. 4, sec. 2, providing that, where a person charged in any state with crime shall flee from justice and be found in another state, he shall on demand of the executive of the state from which he fled be delivered up to be removed to that state, and by federal statutes enacted in furtherance of the provision, and a state statute in aid thereof need not be complied with. Thus, where a fugitive was arrested by an officer on information furnished him from the sister state, and on hearing the governor issued his warrant, it was held that the fugitive could not complain that he was not arrested in accordance with a state law providing for the arrest of a person charged in another state with crime. *Ex p. Bergman*, (1910) 60 Tex. Crim. 8, 130 S. W. 174.

The principles governing international extradition have no application to cases of extradition between states. *Knox v. State*, (1905) 164 Ind. 226, 73 N. E. 255.

**Alaska.**—Under the Washington statute (Pierce's Code, sec. 2035; Ballinger's Annot. Codes & Stat., sec. 7016) providing that when a demand is made upon the governor of

the state by the executive of any state or territory, in any case authorized by the Constitution and laws of the United States, for the delivery over of any person charged with crime, the governor shall, if satisfied that the demand is conformable to law and ought to be complied with, issue his warrant, etc., it has been held that the governor has authority to surrender a fugitive from justice upon the demand of the governor of the district of Alaska, made pursuant to section 393, Act March 3, 1899, 30 Stat. L. 1328, ch. 429, 1 Fed. Stat. Annot. 396, expressly conferring upon the governor of that district power to make such demand. *In re Gillis*, (1905) 38 Wash. 156, 80 Pac. 300.

**Porto Rico.**—Precisely the same power to issue a requisition for the return of a fugitive criminal as is possessed under R. S. sec. 5278 by the governor of any organized territory, is given the governor of Porto Rico by the provisions of the Foraker Act of April 12, 1900, 5 Fed. Stat. Annot. 767, 31 Stat. L. 80, ch. 191, sec. 14, that the laws of the United States not locally inapplicable shall be in force and effect in Porto Rico, and of section 17, 5 Fed. Stat. Annot. 768, that the governor of Porto Rico shall have all the powers of governors of the territories of the United States that are not locally inapplicable. *People v. Bingham*, (1909) 211 U. S. 468, 29 S. Ct. 190, 53 U. S. (L. ed.) 286, *affirming* (1907) 189 N. Y. 124, 81 N. E. 773, *which affirmed* 117 App. Div. 411, 102 N. Y. S. 878; *In re Kopel*, (1906) 148 Fed. 505.

In the District of Columbia the chief justice of the Supreme Court thereof is charged with the same duties that in similar proceedings are imposed upon the governors of the several states. *Hayes v. Palmer*, (1903) 21 App. Cas. 450.

**Fugitive serving a sentence in asylum state.**—The governor, otherwise than by exercising his pardoning power, has no power by virtue of the Federal Constitution, or otherwise, to grant an extradition demand issued by the governor of another state for the return of a fugitive from the justice of that state lawfully held in a penal institution under an unexpired sentence. *In re Opinion of Justices*, (1909) 201 Mass. 609, 89 N. E. 174.

**Race prejudice as cause for refusing extradition.**—The mere suggestion that the alleged fugitive from the justice of another state, because of his race and color, will not receive a fair and impartial trial in the court of the demanding state, and will not be adequately protected against violence while in



the custody of that state, does not require the executive of the state in which he may be found to refuse to surrender him on demand made in conformity with the Federal Constitution and laws, nor furnish a ground for his release on habeas corpus. *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92.

**State and federal courts.**—The state courts are bound by the construction of the extradition laws adopted by the Supreme Court of the United States. *Dennison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1045.

**Respective rights of demanding and asylum states.**—To the same effect as the original note, see *In re Opinion of Justices*, (1909) 201 Mass. 609, 89 N. E. 174.

**Who is "a fugitive from justice."**—To the same effect as the first paragraph of the original note. *Depolloy v. Palmer*, (1906) 28 App. Cas. (D. C.) 324; *Com. v. Hare*, (1908) 36 Pa. Super. Ct. 125.

To be a fugitive from justice within the meaning of the provisions of U. S. Const., art. 4, sec. 2, and R. S. sec. 5278, it is only necessary that the accused, having been in the demanding state when the crime was committed, thereafter leave that state and be found within the territory of another. *Appleyard v. Com.*, (1906) 203 U. S. 222, 27 S. Ct. 122, 51 U. S. (L. ed.) 161; *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99.

A person indicted the second time for the same offense is none the less a fugitive from justice because, after the dismissal of the first indictment, on which he was originally extradited, he left the state with the knowledge of, or without objection by, the state authorities. *Bassing v. Cady*, (1908) 208 U. S. 386, 28 S. Ct. 392, 52 U. S. (L. ed.) 540.

One who does, within the state, an overt act, which is, and is intended to be, a material step towards accomplishing a crime, and then absents himself from the state and does the rest elsewhere, becomes a fugitive from justice for extradition purposes when the crime is complete, if not before. *Strassheim v. Daily*, (1911) 221 U. S. 280, 31 S. Ct. 558, 55 U. S. (L. ed.) 735; *State v. Gerber*, (1910) 111 Minn. 132, 126 N. W. 482.

One convicted of an offense against a state, who, before the expiration of that sentence, was delivered to the federal authorities to serve out a prior sentence, would at the end of such prior sentence be a fugitive from justice under the United States Constitution, and could be taken by the state under the direct provisions of this section. *People v. Benham*, (1911) 71 Misc. 345, 128 N. Y. S. 610.

Section 364 of the Criminal Code of Nebraska (Cobbeys Ann. Code 1901) does not authorize the extradition of a person charged with crime against the laws of another state without proof that the person so charged is a fugitive from the justice of the demanding state. *Dennison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1045.

For other cases on the question as to who is a fugitive from justice under the extradition laws, see *People v. Baker*, (1911) 142 App. Div. 598, 127 N. Y. S. 382; *Coleman v. State*, (1908) 53 Tex. Crim. 93, 113 S. W. 17.

**Actual presence when crime committed.**—A person cannot be a fugitive from justice unless he was in the state from which the demand comes when it is charged that the crime was committed. *Farrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502; *Hayes v. Palmer*, (1903) 21 App. Cas. (D. C.) 450; *O'Malley v. Quigg*, (1909) 172 Ind. 350, 88 N. E. 611; *People v. Baker*, (1911) 142 App. Div. 598, 127 N. Y. S. 382.

In *Ex p. Hoffstat*, (1910) 180 Fed. 240, affirmed 218 U. S. 665, 31 S. Ct. 222, 54 U. S. (L. ed.) 1201, it was held that the petitioner, a resident of New York, indicted in Pennsylvania for conspiracy to bribe members of the Pittsburg city council, could not be extradited, in the absence of some proof that he had been physically present in Pennsylvania when the offense was committed, as otherwise he could not be a fugitive from justice of that state.

**Escaped convict.**—A person who, after having been convicted of a crime committed within a state, when sought for, to be subjected to the sentence of the court, is found within another state, is a fugitive from justice within the meaning of the extradition statute. *Hughes v. Pfanz*, (C. C. A. 1905) 138 Fed. 980.

**The belief of the accused, when leaving the demanding state, that he had not committed any crime against the laws of that state, does not prevent his being a fugitive from justice within the meaning of the provision of U. S. Const., art. 4, sec. 2, and R. S. sec. 5278.** *Appleyard v. Massachusetts*, (1906) 203 U. S. 222, 27 S. Ct. 122, 51 U. S. (L. ed.) 161.

**The motive of the accused in leaving the state has no bearing upon the question as to whether he is a fugitive from justice.** *Ex p. Hoffstat*, (1910) 180 Fed. 240, affirmed 218 U. S. 665, 31 S. Ct. 222, 54 U. S. (L. ed.) 1201; *Com. v. Hare*, (1908) 36 Pa. Super. Ct. 125.

One found in another state on institution of prosecution against him, who refuses to return voluntarily, is a fugitive within the extradition law, though he left openly, not in flight or with any intent to avoid arrest; the manner of his leaving being immaterial. *Taylor v. Wisc.*, (Ia. 1910) 126 N. W. 1126.

**Evidence as to flight from justice.**—Independent proof, apart from the requisition papers, that the accused was a fugitive from justice, need not be demanded by the governor of the surrendering state before issuing his warrant of arrest in extradition proceedings. *Pettibone v. Nichols*, (1906) 203 U. S. 192, 27 S. Ct. 111, 51 U. S. (L. ed.) 148.

The statute does not provide for the particular kind of evidence to be produced before the governor, nor how it shall be authenticated, but it must at least be evidence that is satisfactory to his mind. *Munsey v. Clough*, (1905) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515, affirming (1902) 71 N. H. 594, 53 Atl. 1086; *Farrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502.

Contradictory evidence on the question of the presence or absence of the accused in the state at the time of the commission of the

offense will not require his discharge on habeas corpus to review the issuance of a warrant of arrest in interstate extradition proceedings. *Munsey v. Clough*, (1905) 106 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515.

Where there was specific evidence that the petitioner, a resident of New York, participated there in a conspiracy to bribe members of the city council of Pittsburg to select certain banks in Pittsburg, of one of which petitioner was president, as city depositories, and there was substantial evidence from which a jury would be justified in drawing an inference that petitioner was in Pittsburg on a day when some act or acts in furtherance of the conspiracy were performed, it was held that there was sufficient proof that he was a fugitive from justice to justify his extradition to Pennsylvania. *Ex p. Hoffstot*, (1910) 180 Fed. 240, *affirmed* 218 U. S. 665, 31 S. Ct. 222, 54 U. S. (L. ed.) 1201.

In *Hayes v. Palmer*, (1903) 21 App. Cas. (D. C.) 450, the appellant was charged with keeping "a gaming table for gambling" and with keeping and managing "a house for gambling." It was held that he did not overthrow the *prima facie* case of the state by testimony that he had not been in the state on the date named, but had been there "shortly before" and frequently during the summer without showing the exact dates when he was there.

Warrant is *prima facie* evidence as to flight from justice. — *Bassing v. Cady*, (1908) 208 U. S. 386, 28 S. Ct. 392, 52 U. S. (L. ed.) 540; *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92; *Hayes v. Palmer*, (1903) 21 App. Cas. (D. C.) 452; *State v. Curtis*, (1910) 111 Minn. 240, 126 N. W. 719.

To the same effect as the second paragraph of the original note, see *Morrison v. Dwyer*, (1909) 143 Ia. 502, 121 N. W. 1064.

It is a question of fact whether the person sought to be extradited is a "fugitive from justice." *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99.

Question cannot be raised in demanding state. — Where the accused is personally within the jurisdiction of the demanding state, and there applies to the court for his discharge on habeas corpus, he cannot raise the question as to whether or not he has been, as a matter of fact, a refugee from the justice of that state, within the meaning of the Federal Constitution and the Act of Congress authorizing interstate extradition. *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

Indictment — Necessity for. — The executive of a state upon whom demand is made for the arrest and extradition of a fugitive criminal has no power to issue his warrant of arrest for a crime committed in another state, so far as any authority has been conferred upon him by the federal statutes, unless he is furnished with a copy of the indictment or affidavit required by the provisions of this section. *Compton v. Alabama*, (1908) 214

U. S. 1, 29 S. Ct. 605, 53 U. S. (L. ed.) 885, *affirming* (1907) 152 Ala. 68, 44 So. 685.

Technical sufficiency. — The legal sufficiency of the indictment is not to be determined by the officer granting the requisition warrant. *Depoilly v. Palmer*, (1906) 28 App. Cas. (D. C.) 324.

It is a matter for the determination of the court having jurisdiction of the crime charged. *Hayes v. Palmer*, (1903) 21 App. Cas. (D. C.) 450; *People v. Baker*, (1911) 142 App. Div. 598, 127 N. Y. S. 382; *In re Renshaw*, (1904) 18 S. D. 32, 99 N. W. 83.

Where extradition proceedings were instituted by Alabama to prosecute petitioner for an alleged homicide committed in that state, under the laws of which it was not essential that the indictment should charge either the time or venue of the offense, it was held that an indictment omitting such elements was not objectionable for that reason in the extradition proceedings. *Coleman v. State*, (1908) 53 Tex. Crim. 93, 113 S. W. 17.

To the same effect as the first paragraph of the original note, see *Harris v. Magee*, (Ia. 1911) 129 N. W. 742.

For other cases see *Pierce v. Creecy*, (1908) 210 U. S. 387, 28 S. Ct. 714, 52 U. S. (L. ed.) 1113, *affirming* (1907) 155 Fed. 663; *Strassheim v. Daily*, (1911) 221 U. S. 280, 31 S. Ct. 558, 55 U. S. (L. ed.) 735; *Ex p. Lewis*, (Nev. 1911) 115 Pac. 729.

Burden to show insufficiency. — In habeas corpus by prisoners held pursuant to an indictment found in a sister state, the burden is on relators to show that the indictment is insufficient by producing, if necessary, the statute under which it was found; and hence the fact that such statute was not submitted with the requisition papers to the governor under whose warranty relators were arrested will not warrant the presumption that the law of the sister state is the same as that of the forum, under which the indictment would be insufficient. *In re Renshaw*, (1904) 18 S. D. 32, 99 N. W. 83.

Information. — An information is sufficient basis for extradition. *People v. Stockwell*, (1904) 135 Mich. 341, 97 N. W. 765.

Sufficiency. — It is not necessary that the information charge precisely the same offense named in the original warrant of arrest, so long as it is based on the same transaction. *People v. Stockwell*, (1904) 135 Mich. 341, 97 N. W. 765.

Affidavit. — It is not necessary that extradition proceedings under this section shall be based on an indictment, but that a verified complaint or affidavit charging a person with a crime is sufficient to confer jurisdiction on the governor of the state to which the defendant has fled. *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99.

Where the requisition is accompanied by a certified copy of an indictment against the fugitive the governor need not consider the sufficiency of the affidavit attached to the requisition. *Law v. State*, (Ala. 1911) 56 So. 79.

On information and belief. — An affidavit for a requisition in extradition proceedings, made on information and belief, and not

predicated on facts within the knowledge of the affiant, is insufficient. *People v. City Prison*, (1908) 60 Misc. 525, 112 N. Y. S. 492; *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077.

But a complaint, charging a crime sworn to by the county attorney as true without qualification, is a sufficient affidavit as the basis of an extradition proceeding, as against the objection that the complaint was necessarily on information and belief and insufficient. *Morrison v. Dwyer*, (1909) 143 Ia. 502, 121 N. W. 1064.

*Authority of officer administering oath.*—In *State v. Bates*, (1907) 101 Minn. 303, 112 N. W. 260, it was objected that the complaint or affidavit purported to be sworn to before a justice of the peace, but that there was no proof before the court that a justice of the peace in the state of California is authorized to administer an oath, and that the courts of Minnesota cannot presume that the statute law of California is the same as in Minnesota. It was held that it would be implied from the executive authentication that the officer certifying to the jurat of the affidavit was such magistrate as he was therein represented to be.

An affidavit made before a notary public, who under Georgia Code 1895 (vol. 2, p. 982; vol. 3, p. 93) is *ex officio* a justice of the peace, must be regarded as satisfying the requirement of the provisions of this section, that such affidavit be made before a magistrate, where the governor of Georgia has based his requisition upon such affidavit, and a warrant of arrest has been issued thereon by the governor of the state upon whom the demand for arrest and extradition was made. *Compton v. Alabama*, (1908) 214 U. S. 1, 29 S. Ct. 605, 53 U. S. (L. ed.) 885, *affirming* (1907) 152 Ala. 63, 44 So. 685.

*Record of conviction in lieu of affidavit.*—Where a charge of crime made against a person in affidavits filed before a magistrate or a court has culminated in a conviction, the record of such conviction is sufficient evidence in proceedings for his extradition from another state, and the question as to the sufficiency of the affidavits becomes immaterial. *Hughes v. Pfanz*, (C. C. A. 1905) 138 Fed. 960.

A verified complaint is sufficient as an affidavit required by this section. *Morrison v. Dwyer*, (1909) 143 Ia. 502, 121 N. W. 1064; *State v. Bates*, (1907) 101 Minn. 303, 112 N. W. 260; *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077.

Under 2 Ballinger's Ann. Codes & Stat. of Washington, sec. 7017, declaring that when any person shall be found within the state charged with an offense committed in another state, any court or magistrate may on complaint issue a warrant for his arrest, etc., the complaint on which the warrant is issued must show that accused has been legally charged with crime in the demanding state. *State v. White*, (1905) 40 Wash. 560, 82 Pac. 907.

The question of identity of the person accused cannot be inquired into on habeas corpus where there is no allegation in the plead-

ings that he is not such person. *State v. Bates*, (1907) 101 Minn. 303, 112 N. W. 260; *Gillis v. Leekley*, (1905) 38 Wash. 156, 80 Pac. 300.

*Charged with crime.*—A fugitive from justice is "charged" with a crime, within the extradition law, only when he is charged lawfully by a person who has knowledge of its commission, or is possessed of information, which he states under oath, leading a reasonable and fair mind to infer its commission. *People v. City Prison*, (1908) 60 Misc. 525, 112 N. Y. S. 492.

It is only necessary to inquire whether a crime has been charged under the statute of the demanding state as construed by the courts of that state. *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99.

A finding on extradition proceedings that an indictment upon which they are based does not charge a crime does not preclude a subsequent trial on the merits in the state where the indictment was found after the accused has been found in that state and arrested. *Benson v. Palmer*, (1908) 31 App. Cas. (D. C.) 561.

In extradition proceedings, allegations that accused in a specified county and state on a day named obtained a specified sum of money from one named person as agent of another by false pretenses by drawing and delivering to such person a check for that amount on a bank at a specified place, and procured such person as such agent to cash the check by falsely representing that he was financially responsible, and had funds in or credit with the bank, and that the check would be honored, and that such person was deceived thereby, was held to sufficiently charge the offense of obtaining money on false pretenses. *Taylor v. Wise*, (Ia. 1910) 126 N. W. 1126.

Where an Ohio statute provided that any person who obtained of another anything of value by any false pretense, with intent to defraud, shall be guilty of an offense which, if the value of the property be thirty-five dollars or more, is punishable by imprisonment, an affidavit charging that accused, on a particular day, in M. county, Ohio, unlawfully and falsely pretended to a certain watch company, with intent to defraud it, that he was the owner of a dry goods store in Y., Ohio, which statement was false and known so to be by accused, and by means of such false statement accused obtained from the company jewelry worth \$400, was held to sufficiently state an offense, under the Ohio laws, to sustain extradition proceedings. *In re Strauss*, (C. C. A. 1903) 126 Fed. 327.

It is a question of law whether the person extradited was substantially charged with a crime against the laws of the state demanding his surrender. *Munsey v. Clough*, (1904) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515, *affirming* (1902) 71 N. H. 594, 53 Atl. 1086; *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99; *Depoilly v. Palmer*, (1906) 28 App. Cas. (D. C.) 324; *Dennison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1045; *In re Waterman*, (1907) 29 Nev. 288, 89 Pac. 291. To the same effect as the original note, see *Com. v. Philadelphia County Prison*, (1908)

220 Pa. St. 401, 69 Atl. 916, *affirming* (1907) 33 Pa. Super. Ct. 594.

*Complaint before committing magistrate.*—A person against whom a complaint for a felony has been filed before a committing magistrate, who can only charge or hold for trial before another tribunal, is "charged" with the crime within the meaning of U. S. Const., art. 4, sec. 2, subd. 2, and of R. S. sec. 5278. *Matter of Strauss*, (1905) 197 U. S. 324, 25 S. Ct. 535, 49 U. S. (L. ed.) 774.

*Person convicted and sentenced.*—In *Hughes v. Pfanz*, (C. C. A. 1905) 138 Fed. 980, it appeared that the appellant had been convicted of a crime in Indiana and sentenced under the indeterminate sentence law of that state and had escaped from the state before his sentence expired. It was claimed that he was not "charged with crime" within section 5278. The court said: "The term 'charged with crime,' as used in the Constitution and statute, seems to us to have been used in its broad sense, and to include all persons accused of crime. It would be a very narrow and technical construction to hold that after the accusation, and before conviction, a person could be extradited, while after conviction, which establishes the charge conclusively, he could escape extradition. The object of the provisions of the Constitution and statute is to prevent the escape of persons charged with crime, whether convicted or unconvicted, and to secure their return and punishment if guilty. Taking the broad definition of 'charged with crime' as including the responsibility for crime, the charge would not cease or be merged in the conviction, but would stand until the judgment is satisfied. It would include every person accused, until he should be acquitted, or until the judgment inflicted should be satisfied. Any other construction would prevent the return of escaped convicts upon the charge under which they had been sentenced, and defeat in many instances the ends of justice. The relator was convicted of the crime of larceny in Indiana, and sentenced, and the term of sentence has not yet expired. That charge of larceny continues to be a charge against him until the sentence has been performed, and he therefore stands 'charged with crime,' within the meaning of that term as used in the Federal Constitution."

*Place of commission.*—An affidavit for a requisition, made by the governor of Colorado, alleged that accused obtained from the prosecutor two title deeds purporting to convey lands in Kansas; that she promised to take the deeds to the recorder in the county where the lands described in the deeds were situated, and there record the same, for which purpose the deeds were delivered to her; that she did not record them, but converted them to her own use, to wit, that she left Colorado within a few days after obtaining the deeds for the state of Kansas and there obtained other conveyances to the property and transferred the title to other persons, etc. It was held that the offense stated in the affidavit was committed in Kansas, and was not within the jurisdiction of the courts of Colorado, and hence the affidavit was insufficient to sus-

tain the requisition. *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077.

*Presumptions.*—It is presumed that the acts charged in an indictment found in a sister state, under which the extradition of fugitives from justice is sought, are sufficient to constitute a crime under its laws. *In re Renshaw*, (1904) 18 S. D. 32, 99 N. W. 83.

The words "treason, felony, or other crimes."—To the same effect as the first paragraph of the original note, see *Com. v. Hare*, (1908) 36 Pa. Super. Ct. 125.

The word "crime," as used in Const. U. S., art. 4, sec. 2, requiring that a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, on demand of the executive authority of the state from which he fled, shall be delivered up to be removed to the state having jurisdiction of the crime, embraces not only misdemeanors, but treason and felony as well, being sufficiently broad to include every possible crime committed within the border of the United States. *Ross v. Crofutt*, (1911) 84 Conn. 370, 80 Atl. 90.

Where a defendant, after conviction in a sister state, fled from the justice of that state, the mere fact that in the judgment of conviction there was imposed a pecuniary fine and sentence to jail was held not to show that he was not guilty of a felony within Const. U. S., art. 4, sec. 2, and the federal statutes relating to extradition, there being nothing to show that under the law of the sister state accused might not have been imprisoned in the penitentiary. *Ex p. Bergman*, (1910) 60 Tex. Crim. 8, 130 S. W. 174.

"Certified as authentic."—Extradition proceedings are sufficiently authenticated where the record of the prosecution is certified by the justice before whom it is pending, the county clerk certifies to the justice's official character, and the attorney-general certifies that the application for requisition is in due form under the laws of that state, while the governor certifies to the authenticity of the records and that by such papers and records the accused stands charged with a crime. *Taylor v. Wise*, (1910) 126 N. W. 1126.

The question of the authenticity of the complaint is for the governor's own determination, and his certificate to the fact alone is required. *Morrison v. Dwyer*, (1909) 143 Ia. 502, 121 N. W. 1064.

*Presumptions.*—The presumption is that one authenticating an indictment, made a part of requisition papers, as governor of the demanding state, was so acting at the time. *Kemper v. Metzger*, (1907) 169 Ind. 112, 81 N. E. 663.

Where a governor's requisition is issued in extradition proceedings, it will be presumed on habeas corpus in favor of the action of the governor that his requisition was attached to the papers and affidavits on which it was based, and that he stated therein that the annexed papers were duly authenticated in accordance with the laws of the demanding state. *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077.

*The purpose of requiring a certificate of authentication of the affidavit charging a*

crime, attached to a requisition for extradition of a fugitive from justice, is to prevent the governor of the state upon whom the demand is made from being imposed upon by spurious charges of crime, and to advise him of the genuineness of the copy of the indictment or affidavit. *State v. Curtis*, (1910) 111 Minn. 240, 126 N. W. 719.

*Form.*—The certificate of authentication need not be in any particular form. It is sufficient if it shows that a copy of an indictment or affidavit annexed to the requisition is authentic. A certificate was held to be sufficient which was in these words: "It appears from the annexed papers, duly authenticated according to the laws of this state." *State v. Curtis*, (1910) 111 Minn. 240, 126 N. W. 719.

In *State v. Bates*, (1907) 101 Minn. 303, 112 N. W. 260, the certification was as follows: "It satisfactorily appears, by the annexed and accompanying complaint, in form of an affidavit, filed in and issued out of the justice court of Stockton township, county of San Joaquin, state of California, and warrant of arrest issued out of said court, also affidavits of George F. McNoble, Walter F. Sibley, Joseph D. Simpson, and Hayward Reed (which I certify are authentic and duly authenticated in accordance with the laws of the state of California), that in the due and regular course of judicial proceedings under the laws of this state J. H. Grande stands charged with the crime of forgery." Objection was made that the certification related only to the affidavits of McNoble, Sibley, Simpson, and Reed. The court held that the only reasonable construction of the language used was that the governor certified that all of the documents enumerated by him and upon which he based his demand were authentic, and that his certificate was therefore sufficient.

*Proceedings before governor — Right to hearing before governor.*—The person demanded in interstate extradition proceedings has no right to a hearing before the governor on the question whether he has been substantially charged with a crime and whether he is a fugitive from justice. *Munsey v. Clough*, (1905) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515; *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92; *Farrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502.

*Sufficiency of requisition papers.*—An extradition requisition reciting that the accused was charged by indictment with a specified crime against the laws of the state, and had become a fugitive from the justice of that state, accompanied by a certified copy of the indictment, makes a *prima facie* case against the accused as an alleged fugitive from justice, and, in the absence of proof to the contrary, authorizes the executive of the surrendering state to issue his warrant for the arrest and delivery of the alleged criminal to the agent of the demanding state. *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92. See also *Ross v. Crofutt*, (1911) 84 Conn. 370, 80 Atl. 80.

*Scope of governor's inquiry.*—When requi-

sition is made upon a governor he must determine, first, whether the person demanded is substantially charged with a crime against the laws of the state from whose justice it is alleged he has fled, by an indictment or affidavit properly certified; and, second, whether he is a fugitive from justice from the state demanding him. *Dennison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1045. See also *Ross v. Crofutt*, (1911) 84 Conn. 370, 80 Atl. 80; *Harris v. Magee*, (Ia. 1911) 129 N. W. 742.

*Discretion of executive as to surrender.*—Whether the warrant of arrest shall be issued or not is an executive consideration, and the duty of the governor is absolute whenever the requisition from the demanding state is presented in due form, with the necessary accompanying papers as required by law, to the governor of the state where the accused has taken refuge. The latter is under obligation to issue a warrant for the surrender of the person accused, if he be a fugitive from justice. If the requisition is in proper form he has no authority to determine whether the charge is true. The constitutional provision for extradition is in the nature of a treaty between the states to which the executive of each is bound to give effect. *In re Opinion of Justices*, (1909) 201 Mass. 609, 89 N. E. 174; *Com. v. Hare*, (1908) 36 Pa. Super. Ct. 125; *Ex p. Denning*, (1907) 50 Tex. Crim. 629, 100 S. W. 401; *Coleman v. State*, (1908) 53 Tex. Crim. 93, 113 S. W. 17.

*Motives of governor.*—The motives which prompt the chief executive of a state to issue his warrant for the rendition of a prisoner are not proper subjects of judicial inquiry. Such inquiry would be opposed to public policy and the freedom of action of the executive department of government. *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

*Motive for proceeding.*—In *Com. v. Philadelphia County Prison*, (1908) 220 Pa. St. 401, 69 Atl. 916, *affirming* (1907) 33 Pa. Super. Ct. 594, the court said: "Assuming that the demanding state has complied with the requirements of the Federal Constitution and the Act of Congress in making the requisition for the accused, it would be equally an unconstitutional exercise of power for the court of the asylum state to inquire into the motives of the prosecution, instituted in conformity with the laws of the demanding state, and release the offender and thereby prevent his extradition for trial in the latter state. The only possible effect of permitting the motives of the private prosecutor to be shown on a habeas corpus extradition proceeding would be to show the guilt or innocence of the accused. If a person is guilty of an offense against the laws of a state, it is no defense for him to allege that the prosecution was inspired by improper motives. It very frequently happens that criminals are brought to punishment only by persons who have motives other than the vindication of the violated law; but it has never been held that such reason was sufficient to invalidate a con-

viction for a criminal offense. Good faith and courtesy require a state to honor the demand of a sister state for the return of a fugitive from justice."

**Executive warrant — Conditions precedent.** — It is only necessary, as a condition precedent to the issuing of the governor's warrant, to establish two propositions: first, that the defendant was substantially charged with crime against the laws of another state, and second, that he was a fugitive from the justice of that state. *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99.

**Copies of affidavit or indictment.** — It is not necessary that the executive warrant in extradition proceedings should be accompanied by certified copies of the affidavit or indictment, or that such affidavit or indictment be set out in the warrant. *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077.

**Clerical errors.** — Where extradition papers showed that the alleged fugitive from justice was charged by affidavit, a recital in the warrant of the governor of the state on which the demand was made that the fugitive was charged by indictment was held to be a mere immaterial clerical error. *Ex p. Coleman*, (1908) 53 Tex. Crim. 93, 113 S. W. 17.

**Recitals.** — It is not necessary that the executive warrant in extradition proceedings recite that the affidavit or indictment from the demanding state was presented to the governor of the asylum state by any legal authority from such demanding state. *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077.

It is not necessary that the warrant should contain the express statement that the governor has found that the accused is a fugitive from justice. The fact of the issuing of the warrant upon demand made upon that ground is sufficient to justify the presumption that the governor so found, until that presumption is overthrown by proof to the contrary. *Dennison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1046.

In *Ex p. Thomas*, (1908) 53 Tex. Crim. 37, 108 S. W. 663, it was held that in view of the Code Crim. Pro. of Texas 1896, art. 254, subd. 2, which provides that a warrant of arrest "must state that the person is accused of some offense against the laws of the state, naming the offense," an executive warrant in extradition proceedings which fails to name the offense alleged to have been committed in the foreign state, and is neither accompanied by an indictment nor a complaint disclosing the nature of the offense, is fatally defective.

**Is prima facie as to legal prerequisites.** — The warrant of the governor, authorizing the extradition of a person charged with an offense in another state, is *prima facie* evidence that all the essential prerequisites have been observed. *Ross v. Crofutt*, (1911) 84 Conn. 370, 80 Atl. 90; *Kemper v. Metzger*, (1907) 169 Ind. 112, 81 N. E. 663; *People v. Police Com'r*, (1905) 100 App. Div. 483, 91 N. Y. S. 769; *Ex p. Bergman*, (1910) 60 Tex. Crim. 8, 136 S. W. 174; *Matter of Gillis*, (1905) 38 Wash. 156, 80 Pac. 300.

On habeas corpus to review the issuance of an extradition warrant by the governor of a

state, the accused is concluded by the *prima facie* case made out by the papers upon which the governor acted, where such accused, upon the hearing in the habeas corpus proceedings, waives the right to introduce further evidence. *Munsey v. Clough*, (1904) 113 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515.

**Description of offense.** — Where a certified copy of an original information on which extradition proceedings in the demanding state were based was attached to the requisition and charged the petitioner with having separated himself from his wife and minor child, they being destitute and depending wholly upon their earnings for adequate support, contrary to the statute, etc., and throughout the papers such offense was designated as "desertion" and was made a misdemeanor by Pa. Act March 13, 1903 (P. L. 26), a warrant for the arrest and return of petitioner to answer for the crime of "desertion" was not objectionable as failing to set out an offense known to the laws of the demanding state. *Ex p. Hose*, (Nev. 1911) 116 Pac. 417.

**Reviewability after surrender of prisoner.** — The warrant of the chief executive of the state surrendering an accused person, whether issued lawfully or unlawfully, has accomplished its purpose and become *functus officio* as soon as the accused is delivered into the jurisdiction of the demanding state, and the regularity of its issuance thereupon ceases to be a question for the judicial inquiry on application by the prisoner for his discharge, where he is at the time held under due and legal process issued out of a court of competent criminal jurisdiction of the demanding state. *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

**Executive warrant for receiving prisoner.** — A governor's warrant empowering a sheriff to receive defendant from the authorities of another state and convey him hither to be dealt with according to law is sufficient to authorize defendant's production in the court of trial. *People v. Stockwell*, (1904) 135 Mich. 341, 97 N. W. 765.

**Review by federal court.** — The power of the federal courts to interfere in interstate extradition proceedings should only be exercised in cases of urgency, where the error is plain and the necessity for federal intervention obvious. *In re Strauss*, (1903) 126 Fed. 327, 63 C. C. A. 99.

**After prisoner reaches demanding state.** — In interstate extradition, the prisoner is only held under the extradition process until such time as he reaches the jurisdiction of the demanding state, and is thenceforth held under the process issued out of the courts of that state, and it necessarily follows that there is no longer a federal question involved in his detention. *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

**Review by state court.** — The finding of the governor that the person demanded in an extradition requisition should be surrendered is not necessarily final, but may be pronounced

by the courts insufficient to support arrest on conclusive proof that the person demanded was not within the demanding state at the time the crime was alleged to have been committed, and that there was no sufficient evidence to the contrary before the governor. *Farrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502; *Ex p. Cheatham*, (1906) 50 Tex. Crim. 51, 95 S. W. 1077.

**Question of fact.**—The courts will not review the decision of the governor in extradition proceedings upon a question of fact made before him, which the law makes it his duty to decide, and upon which there is evidence *pro* and *con* before the governor. *Dennison v. Christian*, (1904) 72 Neb. 703, 101 N. W. 1045.

**Review of courts of demanding state.**—The action and conduct of the chief executive of the state in which the accused was found in issuing the executive warrant, and of the executive and ministerial officers acting in aid of his warrant, is a matter for the consideration of the courts of his state, subject to the federal courts in so far as the federal question is involved, and is not a question open to examination or consideration by the courts of a foreign state. *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

**Questions raised on habeas corpus.**—On habeas corpus proceedings instituted by one arrested on requisition, evidence as to the guilt or innocence of the accused is inadmissible, being a question solely for the demanding state. *Pierce v. Creecy*, (1908) 210 U. S. 387, 28 S. Ct. 714, 52 U. S. (L. ed.) 113, *affirming* (1907) 155 Fed. 663; *Depoilly v. Palmer*, (1906) 28 App. Cas. (D. C.) 394; *Taylor v. Wise*, (1a. 1910) 126 N. W. 1126; *Ex p. Denning*, (1907) 50 Tex. Crim. 629, 100 S. W. 401. See also under the title HABEAS CORPUS, vol. 3, p. 162.

**Scope of inquiry.**—The purpose of habeas corpus proceedings, challenging the validity of a warrant of extradition issued by the governor on the requisition of the governor of a sister state, is to review the legality of the action of the governor in issuing the warrant, and not to try the question of relator's guilt or innocence. *Harris v. Magee*, (1a. 1911) 129 N. W. 742.

The objection that an extradition requisition contains a clause that the demanding state will not be responsible for any expense attending the arrest and delivery of the alleged fugitive is not available to the accused on habeas corpus to inquire into the legality of the extradition proceedings, but is a matter for the consideration of the executive of the surrendering state when he receives the official demand for the surrender of the alleged fugitive criminal. *Marbles v. Creecy*, (1909) 215 U. S. 63, 30 S. Ct. 32, 54 U. S. (L. ed.) 92.

The jurisdiction of the court on a writ of habeas corpus does not involve any executive function. It is limited to the identification of the person demanded; an inquiry whether the record shows that a crime was substantially charged against him; and whether he is a

fugitive from justice. *Com. v. Hare*, (1908) 36 Pa. Super. Ct. 125. See also *Law v. State*, (Ala. 1911) 56 So. 79.

**Presumptions.**—In habeas corpus to secure the release of one in custody under an extradition warrant it is presumable that the governor had sufficient ground for believing that the prisoner was present in the demanding state when the crime was alleged to have been committed. *Farrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502.

The technical sufficiency of the indictment and the question of the procedure under it are not open to inquiry on habeas corpus to review the issuance of a warrant of arrest in interstate extradition proceedings. *Munsey v. Clough*, (1904) 196 U. S. 364, 25 S. Ct. 282, 49 U. S. (L. ed.) 515; *People v. Police Com'r*, (1905) 100 App. Div. 483, 91 N. Y. S. 760; *Ex p. Coleman*, (1908) 53 Tex. Crim. 93, 113 S. W. 17.

**Bail.**—In *Connecticut* in habeas corpus to secure the release of one in custody under an extradition warrant, it is within the discretion of the Court of Common Pleas, after remanding the prisoner, to refuse to admit him to bail. *Farrell v. Hawley*, (1905) 78 Conn. 150, 61 Atl. 502.

In *Mississippi* there is no statute allowing bail in extradition cases, either pending trial or on appeal. *Ex p. Wall*, (1904) 84 Miss. 783, 38 So. 628; *Ex p. Edwards*, (1907) 91 Miss. 621, 44 So. 827.

**How party brought into state not inquired into.**—To the same effect as the first paragraph of the original note. *In re Moyer*, (1906) 12 Idaho 250, 85 Pac. 897; *In re Pettibone*, (1906) 12 Idaho 264, 85 Pac. 902; *In re Haywood*, (1906) 12 Idaho 264, 85 Pac. 902.

Arranging and carrying out the arrest and deportation of the accused so as to leave him no opportunity to prove before the governor of the surrendering state that he was not a fugitive from justice, or to appeal to some court of that state to prevent his illegal deportation, does not violate the provisions of U. S. Const., art. 4, sec. 2, or R. S. sec. 5278, relating to extradition proceedings. *Pettibone v. Nichols*, (1906) 203 U. S. 192, 27 S. Ct. 111, 51 U. S. (L. ed.) 148.

**Trial for different offenses.**—To the same effect as the first paragraph of the original note, see *Knox v. State*, (1905) 164 Ind. 226, 73 N. E. 255; *Taylor v. Com.*, (1906) 96 S. W. 440, 29 Ky. L. Rep. 714; *Rutledge v. Krauss*, (1906) 73 N. J. L. 397, 63 Atl. 988.

**Civil process.**—To the same effect as the Minnesota and New York cases cited in the original note. *Rutledge v. Krauss*, (1906) 73 N. J. L. 397, 63 Atl. 988.

In *State v. Boynton*, (1909) 140 Wis. 89, 121 N. W. 887, *following* *Moletor v. Sinnen*, (1890) 76 Wis. 308, 44 N. W. 1009, 7 L. R. A. 817, 20 Am. St. Rep. 71, cited in the original note, it was held that one who was brought into the state by extradition proceedings on a criminal charge was not subject to arrest for contempt until he had had an opportunity to return to the state from which he was extradited, though he was at the time he absconded a resident of Wisconsin, and had not since

acquired a residence elsewhere, and though the court had prior to his departure from Wisconsin obtained jurisdiction of the subject-matter of the suit in which the judgment was rendered and of his person.

Where the defendant, who was a *bona fide* resident of another state, was brought into Iowa by extradition proceedings to answer a criminal complaint, and, after giving bail, voluntarily returned for trial, and was acquitted, and intended to return to his home on the first train leaving the place where his trial was had, it was held that he was privileged from the service of civil process before he could so depart. *Murray v. Wilcox*, (1904) 122 Ia. 188, 97 N. W. 1087.

Where a person was arrested in another state, where he was residing with the relator's wife, and was returned to Michigan upon a requisition, for nonsupport of his own wife, it was held that he was privileged from arrest upon relator's civil suit for alienation of relator's wife's affections, made upon the day that the criminal action was dismissed, and before he had an opportunity to leave the state. *Weale v. Clinton Circuit Judge*, (1909) 158 Mich. 563, 123 N. W. 31, 16 Detroit Leg. N. 709.

Extraditing twice for same offense. — A second indictment for the same offense may serve as the basis for the second extradition of a person as a fugitive from justice, without violating any rights secured to him by the Federal Constitution or laws, where the first indictment, on which the accused was origi-

nally extradited, was dismissed on motion of the state's attorney before the accused was placed in jeopardy. *Bassing v. Cady*, (1908) 208 U. S. 386, 28 S. Ct. 392, 52 U. S. (L. ed.) 540.

Change of government from territorial to state. — Mere transaction from territorial to state government is insufficient of itself to abolish a crime committed against the territorial law, or to preclude the state from obtaining the return of a person to answer therefor by extradition proceedings; but, to prevent such return, it must appear that the offense no longer exists in the state. *Ex p. McCarthy*, (1909) 56 Tex. Crim. 209, 119 S. W. 682.

Right to appeal to United States Supreme Court. — Habeas corpus proceedings on behalf of a person whose interstate extradition is sought pursuant to the Federal Constitution and laws, and who contends that his detention in custody is unlawful because the indictment, which is its only excuse, is not a charge of crime within the meaning of U. S. Const., art. 4, sec. 2, par. 2, regulating extradition, involve the construction of the Constitution of the United States, within the meaning of the Act of March 3, 1891, 26 Stat. L. 826, ch. 517, sec. 5, 4 Fed. Stat. Annot. 398, governing direct appeals from the Circuit Courts to the Supreme Court. *Pierce v. Creecy*, (1908) 210 U. S. 387, 28 S. Ct. 714, 52 U. S. (L. ed.) 1113, affirming (1907) 155 Fed. 663.

## Vol. III, p. 90, sec. 5.

Unsworn statements certified by the United States ambassador and the *chargé d'affaires* to be authenticated properly and legally so as to be received for similar purposes by tribunals of the country from which the accused has fled are, by the express terms of this

section, admissible in evidence in extradition proceedings. *Elias v. Ramirez*, (1910) 215 U. S. 398, 30 S. Ct. 131, 54 U. S. (L. ed.) 253, reversing (1907) 11 Ariz. 256, 90 Pac. 323.

# FALSE PERSONATION.

## Vol. III, p. 92. [Act of April 18, 1884.]

Obtaining fraudulent credit. — This statute covers the obtaining of some valuable thing by means of fraudulent standing or credit secured by holding out one's self as an officer of the United States. *U. S. v. Ballard*, (1902) 118 Fed. 757.

Wrongfully obtaining money. — In *U. S. v. Farnham*, (1904) 127 Fed. 478, it appeared that defendant, while stopping at prosecutor's hotel as a guest, falsely represented himself to the prosecutor as a secret service operative in the employ of the government, and exhibited to the prosecutor a metal badge inscribed "Secret Service, U. S." Ten months thereafter defendant returned and represented himself as a traveling salesman, spending

several days at the hotel. The prosecutor believed the defendant to be a Free Mason, and took special care of him during sickness on that account, after which the defendant presented a check which he alleged had been signed by his employer in payment of his salary, and obtained seventy dollars thereon from prosecutor. The check was drawn on a bank which did not exist, was returned unpaid, and the prosecutor declared that he cashed the check because he continued to believe defendant was a secret service operative. It was held that such facts were insufficient to sustain a conviction for pretending to be an employee of the United States, and as such knowingly and feloniously obtaining from



another a sum of money, etc., prohibited by this Act.

**Valuable thing.**—A month's lodging is a valuable thing, within the meaning of this Act. *U. S. v. Ballard*, (1902) 118 Fed. 757.

**Indictment.**—In *U. S. v. Ballard*, (1902) 118 Fed. 757, it appeared that an indictment

in the following words of the statute alleged that the defendant "did demand and obtain" a certain thing of value. It was held that it was not necessary in order to sustain the indictment to prove that he both demanded "and" obtained the thing alleged.

## FINES, PENALTIES, AND FORFEITURES.

### Vol. III, p. 98, sec. 1041.

**Effect of death of defendant.**—The purpose of a fine imposed in a criminal case is the punishment of the defendant personally for the offense of which he has been convicted, and while the federal statutes provide for the collection of a fine by execution as in case of civil judgments, there is no provision making it a debt, and where a defendant upon whom a fine has been imposed by a federal court dies before the fine has been paid or

collected, the cause abates, and the fine cannot be collected from his estate. *U. S. v. Mitchell*, (1908) 163 Fed. 1014, *affirmed* (C. C. A. 1909) 173 Fed. 254.

**The homestead.**—To the same effect as the original note and citing the cases therein mentioned, see *U. S. v. Stacey*, (1907) 155 Ind. 510.

For another case under this section, see *Ex p. Barclay*, (1907) 153 Fed. 669.

### Vol. III, p. 99, sec. 1042.

**Homestead exemption.**—This section construed in connection with the section immediately preceding it evidences an intention on the part of Congress to place the United States on an equality with civil contract creditors in the enforcement of judgments in criminal and penal cases, and to give the families of poor convicts the full benefit of the exemption and homestead laws of the states as against such judgments; and in the absence of any statute expressly providing therefore, an execution on a judgment for a fine in favor of the United States cannot be levied on the defendant's homestead in a particular state, although under the state law such homestead is only exempt from contract debts, and not from judgments for torts or in favor of the commonwealth in criminal cases. *Allen v. Clark*, (C. C. A. 1903) 126 Fed. 738.

**Recaption for payment of fine.**—Where a prisoner in the penitentiary, after having served the imprisonment part of the sentence, was erroneously discharged on habeas corpus because it was supposed that his incarceration could not be continued for nonpayment of the fine assessed, it was held that the United States, on reversal of such order,

could retake and return him to the penitentiary from which he had been released, and hold him therein until he had been lawfully discharged by payment of the fine, or by taking the poor debtor's oath after thirty days additional imprisonment, as authorized by this section. *Haddox v. Richardson*, (C. C. A. 1909) 168 Fed. 635.

**"Jail."**—The word "jail," as used in the last sentence of this section does not imply that no prisoner should be held in a penitentiary for nonpayment of a fine or a fine and costs, but was used merely to indicate the place of confinement, and hence a federal prisoner could be properly retained in the same institution where he had served his term of imprisonment for the nonpayment of a fine, or a fine and costs, assessed as a part of the sentence, until the fine was paid, or the prisoner applied to take the poor debtor's oath after the expiration of thirty days from the completion of his term. *Haddox v. Richardson*, (C. C. A. 1909) 168 Fed. 635.

**Maximum term of imprisonment.**—To the same effect as the original note, see *Ex p. Peeke*, (1906) 144 Fed. 1016, *affirmed* (C. C. A. 1907) 153 Fed. 166.

### Vol. III, p. 100, sec. 1047.

**Collecting delinquent internal revenue taxes.**—Under this section the government may not recover unpaid special taxes and penalties against persons engaged in the business of rectifying, purifying, and refining distilled spirits, for a longer period than five years from the date of suit brought. *U. S. v. Smith, et al., Co.*, (1911) 184 Fed. 532.

Under R. S. sec. 3184, 3 Fed. Stat. Annot. 584, providing for the collection of delinquent internal revenue taxes with a penalty of five per cent. thereon and interest at the rate of one per cent. a month, such interest is not a penalty, but is recoverable as interest, and the limitation of five years, prescribed by section 1047 for suits to recover penalties, does

not apply to a suit to recover such interest as a part of the debt. *U. S. v. Guest*, (C. C. A. 1906) 143 Fed. 456.

**Violation of Interstate Commerce Acts.** — An action to recover damages for discrimination in violation of the Interstate Commerce Act (Act of Feb. 4, 1887, ch. 104, secs. 2, 8, 24 Stat. L. 379, 382, 3 Fed. Stat. Annot. 813, 833), providing that for a violation of the terms of the Act the carrier shall be liable to the persons injured for the full amount of damages sustained, and for a reasonable counsel or attorney's fee to be taxed by the court, is within the five-year limitation of this section. *Carter v. New Orleans, etc., R. Co.*, (C. C. A. 1906) 143 Fed. 99.

### Vol. III, p. 106, sec. 5296.

**"Jail."** — See under this title, vol. 3, p. 99, sec. 1042.

**Recaption for payment of fine.** — See under this title, vol. 3, p. 99, sec. 1042.

**Customs revenue cases.** — This section does not apply to customs revenue cases, which are subject to the three-year limitation for similar proceedings "accruing under the customs revenue laws of the United States," which is provided in section 22, Act June 22, 1874, ch. 391, 18 Stat. L. 190, 2 Fed. Stat. Annot. 761. *U. S. v. Wittemann*, (C. C. A. 1907) 152 Fed. 377.

**An action for damages.** — *Chattanooga Foundry, etc., Works v. Atlanta*, (1906) 203 U. S. 390, 27 S. Ct. 65, 51 U. S. (L. ed.) 241, *affirming* (1900) 101 Fed. 900, set out in the original note.

Under this section see also *U. S. v. One Dark Bay Horse*, (1904) 130 Fed. 240.

## FOOD AND DRUGS.

### Vol. III, p. 119, sec. 2.

**Substances not within Act.** — A food product known as "Fruit of the Meadow," composed of leaf lard and beef fat, bathed in salt ice water to take away the fat and lard odor, but not having any ingredient to give it a butter flavor, or coloring matter to give it a

butter appearance, although put up and sold in pound packages, is not taxable as oleomargarine, under this Act, which is intended to apply only to products made in conscious imitation of butter. *Braun v. Coyne*, (1899) 125 Fed. 331.

### Vol. III, p. 120, sec. 3.

**Barter.** — In *Ewers v. Weaver*, (1910) 182 Fed. 713, it appeared that the plaintiff and his brother were both retail dealers in oleomargarine, and had paid the tax for the first six months of 1910. The plaintiff, having purchased a wholesale shipment of oleomargarine, which had not arrived, borrowed from his brother a package of the same material which the brother had obtained from the same wholesale dealer from whom plaintiff's supply had been ordered. A few days thereafter the plaintiff's shipment arrived, and he returned to his brother the precise amount borrowed of the same product and brand. It was held that such a transaction constituted a barter, and not a sale, and did not subject the plaintiff to the tax imposed on wholesale dealers in oleomargarine.

**"Manufacturer."** — The actual selling, vending, or furnishing of oleomargarine for use and consumption by others is not one of the necessary components of a manufacturer as contemplated by such Act, so as to require proof of actual selling, vending, or furnishing of some of the product to constitute the offense; the term "manufacturer" as so used being construed to mean one engaged in the business of selling, vending, or furnishing oleomargarine for consumption of others. *Vermont v. U. S.*, (1909) 174 Fed. 792, 98 C. C. A. 500.

The words "any person," as used in the

third sentence of the first paragraph of this section are not limited to licensed wholesale or retail dealers in oleomargarine, but are comprehensive enough to embrace any or all persons, whether licensed dealers or not, selling, vending, or furnishing oleomargarine to which they have added coloring matter to represent butter. *Vermont v. U. S.*, (1909) 174 Fed. 792, 98 C. C. A. 500.

**Evidence.** — In *Vermont v. U. S.*, (C. C. A. 1909) 174 Fed. 792, the evidence was held to be sufficient to warrant a conviction of the defendants as manufacturers of oleomargarine for mixing coloring matter therewith to represent butter without having paid the federal tax and obtained the required license, and for selling, vending, or furnishing oleomargarine for use and consumption of others.

**Applicability of internal revenue laws.** — The Oleomargarine Acts are complete in themselves, only those provisions of the general internal revenue statutes which are expressly enumerated therein being applicable thereto; and therefore a collector is not authorized to exact the penalty of fifty per cent. provided for by R. S. sec. 3176, 3 Fed. Stat. Annot. 580, from a dealer for neglecting to make the proper return. *Craft v. Schafer*, (1907) 153 Fed. 175, 82 C. C. A. 349. See also *Grier v. Tucker*, (1907) 150 Fed. 658, *affirmed* (1908) 160 Fed. 611, 87 C. C. A. 513.

## Vol. III, p. 121, sec. 4.

**Manner of prosecution.**—A violation of this section, while not in terms a misdemeanor, is in the nature of a criminal offense and may be prosecuted by information or indictment. *U. S. v. Joyce*, (1905) 138 Fed. 455.

**Indictment.**—Where a person is indicted for the unlawful sale of oleomargarine, in violation of this Act, it is sufficient to charge in the words of the Act that the defendant was carrying on the business of a wholesale or of a retail dealer, as the case may be, without having paid the tax required by law. *U. S. v. Joyce*, (1905) 138 Fed. 457; *Hart v. U. S.*, (C. C. A. 1910) 183 Fed. 368.

An indictment need not set out a statement of the facts which constitute the defendant a manufacturer. *Hart v. U. S.*, (C. C. A. 1910) 183 Fed. 368.

An indictment in the words of this Act was held not to be objectionable for indefiniteness nor for failure to negative that defendant was a manufacturer selling his own product in stamped packages at the place of manufacture, within the exception of the statute. *U. S. v. Joyce*, (1905) 138 Fed. 455.

## Vol. III, p. 122, sec. 5.

**Liability on bond.**—R. S. sec. 3232, 3 Fed. Stat. Annot. 605, provides that no person shall be engaged in or carry on any trade or business of a kind thereafter mentioned until he has paid a special tax therefor in the manner provided. Section 3233, 3 Fed. Stat. Annot. 605, provides for registration of persons engaged in such trades, with the internal revenue collector, and sections 3238 and 3239, 3 Fed. Stat. Annot. 607, provide that such special taxes shall be paid by stamps denoting the tax, which shall be exhibited in the taxpayer's place of business. It has been held that a bond given by a manufacturer of oleomargarine as authorized by section 5, to secure

Since the tax on oleomargarine is leviable when the substance is manufactured and sold or removed for consumption and use an indictment alleging a manufacture and sale of oleomargarine without payment of the tax, and with intent to defraud the United States of the same and that it should not be paid, in the language of the statute, was not invalid, in the absence of an application for a bill of particulars, for failure to allege the specific means by which defendant attempted or intended to attempt to defraud the United States. *Enders v. U. S.*, (C. C. A. 1911) 187 Fed. 754.

This section creates two classes of manufacturers, one manufacturing oleomargarine itself for sale, and the other those selling oleomargarine for consumption after adding artificial coloration; and hence an indictment against an alleged member of the second class for selling oleomargarine on which the tax was not paid was not defective for failure to contain the averment, applicable only to original manufacture, that the oleomargarine on which the tax was not paid was intended for sale. *Enders v. U. S.*, (C. C. A. 1911) 187 Fed. 754.

a compliance with the laws and regulations in regard to the manufacture, removal, and sale of oleomargarine, and providing that the manufacturer shall comply with all the requirements of the law, and regulations "in regard to the manufacture, removal, and sale of oleomargarine," and shall not engage in any attempt to defraud the government of any tax on their manufactures, and shall render a true and correct return, etc., does not secure the manufacturer's liability for the payment of the special tax mentioned above. *U. S. v. Elgin Churning Co.*, (1910) 183 Fed. 878.

## Vol. III, p. 122, sec. 6.

**Penalty.**—The penalty prescribed in this section does not apply to that part of the section prohibiting retailers from selling in quantities exceeding ten pounds, such offense being subject to punishment by a fine of \$1,000 without imprisonment, as prescribed by section 18. *Ripper v. U. S.*, (C. C. A. 1910) 178 Fed. 24.

**Constitutionality.**—The provision of this section that retail dealers must sell in quantities not exceeding ten pounds at any one time violates no constitutional right. *Ripper v. U. S.*, (C. C. A. 1910) 178 Fed. 24.

The words "every person," as used in the last sentence of this section, should be construed to refer solely to manufacturers and dealers mentioned in the first part of the section, so that an indictment for violating such section, failing to charge that accused was either a manufacturer or dealer in oleomargarine, and as such packed produce in a

manner violative of the Act, would state no offense. *Morris v. U. S.*, (1909) 168 Fed. 682, 94 C. C. A. 168.

**Knowledge.**—In *Goll v. U. S.*, (C. C. A. 1908) 166 Fed. 419, it was held that where G. was not shown to have ordered, advised, approved, or had knowledge of a sale of oleomargarine by another not under G.'s control, without being properly printed or branded, G. could not be convicted of the alleged wrongful sale of such substance.

**Indictment.**—An indictment founded on this section, charging a retail dealer with having violated said section and the regulations prescribed thereunder by failing to pack oleomargarine sold by him as therein required, must describe the package used with reasonable certainty so as to advise the defendant of the particular offense charged, and therefore a general averment that "the said oleomargarine was not then and there packed

in new, suitable wooden or paper packages having marked or branded thereon the name and address of him the said L., the words 'pound' and 'oleomargarine,' and the quantity of oleomargarine so sold as aforesaid," but which failed to specify in which respect the package used was unlawful, was held to be insufficient as being too indefinite and uncertain. *U. S. v. Lockwood*, (1908) 164 Fed. 772.

An indictment under this section charging generally that the defendants did knowingly, wilfully, and unlawfully sell and offer for sale, deliver and offer to deliver, oleomargarine in other form than in new wooden or paper packages marked, stamped, and branded as required by law, without alleging whether

the sales were at wholesale or at retail, and in what respect the packages were not in the form prescribed, and what stamps, marks, or brands required by law they did not have thereon, was held to be insufficient. *U. S. v. Joyce*, (1905) 138 Fed. 457.

But an indictment for unlawfully selling oleomargarine, averring that both of the defendants named therein "unlawfully and knowingly did sell and deliver" at a time and place and to a person named a one-pound package of oleomargarine wrapped in a paper wrapper, without being then and there marked and branded in the manner required by section 6, was held to be sufficient. *Goll v. U. S.*, (C. C. A. 1908) 166 Fed. 419.

### Vol. III, p. 123, sec. 8.

The congressional power to levy excises was not exceeded by the enactment of this Act imposing an excise on artificially colored oleomargarine, because that body did not choose to tax natural butter artificially colored. *McCray v. U. S.*, (1904) 195 U. S. 44, 24 S. Ct. 769, 49 U. S. (L. ed.) 91.

**Due process of law.**—The excise on artificially colored oleomargarine does not infringe the constitutional guaranty of due process of law because the effect of the tax may be to suppress the manufacture of that article. *McCray v. U. S.*, (1904) 195 U. S. 44, 24 S. Ct. 769, 49 U. S. (L. ed.) 91.

**Due process of law** is not denied by this section because Congress has not chosen to tax natural butter artificially colored. *McCray v. U. S.*, (1904) 195 U. S. 44, 24 S. Ct. 769, 49 U. S. (L. ed.) 91.

**The motives or purposes of Congress** in enacting the tax imposed by this Act on artificially colored oleomargarine are not open to judicial inquiry in considering the power of that body to enact such legislation. *McCray v. U. S.*, (1904) 195 U. S. 44, 24 S. Ct. 769, 49 U. S. (L. ed.) 91.

**"Free from artificial coloration."**—Oleomargarine containing a small quantity of a vegetable oil, which substantially serves only to give the product the yellow shade which causes it to resemble butter, cannot be regarded as within the proviso in this section imposing a lesser tax on oleomargarine when "free from artificial coloration that causes it to look like butter of any shade of yellow," on the theory that the use of a substance which Congress has, in section 2, recognized as a possible ingredient, cannot be artificial coloration, since this congressional enumeration of ingredients specifically includes color-

ing matter. *Cliff v. U. S.*, (1904) 195 U. S. 160, 25 S. Ct. 1, 49 U. S. (L. ed.) 139.

Of similar effect, see *Moxley v. Hertz*, (1910) 216 U. S. 344, 30 S. Ct. 305, 54 U. S. (L. ed.) 510; *Moxley v. Hertz*, (C. C. A. 1911) 185 Fed. 757.

**Artificially colored oleomargarine**, whose color is imparted in its manufacture by the use of an artificially colored and authorized ingredient, is not within this section imposing, instead of the general tax on oleomargarine prescribed by that section, a lower rate when "free from artificial coloration," because of the provision of section 3 that persons adding to, or mixing with, oleomargarine any artificial coloration shall be held to be manufacturers of oleomargarine. *McCray v. U. S.*, (1904) 195 U. S. 44, 24 S. Ct. 769, 49 U. S. (L. ed.) 91.

**Oleomargarine** whose yellow color is produced by the employment, as an ingredient, of butter which itself is artificially colored, is not "free from artificial coloration," within the meaning of the proviso in this section prescribing a lower rate of taxation for oleomargarine not so colored, although the statute treats butter, whether artificially colored or not, as an authorized ingredient of oleomargarine. *McCray v. U. S.*, (1904) 195 U. S. 44, 24 S. Ct. 769, 49 U. S. (L. ed.) 91.

**Findings of fact.**—A finding that the use of palm oil as an ingredient of oleomargarine was substantially only for coloring purposes was not disturbed on appeal, where it was based on testimony that out of a total of 160 ounces only 1½ ounces were palm oil, and that this quantity imparted the yellow shade which caused the product to resemble butter. *Cliff v. U. S.*, (1904) 195 U. S. 160, 25 S. Ct. 1, 49 U. S. (L. ed.) 139.

### Vol. III, p. 124, sec. 11.

**Waiver of jury trial.**—Persons prosecuted by information in a federal District Court under this section may waive the jury to which they are entitled by U. S. Const., Amend. VI., since the mandate of article 3, section 2, clause 3, that "the trial of all

crimes, except in cases of impeachment, shall be by jury," does not include such petty offenses, and there is no congressional legislation or rule of public policy requiring a jury in such cases. *Schick v. U. S.*, (1904) 195 U. S. 67, 24 S. Ct. 826, 49 U. S. (L. ed.) 101,

## Vol. III, p. 125, sec. 13.

**Elements of offense.**—In order to constitute the offense of neglect or refusal to destroy the stamp from an emptied oleomargarine package, it need only appear that the package had a stamp on it denoting the payment of a tax; that it was emptied of its contents; that it was in defendant's possession in its emptied condition; and that he wilfully neglected or refused to destroy the stamp while the empty package was in his possession; and hence an indictment for such offense is not defective for failure to charge that the package was emptied while in the defendant's possession. *Ripper v. U. S.*, (C. C. A. 1910) 178 Fed. 24. Of similar effect, see *Vermont v. U. S.*, (1909) 174 Fed. 792, 98 C. C. A. 500.

**"Emptied" package.**—Section 6 of this Act provides that all oleomargarine shall be packed by the manufacturer in packages containing not less than ten pounds, and stamped, and that retail dealers must sell only from original stamped packages, in quantities not exceeding ten pounds, and shall pack the oleomargarine sold by them in suitable packages which shall be marked as prescribed. A regulation made by the Commis-

sioner of Internal Revenue permits retail dealers to take the oleomargarine from the original stamped package in advance of sales and put it up in retail packages, marked and branded as prescribed by law and regulation, and offer the same for sale, provided such prepared retail packages remain till sold in or on the manufacturer's original package; a retail dealer, however, to be subject to a fine if he remove his prepared packages from the original package and sell them separated from and independently of the manufacturer's stamped package. It has been held that a manufacturer's stamped package is not "emptied," within section 13, making it a duty, subject to a fine for violation thereof, of the person in whose hands the package is when emptied, to destroy the stamps thereof, where it still contains a pound package put up by the retailer of its original contents. *U. S. v. Knott*, (1907) 151 Fed. 925.

**Evidence.**—In *Vermont v. U. S.*, (1909) 174 Fed. 792, 98 C. C. A. 500, the evidence was held to sustain a conviction of wilfully refusing to remove the stamps from oleomargarine packages on removal of the contents therefrom.

## Vol. III, p. 125, sec. 15.

**Indictment.**—Sections 6 and 10 of this Act provide different stamps, marks, and brands for oleomargarine according as it is of domestic or foreign manufacture, and if the former, if it is to be sold at wholesale or retail. Section 7 requires every domestic manufacturer to paste securely on each package a printed label giving the number of the factory and the district and state, etc.; a warning against the removal of the contents of the package without destroying the stamp, which is made an offense; and section 15

makes it an offense to deface or remove any of the stamps, marks, or brands required by law from such packages. It has been held that an indictment alleging that defendants wilfully, etc., defaced the stamps, marks, and brands upon two certain packages containing oleomargarine, which packages were in their possession for sale, but which failed to show that the stamps removed were such as were prescribed by the statute, was insufficient. *U. S. v. Joyce*, (1905) 138 Fed. 457.

## Vol. III, p. 126, sec. 17.

**Indictment.**—An indictment which, after averring facts showing defendant to have been a manufacturer of oleomargarine within the statute, charges in the language of the statute that he attempted to defraud the United States of the tax on oleomargarine produced by him, is sufficient, without setting out the particular acts relied on to prove such attempt. *Hardesty v. U. S.*, (1909) 168 Fed. 25, 93 C. C. A. 417.

Where an indictment for an attempt to defraud the United States of a tax on oleomargarine, in violation of this section, contained a general charge in the language of the statute, it was held not to be objectionable for failure to affirmatively allege that the tax was assessable, as the defendant was notified by such general charge that the government intended to prove either that the oleomargarine had been sold, or that it had been removed for sale and consumption, without payment of the tax. *Enders v. U. S.*, (C. C. A. 1911) 187 Fed. 754.

**Information.**—An information for the forfeiture of an oleomargarine plant, under this section, is sufficient, which charges in the language of the statute that the claimant was engaged in the business of manufacturing oleomargarine, and defrauded and attempted to defraud the United States of the tax on the oleomargarine produced by it, or a part thereof. *U. S. v. New Jersey Melting, etc., Co., Manufacturing Apparatus, etc.*, (1905) 141 Fed. 475.

**Evidence.**—An indictment charging the defendants with an attempt to defraud the United States of the tax on oleomargarine manufactured by them is sustained by evidence that they were dealers in oleomargarine, that they bought uncolored oleomargarine, colored the same to resemble butter, and repacked it in empty packages before used and stamped as containing the colored product, and that they had previously systematically done the same thing, and sold the article so colored without paying the

additional tax required thereon. *Hardesty v. U. S.*, (1909) 168 Fed. 25, 98 C. C. A. 417.

In *Enders v. U. S.*, (C. C. A. 1911) 187 Fed. 754, the evidence was held to be sufficient to sustain a conviction of manufacturing oleo-

margarine by the addition of artificial coloring, and that the same had been sold or removed for sale and consumption without payment of the required tax with intent to defraud the United States.

### Vol. III, p. 127, sec. 20.

**Regulations.**—The treasury officials may not by regulation so construe this Act as to nullify its provisions as legally interpreted.

*Moxley v. Herts*, (C. C. A. 1911) 185 Fed. 757.

### Vol. III, p. 127, sec. 1.

**Removal of labels and stamp.**—In *U. S. v. Green*, (1905) 137 Fed. 179, it was held that this section does not divest the butter of its interstate commerce character so as to immediately entitle the consignee to remove such marks and labels without liability for violating such Act, the court saying: "Without going into the numerous cases bearing to some extent, even though indirectly, on the question, this court is of the opinion that in making process or renovated butter transported into a state, and remaining therein for use, consumption, sale, or storage therein, subject on arrival in such state to the operation and effect of the laws of such state enacted in the exercise of its police power to the same extent and in the same manner as though such articles had been produced in such state, and declaring that same shall not be exempted from such laws by reason of being introduced into such state in original packages or otherwise, Congress did not intend to confer any power and has not conferred any power on any person to remove the marks, labels, stamps, etc., from process or renovated butter. When the packages are used the marks, stamps, etc., are to be de-

stroyed. New York has passed no law allowing this to be done, and it is not seen that such a law could be passed in the legitimate exercise of the police power of the state. Section 1 of the Oleomargarine Act was not intended to abrogate any penalty imposed for the violation of the penal provisions referred to, or to permit the acts therein forbidden, or to empower a state to make any law interfering with the operation of such laws, unless there should arise a conflict between the laws of the United States and those of the state passed in the legitimate exercise of its police power. It is perfectly clear that to permit the removal of the stamps, marks, labels, etc., on packages of a food product of this character, and specifically authorized by law, while such articles remain an article of interstate commerce, or even thereafter, when we consider the objects and purposes of the law, would not only defeat the objects and purposes of the legislative body as to inspection, etc., but open the doors wide to frauds on the revenue. The placing of the marks, etc., on the packages implies they are to remain."

### Vol. III, p. 128, sec. 4. [*Butter defined, etc.*]

**"Absorption" defined.**—In the provision of this section defining adulterated butter as including "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream," the word "absorption" is not used in the sense of chemical absorption, and any butter is within the definition which contains an abnormal quantity

of water, whether by chemical absorption or by incorporation. *Coopersville Co-operative Creamery Co. v. Lemon*, (1908) 163 Fed. 145, 89 C. C. A. 595.

**Intent.**—Butter containing an abnormal quantity of water is subject to the tax imposed by this section without regard to the intent of the manufacturer. *Coopersville Co-operative Creamery Co. v. Lemon*, (1908) 163 Fed. 145, 89 C. C. A. 595.

### [*Tax on manufacture of adulterated or renovated butter — stamps.*]

The removal of stamp and caution notices attached to original packages of renovated butter which is the subject of interstate com-

merce is a misdemeanor. *U. S. v. Green*, (1905) 137 Fed. 179.

### [*Oleomargarine rules and penalties applied to adulterated butter.*]

**Regulations respecting amount of moisture.**—Though Act Cong. Aug. 2, 1886, ch. 840, 24 Stat. L. 209, 3 Fed. Stat. Annot. 127, authorized the Secretary of the Treasury to prescribe rules and regulations for carrying it into effect, it did not authorize him to promulgate a rule construing this section declaring that butter should be confiscated if it

contained an abnormal quantity of moisture, by providing that it should be confiscated if it contained more moisture than sixteen per cent. *U. S. v. 11,150 Pounds Butter*, (1911) 188 Fed. 157. *Contra*, *Coopersville Co-operative Creamery Co. v. Lemon*, (1908) 163 Fed. 145, 89 C. C. A. 595.

## Vol. III, p. 130, sec. 5.

**Regulations.**—The purpose of this section is to provide for the sanitary inspection and the marking and branding of "process" or "renovated" butter at the place of manufacture, to the end that none shall be shipped from the factory which can in any way be injurious to the health of the consumer, and the section authorizes the Secretary of Agriculture to cause such inspection to be made, and to "make all needful regulations for carrying this section into effect." A regulation, however, which prohibits a dealer, re-

ceiving or handling such butter after it has been duly inspected, marked, and branded, and shipped from the factory, from obliterating the marks or brands thereon has no relation to such sanitary purpose, and finds no warrant in the statute, being calculated only to prevent fraud on the part of the dealer in his relations with his customers, and there is nothing in the statute which will support an indictment or information for the violation of such regulation. *U. S. v. Bohl*, (1903) 125 Fed. 625.

## Vol. III, p. 131, sec. 6.

**Regulations.**—This section does not so limit the power of the Internal Revenue Commissioner as to authorize only the making of regulations requiring returns as to the contents of the books required to be kept by wholesale dealers; but he is authorized to adopt a regulation requiring such dealers to make monthly returns showing the packages and pounds of oleomargarine received, the quantity disposed of, and the names and addresses of the consignees. *U. S. v. Lamson*, (1909) 173 Fed. 673.

The provisions of this section requiring wholesale dealers in oleomargarine to keep books and render returns as required by the Commissioner of Internal Revenue, and the regulation requiring monthly reports by such dealers, do not make the sufficiency of the returns depend on their conformity to the books, but on their conformity to the facts; such dealers being required to make both their books and returns a correct record of the facts. *U. S. v. Lamson*, (1909) 173 Fed. 673.

Neither is such a regulation unreasonable because it does not apply to dealers in process, renovated, or adulterated butter. *U. S. v. Lamson*, (1909) 173 Fed. 673.

Where the names of the purchasers as given in a wholesale dealer's return were wholly or partly fictitious or erroneous, there was a violation of the regulation, though the quantity disposed of was correctly disclosed. *U. S. v. Lamson*, (1909) 173 Fed. 673.

The requirement of regulations made under this section, that dealers shall "make monthly returns on form 217 . . . showing in detail the number of packages and the number of pounds of oleomargarine received, . . . also the quantity disposed of, with the name and address of each person to whom sold or consigned," does not require a statement in detail of the number of packages and the number of pounds disposed of to each person, and the forms furnished for such returns cannot impose additional requirements to those of the statute or regulations which will have the force of law, and a failure to comply with which will constitute a criminal offense. *U. S. v. Lamson*, (1908) 162 Fed. 165.

Under the regulations made by the Commissioner of Internal Revenue pursuant to this section, and in force prior to 1907, which

require wholesale dealers to make returns showing, among other things, the names and addresses of all persons to whom sales have been made, and that "the recapitulation should be signed by the firm name . . . and the person swearing to the return should sign on the dotted lines below the right hand of the printed affidavit," the oath required is to the recapitulation only, and not to the list of customers contained in the return. *U. S. v. Lamson*, (1908) 165 Fed. 80.

**False oath to return.**—This section, requiring wholesale dealers to keep such books and render such returns as the Commissioner of Internal Revenue may by regulation require under prescribed penalties for its violation, has no relation to the tax to be assessed on such dealers, and the regulations made thereunder and in force prior to their revision in 1907, in requiring an oath to the returns, do not have the force of law in such sense that a false oath to a return subjects the maker to prosecution for perjury under R. S. sec. 5392, 5 Fed. Stat. Annot. 701. *U. S. v. Lamson*, (1908) 165 Fed. 80.

**Entries in books.**—The former revised regulations made by the Commissioner of Internal Revenue in December, 1904, governing the keeping of books and the making of returns by wholesale dealers in oleomargarine, pursuant to this section, do not require the entry on the books of the number of packages and pounds of oleomargarine disposed of at any specified time, and the failure to make such entries on the same day or during the same month when the goods are disposed of is not a criminal offense under section 6. *U. S. v. Lamson*, (1908) 162 Fed. 165.

**Indictment.**—Upon a reasonable construction of regulations made under this section the entries required to be made in the books may be made by the agent of the dealer, and an indictment for failure to make such entries should aver that the dealer did not make and did not cause to be made such entries. *U. S. v. Lamson*, (1908) 162 Fed. 165.

A corporation is a "person" within the meaning of section 6, requiring wholesale dealers in oleomargarine to keep certain books and make certain returns, and providing for punishment by fine and imprisonment "any person who wilfully violates any of the provisions of this section," although section 5 applies in express terms to corporations, and

## 1909 Supp., p. 137, sec. 1.

**Constitutionality.**—This Act is within the jurisdiction of Congress, as a proper regulation of interstate commerce. *Shawnee Milling Co. v. Temple*, (1910) 179 Fed. 517; *U. S. v. Seventy-Four Cases Grape Juice*, (1910) 181 Fed. 629.

It is not unconstitutional as an attempted exercise by Congress of police power belong-

ing to the states. *U. S. v. 420 Sacks Flour*, (1910) 180 Fed. 518.

**Construction and validity.**—See note to *McDermott v. State*, (1910) 21 Ann. Cas. 1315.

This Act was cited in the following cases: *Charles v. U. S.*, (C. C. A. 1910) 183 Fed. 566; *State v. Eckenrode*, (Ia. 1910) 127 N. W. 57.

## 1909 Supp., p. 137, sec. 2.

**Certainty and definiteness.**—This Act is not void for uncertainty and indefiniteness, in that no standard of grade, quality, or purity is prescribed, but that the determination of the standard is left to the courts, as such objection may be obviated by requiring specific and properly drawn pleadings. *U. S. v. 420 Sacks Flour*, (1910) 180 Fed. 518.

**Conditions precedent.**—Although an indictment under the Food and Drugs Act for adulteration or misbranding is not demurrable because it contains no allegation of notice from the Department of Agriculture to the defendant or the result of the examination of the article, and that he was given an opportunity to be heard, as required by section 4 of the Act, since such prosecutions may be maintained by the district attorney under section 5 without the intervention of the department, such allegations and proof are necessary in all cases where the prosecution is instigated by officers or agents of the department; and if it appears on the trial that the case is such, there can be no conviction in the absence of such allegation and proof. *U. S. v. Morgan*, (1910) 181 Fed. 587.

When proceedings for violation of the Food and Drugs Act by adulteration or misbranding are instituted at the instance of the Department of Agriculture, whether such proceedings are *in personam* or for a forfeiture of goods under section 10, it would seem that the notice of examination and opportunity to be heard provided for by section 4 are necessary conditions precedent and must be alleged and proved; but under section 5 a district attorney may institute such a proceeding upon complaint of any state health officer or any adequate proof without the action of the agents of the department. *U. S. v. Seventy-Four Cases Grape Juice*, (1910) 181 Fed. 629.

**"Misbranded or adulterated."**—Where bottles containing intoxicating liquors were labeled as containing Monogram whiskey, and were marked "Blend," and the alcoholic content was less, and the residuum from 100 cubic centimeters was more, than the standard test prescribed by sections 6 and 7 of this Act, it was held that they were "misbranded and adulterated." *State v. Intoxicating Liquors*, (1909) 106 Me. 135, 78 Atl. 268.

The officers of a corporation which manufactured a food product, shipped by its manager in interstate commerce, which was adulterated or misbranded, were held to be subject to prosecution therefor where they employed the manager and authorized him to

operate the plant and sell the product without restriction, and the previous course of business had been to ship on orders to other states. *U. S. v. Mayfield*, (1910) 177 Fed. 765.

**Shipment induced by government agent.**—The fact alone that the only interstate shipment shown of a misbranded food article by the manufacturer was secretly induced by an agent of the Department of Agriculture was held not to be a defense to a prosecution therefor under the Food and Drugs Act, the reasons for the action of such agent not appearing. *U. S. v. Morgan*, (1910) 181 Fed. 587.

**Mere receipt without delivery.**—The mere receipt of an adulterated or misbranded drug does not constitute an offense, where claimants have not delivered, or offered to deliver, the drug in unbroken packages; and it appears that the claimants retained the packages in their possession, opened and tested them, and caused the standard of strength, quality, and purity to be plainly stamped on the containers prior to seizure. *U. S. v. Five Boxes Asafetida*, (1910) 181 Fed. 561.

**Brand.**—This section and section 10 require that a different brand or mark shall be placed upon an article transported in interstate or foreign commerce from that required by section 3449, R. S., 3 Fed. Stat. Annot. 795. (1908) 26 Op. Atty-Gen. 474.

**Sale by government officers.**—A sale under section 1241, R. S., 7 Fed. Stat. Annot. 1017, by government officers, of drugs and medicines purchased for the use of the army and afterwards condemned as being unfit for use, is as much subject to the provisions of the Food and Drugs Act as a sale by a private person would be under similar circumstances, and would render the officers making the sale liable under that Act, unless the drugs and medicines so sold were labeled in accordance with its provisions. (1908) 26 Op. Atty-Gen. 546.

**Regulation of sales.**—This Act regulates sales in the District of Columbia and the territories, but does not extend to sales of importations into one state from another so as to extend to and cover the regulation of such sales by a state law. *McDermott v. State*, (1910) 143 Wis. 18, 126 N. W. 888.

**Information.**—Since a defendant may not be imprisoned in the penitentiary unless sentenced to confinement for more than a year, no imprisonment in the penitentiary can be imposed for violation of this Act; and hence the institution of proceedings thereunder by



information of the district attorney is not a violation of Const. U. S., Amend. 5, providing that no person shall be held to answer for an infamous crime except on presentment or indictment of a grand jury. *U. S. v. J. Lindsay Wells Co.*, (1910) 186 Fed. 248.

In *U. S. v. Schurman*, (1910) 177 Fed. 581, it appeared that the defendants manufactured and sold in interstate commerce "Dutch tea rusk." The packages were marked "Genuine Dutch Tea Rusk," and stated that the contents were "made in Holland, Mich., by the Michigan Tea Rusk Company, Holland, Mich.;" the word "Holland" where it first occurred in type was so large and prominent as to hold the attention and mislead purchasers into supposing that the article was a genuine importation from Holland. A hearing was had under the rules of the Department of Agriculture, in which respondents claimed that the markings were not misleading, but offered to change the labels as directed by the government, if found otherwise. It was held that since the defendant's violation of Food and Drugs Act prohibiting the branding of an article of food so as to purport to be a foreign product when it was not so was doubtful, leave would not be granted to file an information prior to notice of adverse finding by the department and an opportunity to alter the labels as directed.

Averments that a fluid was labeled "Flavor of Lemon and Citral—A Pure Flavor," and that it did not contain an appreciable quantity of lemon oil which was an essential ingredient of a pure lemon flavor, did not state facts sufficient to show a misbranding because they failed to show that the fluid was labeled a pure flavor of lemon, or that lemon oil was an essential element of a pure flavor of lemon

and citral. An averment that the defendant intended that the label "Flavor of Lemon and Citral—A Pure Flavor" should be understood by the public and purchasers to mean a pure flavor or extract of lemon was futile, because the accepted and usual signification of the label is that the article is not a pure flavor or extract of lemon, but that it is a flavor of lemon and citral. An averment that one who branded an article with a label whose accepted and usual signification correctly describes it intended that the public or purchasers should understand that the label had an opposite and unusual significance fails to disclose any misbranding. *Nave-McCord Mercantile Co. v. U. S.*, (C. C. A. 1910) 182 Fed. 46.

**Sufficiency of affidavits supporting information.**—In *U. S. v. Baumert*, (1910) 179 Fed. 735, it appeared that an information for violating the pure food law was sworn to on information and belief by the United States district attorney supported by certain letters purporting, but not proved, to have been written or authorized by accused taking issue with the Agricultural Department's claim of violation; also a statement not in the form of an affidavit, by an analyst of the Agricultural Department, to which was attached a notary's certificate that it had been subscribed and sworn to, etc. The paper contained no venue, nor was there any certificate attached to it showing that the person certifying it was a notary or authorized to take and certify oaths and affirmations, and that it was taken and subscribed as required by the laws of the state, etc. It was held that the information was not sufficiently proved to justify the issuance of process.

### 1909 Supp., p. 137, sec. 3.

**Regulations.**—It is within the power of the Secretaries of the Treasury, Agriculture, and Commerce and Labor, under this section, to promulgate a rule or regulation which requires that the name of the parent substance shall follow that of the derivative on labels placed on packages containing drugs which

come within the provisions of section 8; but in the absence of such a rule no offense would be committed under the Act by the omission, nor could the article for that reason alone be dealt with as misbranded. (1909) 27 Op. Atty-Gen. 143.

### 1909 Supp., p. 138, sec. 7.

**Macaroni**, to which a coal tar dye known as "Martius yellow" had been added solely as a coloring matter, was held to contain an "added poisonous . . . ingredient which may render it injurious to health," within the fifth clause of this section, and, when shipped in interstate commerce, to be subject to condemnation and destruction under section 10 of the Act, the evidence showing that such coloring matter is a poison which will kill. *U. S. v. 1,950 Boxes Macaroni*, (1910) 181 Fed. 427.

**Adulteration of liquors.**—Where there is no evidence of how the liquors were branded, and no evidence of their "strength, quality, or purity," except that they were colored and slightly sweetened by burnt sugar, they cannot be held to be misbranded or adulterated.

The court cannot take judicial notice that whiskey cannot be colored and sweetened to some slight extent by burnt sugar without exceeding the limits of the standard prescribed by the Pure Food Act. *State v. Intoxicating Liquors*, (1909) 106 Me. 142, 76 Atl. 267.

**Whiskey.**—Whiskey, within the purview of this Act, is the product of sound grain, distilled at a low temperature so as to retain in the distillate the congeneric properties of the grain, which give to the liquor, when matured by aging in charred casks, its desirable potable character. Neutral spirits, which are distilled at a high temperature, may be made from different materials and do not contain such properties, and which are not rendered potable by aging, although reduced by water

to potable strength and from which most of the fusel oil has been removed, are not whiskey nor a like substance with whiskey. *Woolner v. Rennick*, (1908) 170 Fed. 662.

**Silver coating on candy.**—Since the purpose of this Act was to protect the purchaser of food products from having inferior and different articles passed off on him in place of those he desired, and to protect him from injury by prohibiting the addition to foods of substances poisonous or deleterious to health, the words "other mineral substances," under the doctrine of *ejusdem generis*, includes other mineral substances which are deleterious or detrimental to health of the same nature as those specifically described preceding such words, and hence does not include a thin coating of pure silver covering candy, used principally by confectioners for decorative purposes, and not deleterious or detrimental to health. *French Silver Dragée Co. v. U. S.*, (C. C. A. 1910) 179 Fed. 824.

**Horse and mule feed.**—Where a substance sold under the name "Corno Horse and Mule Feed" was contained in a package branded "Corno Horse and Mule Feed, Mixture of ground alfalfa, oats, corn, flax, bran, oat and hominy feeds, made by the Corno Mills Company, East St. Louis, Illinois"—followed by a guaranteed analysis, such substance being a compound and so described on the package, it was held that it was not adul-

terated because it contained a quantity of oat hulls mixed and packed therewith in excess of the amount normally present in oat feed consisting of whole ground oats. *U. S. v. One Car Load Corno Horse Feed*, (1911) 188 Fed. 453.

**Cider vinegar.**—Where samples of alleged pure cider vinegar showed only from .11 to .16 glycerin, it was held to be adulterated. *U. S. v. One Hundred Barrels Vinegar*, (1911) 188 Fed. 471.

**Test.**—In a libel for forfeiture of alleged adulterated vinegar, it was held that the government was not limited to the standards mentioned in the Agricultural Department bulletin No. 65 and Circular 19, nor to methods of analysis adopted under regulation No. 4, but might make use of any accurate test. *U. S. v. One Hundred Barrels Vinegar*, (1911) 188 Fed. 471.

**Question for jury.**—In *Shawnee Milling Co. v. Temple*, (1910) 179 Fed. 517, it was held that whether flour, bleached by the use of nitrogen peroxide under the Andrews patent, or pursuant to the Alsop process, was flour so treated that inferiority is concealed, or containing added poisonous ingredients which may render it injurious to health, in violation of the pure food law, was a question of fact for determination by a jury, or by the court if a jury is waived.

## 1909 Supp., p. 139, sec. 8.

**Tea Inspection Act.**—This Act is not intended as a substitute for the special Tea Inspection Act (Act of March 2, 1897, 29 Stat. L. 604, 3 Fed. Stat. Annot. 138), but both statutes are cumulative so far as the importation of tea is concerned. (1907) 26 Op. Atty-Gen. 166.

**Labeling of deteriorated drugs.**—Where a drug is not sold under a name recognized in the United States pharmacopœia, a general statement on the label that its quality has deteriorated and that it has been condemned for sale under section 1241, R. S., 7 Fed. Stat. Annot. 1017, would be a sufficient compliance with the Food and Drugs Act, and would show that it was not sold under any professional standard, and could not be deemed either adulterated or misbranded under sections 7 and 8 of that Act. Where a drug is sold under a name recognized by the United States pharmacopœia, a mere general statement of the character of the drug, showing only the fact of its deterioration, is insufficient; and in order that it may not be deemed adulterated, its actual strength, quality, or purity should be stated on the label of each bottle, box, or other container in which the goods are intended to reach the consumer. (1908) 26 Op. Atty-Gen. 546.

**Statement of inside circulars.**—This Act merely embraces any statement, design, or device regarding an article which appears on the outside of the package in which the article is offered for sale, whether such statement is printed on or otherwise affixed to the package, or impressed on a separate label affixed

to the package, but does not include an advertising circular inclosed with an article inside the carton in which it is offered for sale. *U. S. v. American Druggists' Syndicate*, (1911) 186 Fed. 387.

**Words given ordinary meaning.**—The names intended by the pure food law to be used on brands or labels are names readily understood and conveying to the general public definite and familiar ideas as to the character or quality of the article branded, even though such names may be inaccurate in the view of a chemist, or physicist, or an expert in some particular industrial art. (1908) 26 Op. Atty-Gen. 474.

**Neutral spirits.**—For the purposes of the pure food law, neutral spirit, or ethyl alcohol, if absolutely pure, would be not only like, but identical, whether it were derived from fruit, from cereals, from sugar cane, or from any other of the many substances which can furnish alcohol. (1907) 26 Op. Atty-Gen. 216.

**Like substances.**—Ethyl alcohol cannot, for the purposes of the pure food law, be considered to be a "like substance" to whiskey. The proper definition of the word "whiskey," for this purpose, is a question of law, and the term is to be given its ordinary significance as a word of everyday speech, and should not be understood in any commercial or scientific sense. (1907) 26 Op. Atty-Gen. 262.

**Misleading statements as to curative effects.**—False and misleading statements in the labels on a proprietary medicine as to its curative or remedial effects, but which do

not import any statement concerning identity, are not "misbranding," within the meaning of section 8. *U. S. v. Johnson*, (1911) 221 U. S. 488, 31 S. Ct. 627, 55 U. S. (L. ed.) 823; *U. S. v. American Druggists' Syndicate*, (1911) 186 Fed. 387.

**Must be misbranded at time of seizure.**—A drug is not adulterated or misbranded so as to be subject to condemnation unless adulterated or misbranded at the time of seizure, and hence, where *asafoetida* below the prescribed test and misbranded was received in interstate commerce and tested and correctly branded before seizure, it was not subject to forfeiture. *U. S. v. Five Boxes Asafoetida*, (1910) 181 Fed. 561.

The word "label," as used in this Act, which requires packages of drugs shipped in interstate commerce to bear a statement on the label of the quantity or proportion of any alcohol, etc., means a descriptive paper affixed to the package, which must include the statement of how much alcohol, etc., is contained in the package. *U. S. v. Sixty-Five Casks Liquid Extracts*, (1909) 170 Fed. 449, *affirmed* (1910) 175 Fed. 1022, 99 C. C. A. 667.

**Necessity for labels.**—This Act not only requires that drugs shipped in interstate commerce and labeled, shall not be misbranded, but also requires that they shall be labeled with labels conforming to its requirements. *U. S. v. Sixty-Five Casks Liquid Extracts*, (1909) 170 Fed. 449, *affirmed* (1910) 175 Fed. 1022, 99 C. C. A. 667.

**Derivative.**—The word "derivative" in this subsection should be understood in its chemical sense. (1909) 27 Op. Atty-Gen. 143.

**Acetphenetidine** is to be considered a "derivative" of acetanilide, within the meaning of subsection 2 of section 8, if it is so related to the latter substance that it would be rightly regarded by recognized authorities in chemistry as obtained from the latter "by actual or theoretical substitution," and it is not indispensable that it should be actually produced therefrom as a matter of fact. (1909) 27 Op. Atty-Gen. 143.

**"Blend."**—The evident intent of the statute was to confine the use of the word "blend" to one kind of mixture and to forbid its use for another; and since, as to whiskey, such mixture must be either composed of two different kinds of whiskey, or of whiskey with one other substance generally mixed with it, namely, ethyl alcohol, it is clear that Congress intended to deny the designation "blend" to a mixture of whiskey and ethyl alcohol. (1907) 26 Op. Atty-Gen. 262.

In what may be termed a "blend" of, or "blended," wines or whiskeys, the two articles mixed must be capable of accurate and sufficient description by a single generic term; they must be substances known by the same name and sufficiently distinctive to afford reasonable warning to purchasers. (1907) 26 Op. Atty-Gen. 216.

Where syrup consisting of refined cane sugar flavored with an extract of maple wood was sold under a label describing it as

"Western Reserve Ohio Blended Maple Syrup," the word "blend" indicated that the article was a mixture and imitation, and there was therefore no violation of the Act. *U. S. v. Sixty-Eight Cases Syrup*, (1909) 172 Fed. 781.

**Blend of vinegar and cider.**—Vinegar, which was in fact distilled vinegar to which a small quantity of pure boiled apple cider had been added for coloring, which was labeled as "Saratoga Brand vinegar, a blend of pure boiled apple cider and distilled vinegar," was held to be misbranded as misleading the public to believe that it was composed of pure boiled apple cider vinegar and distilled vinegar. *U. S. v. Ten Barrels Vinegar*, (1911) 186 Fed. 399.

**Compounds.**—When the words "compound" or "compounded" are used in this Act, it is ordinarily necessary that two substances at least should be mentioned as entering into the combination described, as, for instance, "sherry compounded with port" or "port compounded with sherry," or "compounded port and sherry." It is not, however, universally true that two substances must follow "compound" or "compounded," although it is true that only one substantive can appropriately follow "blend" or "blended." A combination of whiskey with ethyl alcohol, supposing, of course, that there is enough whiskey in it to make it a real compound and not a mere semblance of one, may be fairly called "whiskey," provided the name is accompanied by the word "compound" or "compounded," and a statement of the presence of another spirit is included in substance in the title; it cannot, however, properly be styled "blended whiskey." (1907) 26 Op. Atty-Gen. 216.

Compounds known as articles of food can be sold under their own distinctive name so long as no deleterious matter is put into the product, and the label states where it is manufactured, and it is not an imitation sold under the distinctive name of another article. *U. S. v. One Car Load Corno Horse Feed*, (1911) 188 Fed. 453.

**"Compound" and "blend" distinguished.**—The words "compound" or "blend" are substantially synonymous, in ordinary speech, when applied to mixtures or liquids; but the pure food law establishes a distinction of its own between them, based upon the character of the ingredients entering into the mixture. Thus the intent of this Act is that the term "blended sherry," for instance, or "blend of sherries," shall designate a mixture of two or more kinds of sherry; while the titles "compound of port and sherry," or "compounded port and sherry," would appropriately designate a mixture of two substances, unlike in the view of the law, namely, two distinct and different kinds of wine—"unlike" in the sense that diamonds and coal are unlike. So a mixture of two or more different whiskeys, whether their differences arise from the character of the substances from which they are distilled or from the method of distillation used, or even from their several ages and the environment in which they are kept subsequently to distillation,

would be appropriately termed a "blend of whiskey," or "blended whiskey," or "blended whiskeys," any one of which would be correct, provided each article entering into the combination, standing alone, could be properly designated as "whiskey." While a mixture of a spirit properly designated "whiskey" with another spirit which, standing alone, could not be properly designated as "whiskey," such as ethyl alcohol, must be labeled or branded as a "compound" or as "compounded." (1907) 26 Op. Atty.-Gen. 216.

**Maple syrup.**—In *U. S. v. Scanlon*, (1908) 180 Fed. 485, it appeared that the defendant manufactured syrup from cane sugar, flavored to represent maple syrup by the introduction of an extract from maple wood after it had been chopped down. The syrup was put up in bottles labeled "Western Reserve Ohio Blended Maple Syrup," the words "Ohio" and "Maple Syrup" being in red, and between them the word "Blended," and then below that, in smaller type, the statement, "This syrup is made from the sugar maple tree and cane sugar." It was held that the label was misleading, in that purchasers would ordinarily understand that the article contained in part maple syrup made from the boiled-down sap drawn from live maple trees, and that defendant was therefore guilty of misbranding. The court said: "It is not a question of chemistry in this case, any more than it is with butter. It is a question of what is the popularly recognized definition of maple syrup; and that undoubtedly is, and we do not need the chemists to testify to it, that it is the syrup produced from boiling down the sap that flows in the spring of the year from the live maple tree. It has a certain consistency, and of course a certain specific gravity, which a chemist can tell us about; but those persons who have used it know in a general way when it has a proper consistency and a proper specific gravity, as they certainly do whether it has the proper flavor."

**Canned fruit.**—In *U. S. v. 100 Cases Tepee Apples*, (1908) 179 Fed. 985, it appeared that the claimants operated a canning factory in Benton Harbor, Mich., where fruits grown in Michigan, as well as in other states, were canned and prepared for sale. The claimants canned certain "tepee" apples and blackberries grown in Arkansas, sold under a label on which was printed: "Tepee Apples [or Blackberries, as the case might be]. Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Michigan." There was evidence that Michigan apples and blackberries were better than those grown in Arkansas. It was held that the labels indicated that the fruit was grown in Michigan, and that claimants were therefore guilty of misbranding.

**Honey and corn syrup.**—A food product labeled, "Compound: Pure Comb and Strained Honey and Corn Syrup," is not "misbranded" within the meaning of this section merely because the percentage of corn syrup in the compound largely exceeds that of honey. *U. S. v. Boeckmann*, (1910) 176 Fed. 382.

**Compound of molasses and corn syrup.**—An article of food put up and sold in cases bearing principal labels describing the contents as a particular brand of molasses, but plainly stating in three separate places that the product is a compound of molasses and corn syrup, and also giving all the other information required by this Act and the regulations thereunder, and such article being in fact a compound of molasses and commercial glucose, is not adulterated or misbranded, within the meaning of this Act; it being shown that it contains nothing deleterious to health, and that under the rulings of the department it is permissible to describe commercial glucose on labels or brands as made from corn syrup. *U. S. v. Seven Hundred and Seventy-Nine Cases Molasses*, (C. C. A. 1909) 174 Fed. 325.

**Blended syrup.**—In *U. S. v. Sixty-Eight Cases Syrup*, (1909) 172 Fed. 781, it appeared that certain cases containing syrup seized by the United States were branded and labeled "Western Reserve Ohio Blended Maple Syrup, guaranteed absolutely pure, shipped by Western Reserve Syrup Company, Cleveland, Ohio." The bottles were labeled and branded "Western Reserve Ohio Blended Syrup, Western Reserve Syrup Company, Cleveland, Ohio, Blenders of Fancy Maple Syrup and Maple Sugar." It was held that, construing all the words of the bottle labels together, the same meaning was intended as in the labels on the cases, namely, that the bottles and the boxes contained blended maple syrup.

**Salad oil *prima facie*** means olive oil, and in the absence of evidence that the term has recently acquired a more general meaning to include other oils, its use without further explanation on packages of cotton seed oil shipped in interstate commerce constitutes a misbranding. *Brina v. U. S.*, (1910) 170 Fed. 373.

**Spring water.**—Ordinary Croton water drawn from the pipes in New York city, filtered and bottled after the addition of small quantities of mineral salts and carbonic acid gas, is not "spring water," as the term is generally understood, and the labeling of the bottles as spring water constitutes a misbranding within the meaning of the Food and Drugs Act. *U. S. v. Morgan*, (1910) 181 Fed. 587.

**"Oat feed."**—Since the term "oat feed," in its ordinary acceptance, does not mean the whole oat grain, either crushed or ground, but instead means that part of the grain which remains after the miller subtracts the portions useful for human food, consisting of nubbins, middlings, hulls, and oat dust, a compound substance sold in packages under the name "Corno Horse and Mule Feed," and described in the package as a "mixture of ground alfalfa, oats, corn, alfalfa, oat and hominy feeds," with the name of the manufacturer and the place of manufacture, followed by an analysis of its contents, was held not to be misbranded in violation of this section because it contained an excess of oat hulls in compound and not the whole ground oats. *U. S. v. One Car Load Corno Horse Feed*, (1911) 188 Fed. 453.

## 1909 Supp., p. 141, sec. 9.

**Constitutionality.**—In *U. S. v. Charles L. Heinle Specialty Co.*, (1910) 175 Fed. 299, it was held that this section was not invalid as applied to a wholesaler who sold adulterated or misbranded goods within the state to a dealer under a guaranty of conformity to the Pure Food and Drug Act, with knowledge that such guaranty was exacted to further the sale of the goods in interstate commerce; they having been actually shipped out of the state by the dealer, relying on the guaranty.

**Distinct offense created.**—This section created, in addition to the offense of manufacturing and dealing in adulterated and misbranded foods and drugs, the distinct and substantive offense of guaranteeing such articles, which offense, however, is not complete until the purchaser deals with the article in a manner otherwise punishable by the Act. (1907) 26 Op. Atty-Gen. 449.

The term "dealer," as used in this section, includes wholesale as well as retail dealers, and both are accordingly protected from prosecution by establishing a guaranty in conformity with the requirements of the Act. (1907) 26 Op. Atty-Gen. 449.

Guaranty relates to identical article only.

—The provision that no dealer shall be prosecuted thereunder for shipping in interstate commerce any adulterated or misbranded article of food or drugs when he can establish a guaranty signed by the manufacturer that such article is not adulterated or misbranded, is available to a dealer only when such guaranty relates to the identical article shipped by him, and affords no defense to him where it relates only to a constituent used by him in manufacturing the article shipped. *U. S. v. Mayfield*, (1910) 177 Fed. 765.

**Wholesaler guaranteeing food guaranteed to him by manufacturer.**—Where a wholesale dealer in Maryland purchased certain food, found afterwards to be adulterated, from a Pennsylvania manufacturer, receiving the latter's written guaranty as to the purity of the goods, in conformity with this section, and in turn sold the goods to a retail dealer in the District of Columbia under a similar guaranty, it was held that he was completely protected by the guaranty of the Pennsylvania manufacturer from prosecution under this Act. (1907) 26 Op. Atty-Gen. 449.

## 1909 Supp., p. 141, sec. 10.

**Constitutionality.**—In *Hipolite Egg Co. v. U. S.*, (1911) 220 U. S. 45, 31 S. Ct. 364, 55 U. S. (L. ed.) 364, it was held that Congress could lawfully enact the provisions of this section, under which adulterated articles of food, the subjects of interstate commerce, may be confiscated by a proceeding *in rem* in the federal courts after such articles have reached their destination, and there remain in the hands of the consignee in the original unbroken packages. The court said: "The question here is whether articles which are outlaws of commerce may be seized wherever found; and it certainly will not be contended that they are outside of the jurisdiction of the national government when they are within the borders of a state. The question in the case, therefore, is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulterated articles, but the use of them, or rather to prevent trade in them between the states by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses

in the execution of the powers conferred upon it by the Constitution."

**Jurisdiction.**—The provision of this section that proceedings in cases to forfeit adulterated food shall conform as near as may be to proceedings in admiralty does not render such proceedings within the admiralty or maritime jurisdiction of federal courts; the jurisdiction in such proceedings being conferred by the Act itself. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 303.

Under this section the jurisdiction of the federal government over interstate shipments of adulterated food continues while the food remains in the original unbroken packages at the point of destination. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302.

**Conditions precedent.**—The preliminary examination of an article by the Department of Agriculture, and notice to the party from whom the sample is obtained of its adulteration or misbranding, as provided for in section 4, are not conditions precedent to a libel *in rem* for the forfeiture of articles seized for adulteration or misbranding of articles so shipped while remaining in "original unbroken packages." *U. S. r. Sixty-Five Casks Liquid Extracts*, (1909) 170 Fed. 449, *affirmed* (1910) 175 Fed. 1022, 99 C. C. A. 667; *U. S. r. Nine Barrels Olives*, (1910) 179 Fed. 983; *U. S. r. One Hundred Barrels Vinegar*, (1911) 188 Fed. 471.

**Sufficiency of libel.**—This section provides that any article of food that is adulterated or misbranded within the meaning of the Act, and is being transported from one state, territory, district, or insular possession to another "for sale," shall be subject to forfeiture, and that any article of food that is adul-

tered or misbranded, having been transported and remaining unloaded, unsold, or in the original unbroken packages, shall be liable to be proceeded against in like manner. It has been held that a libel for forfeiture of certain bags of sugar under the latter subdivision of the section, failing to charge that the sugar seized had been transported "for sale," was fatally defective. *U. S. v. Forty-Six Packages Sugar*, 183 Fed. 642.

A libel to forfeit a shipment of desiccated eggs for violation of this Act was not fatally defective for failure to allege the date when they were shipped in interstate commerce on the theory that the shipment might have been made before the Act took effect or because the property was not sufficiently identified; such objections being available by answer. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302.

Verification of libel.—Want of a sufficient verification of a libel to forfeit food is not ground for exception or demurrer to the substance of the libel. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302.

Burden of proof.—Where a state sought to have liquors that were brought into the state forfeited before delivery to the consignee upon the ground that they were misbranded or adulterated within this Act, it was held that the burden was on the state to prove such misbranding or adulteration. *State v. Intoxicating Liquors*, (1909) 106 Me. 142, 76 Atl. 267.

Necessity for seizure before forfeiture proceedings.—Since this section providing for proceedings against adulterated and misbranded food transported in interstate commerce for sale or found in the original packages, etc., does not declare the goods *ipso facto* forfeited by an infraction of the Act, nor expressly authorize an executive seizure before proceedings for forfeiture are instituted, but on the contrary requires the district attorney on receiving a certificate of the facts from the Secretary of Agriculture to commence proceedings without delay for the enforcement of the penalties of the Act, prior executive seizure is not required to sustain forfeiture proceedings by the provision that the proceedings shall conform as near as may be to the proceedings in admiralty. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302; *U. S. v. Spraul*, (C. C. A. 1911) 185 Fed. 405; *U. S. v. One Hundred Barrels Vinegar*, (1911) 188 Fed. 471.

This section does not authorize seizure by a private person. *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302.

Intervention.—Where on a libel by the government to enforce a forfeiture of certain sugar, for violation of this Act, the court permitted the G. Company to interplead or file a brief, and thereafter permitted the withdrawal of the answer and filing of exceptions, to which the district attorney assented, it was held that he could not thereafter object to the G. Company's right to interplead and file a brief in the case, unless further evidence was offered that it was a party in interest, or the *bona fide* owner of the sugar

seized. *U. S. v. Forty-Six Packages Sugar*, 183 Fed. 642.

"Having been transported."—The words "having been transported" contemplate a transportation in interstate commerce, and not from one point in a given state, territory, district, or insular possession to another point in the same state, territory, district, or possession. *U. S. v. Forty-Six Packages Sugar*, 183 Fed. 642.

Shipped for consumption and not for sale.—Where adulterated vinegar was proceeded against under the Food and Drugs Act and it appeared that it had been the subject of interstate commerce and was seized while stored in the original unbroken packages, it was held to be immaterial that the evidence showed that it had been shipped in interstate commerce for consumption, and not for sale in such unbroken packages. *U. S. v. One Hundred Barrels Vinegar*, (1911) 188 Fed. 471.

Shipment for use by consignee as raw material.—The remedy *in rem* in the federal courts provided by this section, where any article of food that is adulterated is being transported from one state to another for sale, or, having been transported, remains unloaded, unsold, or in original unbroken packages, may be invoked where adulterated eggs have been shipped into the state, not for sale, but intended solely for use by the consignee in the bakery business. *Hipolite Egg Co. v. U. S.*, (1911) 220 U. S. 45, 31 S. Ct. 364, 55 U. S. (L. ed.) 364; *U. S. v. Two Barrels Desiccated Eggs*, (1911) 185 Fed. 302.

Shipments from manufacturing agent to owner.—In *U. S. v. Sixty-Five Casks Liquid Extracts*, (1909) 170 Fed. 449, *affirmed* (1910) 175 Fed. 1022, 99 C. C. A. 667, it appeared that the claimant was the owner of a secret formula for a proprietary drug preparation, and conducted its business at Wheeling, W. Va., from which place it sold and shipped its preparation in bottles properly labeled. It had the preparation made, however, at Detroit, Mich., from which point it was shipped to the claimant in casks by car lots, and, when received, was bottled and labeled by claimant in Wheeling before being offered for sale. It was held that such shipments were not made in interstate commerce, but only from the manufacturing agents to the owner, and that the casks after their receipt by claimant were not subject to seizure and forfeiture because not labeled under section 10.

Original packages.—Where, after an adulterated or misbranded drug had been transported in interstate commerce and received by the consignee who was the owner, the packages were opened and samples taken that the strength, quality, and purity might be tested, it was held that such sampling did not constitute a breaking of the original packages. *U. S. v. Five Boxes Asafetida*, (1910) 181 Fed. 561.

Where a liquid in casks is shipped in interstate commerce in carload lots, the cask and not the car is the "original package" within the meaning of this section. *U. S. v. Sixty-Five Casks Liquid Extracts*, (1909) 170

Fed. 449, affirmed (1910) 175 Fed. 1022, 99 C. C. A. 667.

**Forfeiture not dependent upon liability under section 2.**—Section 2 makes it a misdemeanor for any person having received adulterated or misbranded drugs from another state to ship the same from one state to another or to deliver the same in unbroken packages for pay or otherwise, or offer to deliver the same to another person so adulterated or misbranded, and section 10 declares that such articles shall be liable to seizure and forfeiture when in the course of being transported from state to state, or when having been transported they remain unloaded, or unsold, or in the original packages. It has been held that such sections are independent of each other, and hence that it is not essential to the forfeiture of adulterated or misbranded drugs, under section 10, that the owner should have been guilty of violating

section 2. *U. S. v. Five Boxes Asafœtida*, (1910) 181 Fed. 561.

Costs in personam may be assessed against the claimant in a proceeding *in rem* under this section to confiscate adulterated articles of food, the subject of interstate commerce, even if the principles of the admiralty law are made applicable by the provision that the proceedings shall conform as near as may be to the proceedings in admiralty. *Hipolite Egg Co. v. U. S.*, (1911) 220 U. S. 45, 31 S. Ct. 364, 55 U. S. (L. ed.) 364.

**Mode of review.**—A proceeding for the condemnation and forfeiture of an article alleged to be adulterated or misbranded, in which either party is given the right to demand a trial by jury of any issue of fact, where such trial is demanded and had, is reviewable only on writ of error. *U. S. v. Seven Hundred and Seventy-nine Cases Molasses*, (C. C. A. 1909) 174 Fed. 325.

## 1909 Supp., p. 142, sec. 11.

**Effect of Drug and Medicine Act of 1848.**—Drugs imported from Italy, although meeting the standard required by the Drug and Medicine Act of 1848, 3 Fed. Stat. Annot. 142–143, are still subject to the provisions of the Food and Drugs Act of 1906 regarding adulteration, misbranding, and false labeling, and to any test that may be applied to them by the direction of the Secretary of Agriculture in accordance with section 11 of the latter Act. (1907) 26 Op. Atty-Gen. 311.

**Effect of bond.**—Where proceedings were instituted for the examination and exclusion of certain alleged adulterated or misbranded olives, it was held that the importer's execution of a bond for possession under such section did not amount to an official declaration that the olives had been found to comply with the Act. *U. S. v. Nine Barrels Olives*, (1910) 179 Fed. 983.

# GAME ANIMALS AND BIRDS.

## Vol. III, p. 152, sec. 3.

**Constitutionality.**—The provisions of this Act prohibiting the shipment or transportation in interstate commerce of game killed in violation of the local laws, and requiring all packages containing game shipped in interstate commerce to be plainly marked showing the name and address of the shipper and the nature of the contents, and making the violation of such provisions a criminal offense, are within the powers of Congress, and constitutional and valid. *Rupert v. U. S.*, (C. C. A. 1910) 181 Fed. 87.

**Indictment.**—Under the game law of Oklahoma Territory (Wilson's Rev. & Annot. Stat. 1903, secs. 3069, 3078), which permitted the killing of quail between October 15th and February 1st following, but prohibited the

shipping of quail from the territory at any time, an indictment charging a violation of this section by knowingly delivering to a carrier for transportation from the territory into another state the dead bodies of quail killed in the territory in violation of its laws, was held to be sufficient where it averred that such quail were killed "with the intent and for the purpose of being shipped and transported out of the territory," although it did not allege the months in which such quail were killed. The same was held to be true of an indictment under section 4 for failing to mark the packages containing the bodies of such quail. *Rupert v. U. S.*, (C. C. A. 1910) 181 Fed. 87.

## Vol. III, p. 152, sec. 4.

**Constitutionality.**—See under the preceding section.

**Indictment.**—See under the preceding section.

**Construction.**—This section requires all packages "containing such dead animals,

birds, or part thereof, when shipped by interstate commerce, as provided in section 1 of this Act," to be plainly marked, so that the name and address of the shipper and the nature of the contents may be readily ascertained on inspection of the outside of such

packages, and makes the violation of such requirements a penal offense. It has been held that the reference in this section to section 1 was a clerical error, such section having no relation to the subject-matter, and section 3 being manifestly intended; that as so construed section 4 is limited in its application to the two classes of shipments enumerated in section 3, first, animals or birds killed in violation of the game laws, and sec-

ond, animals or birds killed during the open season and "the export of which is not prohibited by law," and that an indictment would not lie under section 4 for a failure to mark a package containing game killed during the open season but the export of which was prohibited by the law of the state where the same was killed. *U. S. v. Thompson*, (1906) 147 Fed. 637.

### Vol. III, p. 152, sec. 5.

**Validity of state laws as to interstate shipments.**—This section confers on any state the right to enact laws prohibiting the possession of dead game within certain periods, whether taken within or without the state. *People v. Hesterberg*, (1906) 184 N. Y. 126, 76 N. E. 1032.

In *State v. Heger*, (1905) 194 Mo. 707, 93 S. W. 252, it was held that the Missouri stat-

ute (Laws of 1905, p. 162, sec. 18) prohibiting the sale of game, whether taken within or without the state, is not invalid as a regulation of interstate commerce, in view of this section providing that dead bodies of foreign game animals transported into any state shall, on arrival in the state, be subject to the operation of the laws of the state, enacted in the exercise of its police power.

## HABEAS CORPUS.

### Vol. III, p. 162, sec. 751.

**Petitioner at large on bail.**—The jurisdiction of the federal courts in cases of habeas corpus is statutory and can only be exercised where the body of the relator is in the custody of the respondent and is brought into court in response to the writ, and the proceeding will not lie where the relator is at large on bail. *Sibray v. U. S.*, (C. C. A. 1911) 185 Fed. 401.

**Scope of the writ.**—The power granted by sections 751, 752, 761 is not coextensive with the judicial power of the national government as defined by the Constitution, so as to comprehend all cases within the jurisdiction conferable upon the federal courts, but it is a jurisdiction to be exercised only in cases within the limited jurisdiction conferred upon the courts by other Acts of Congress. *Clifford v. Williams*, (1904) 131 Fed. 100, *quoting and following* *In re Burrus*, (1890) 136 U. S. 591, 10 S. Ct. 850, 34 U. S. (L. ed.) 502.

**Right of father to custody of children.**—See *Clifford v. Williams*, (1904) 131 Fed. 100, dismissing a petition for a writ of habeas corpus.

**Exercise of the function of *parens patriæ*** for the determination of the right to the custody of an insane person is not within the jurisdiction of federal courts. Therefore where a proceeding had been brought in a state court of competent jurisdiction, between citizens of different states, to determine the sanity of an alleged insane person, and the right to custody thereof, the federal court pending determination of such proceeding will not review the right to the custody of

such incompetent on a writ of habeas corpus alleging that he is restrained of his liberty without due process of law. *Hoadly v. Chase*, (1904) 126 Fed. 818, *affirmed* (C. C. A. 1903) 129 Fed. 1005.

**In custody of state court—Federal court will exercise discretion.**—While the federal court has jurisdiction to issue a writ of habeas corpus to determine the jurisdiction of a state court to deprive a citizen of his liberty, whether such writ should be issued in the exercise of such jurisdiction is a matter to be determined in the exercise of a sound discretion in pursuance of law. *Ex p. Martin*, (1910) 180 Fed. 209.

**Will not interfere with state court.**—"It may now be regarded as the settled policy of the federal courts not to interfere by habeas corpus with the prosecution of criminal offenses in the state courts in any instance—other than certain recognized exceptions, of which this case is not one—where the remedy by writ of error may be invoked. . . . It is not a question of power that actuates this attitude on the part of the federal courts, but a rule of comity." *Ex p. Chadwick*, (1908) 159 Fed. 576, denying a petition for habeas corpus. To the same point, see *Ex p. Powers*, (1904) 129 Fed. 985; *Ex p. Collins*, (1907) 154 Fed. 980.

The federal courts will not interfere by habeas corpus with a state in the administration of its criminal law unless fundamental rights specially secured by the Federal Constitution are invaded. *Rogers v. Peck*, (1905) 199 U. S. 425, 26 S. Ct. 87, 50 U. S. (L. ed.) 256.



Relief by habeas corpus is properly refused in a federal Circuit Court to persons in the military service of the United States, held in the custody of state authorities to answer to a charge of homicide which is asserted by them to have been committed in the discharge of their duty, under the Federal Constitution and laws, to apprehend the deceased for a larceny of property from a federal arsenal, where there is conflicting evidence on the question whether or not the deceased had surrendered before the fatal shot was fired. *U. S. v. Lewis*, (1906) 200 U. S. 1, 26 S. Ct. 229, 50 U. S. (L. ed.) 343.

Where the petitioner held for trial in a state court asserted that the statute he was charged with violating was not applicable to the case, and that he was not guilty of the offense charged, the court said: "Where an act, made the basis of a criminal charge under a state law, is not alleged to have been done as an agent of the national government, nor pursuant to authority conferred by it, nor in the exercise of a right by it given, the federal courts cannot properly acquire jurisdiction by the writ of habeas corpus to adjudicate the question whether the accused is guilty or not guilty. This is so whether the disputed question to be decided is one of fact or law. If the highest court of the state denies a right or immunity guaranteed by the Federal Constitution or laws, the Supreme Court may be applied to for relief." *Ex p. Crowder*, (1909) 171 Fed. 250.

Where petitioner, a citizen and resident of Iowa, was arrested in Oregon for an alleged violation of Laws Oregon 1909, p. 386, regulating and licensing peddlers, and claimed that such ordinance was invalid as violating the commerce clause of the Federal Constitution, he was not entitled to a writ of habeas corpus issued out of the federal court, in the first instance, but should be required to resort to the state courts for relief, and if unsuccessful, to apply ultimately for review by the federal Supreme Court on a writ of error. *Ex p. Martin*, (1910) 180 Fed. 209.

In the "syllabus by the court," in *In re Dowd*, (1904) 133 Fed. 747, it was said, in respect of the powers to issue writs of habeas corpus under R. S. secs. 751-755, that "the law of the land which has been established by repeated decisions of the Supreme Court is that this power should not be exercised where the judgment of the state court under which the petitioner is confined is reviewable by appeal or by writ of error. . . . Under these decisions of the Supreme Court, neither the fact that the petition shows that the state court was without any jurisdiction of the proceeding in which its judgment was rendered (*New York v. Eno*, (1894) 155 U. S. 89, 90, 96, 98, 15 S. Ct. 30, 39 U. S. (L. ed.) 80), nor the fact that the term of the petitioner's imprisonment will expire before a hearing can be had in the ordinary course of proceedings upon the writ of error or appeal (*Markuson v. Boucher*, (1899) 175 U. S. 184, 20 S. Ct. 76, 44 U. S. (L. ed.) 124), ordinarily withdraws a case from the effect of this general rule."

Petitioner, having been extradited, was

placed on trial under the extradition indictment, and having become a witness in his own behalf, after disagreement of the jury, and before the case was finally disposed of, was again indicted for perjury alleged to have been committed on his former trial and was convicted. He appealed to the state Court of Appeal, and applied to the state Supreme Court for discharge on habeas corpus, challenging the state's jurisdiction to try him for any other offense than that for which he was extradited, until he had been either convicted and served his sentence and had a reasonable time to return to his asylum country, or had been acquitted and had a like opportunity. This writ was denied, and a writ of error allowed for review by the Supreme Court of the United States. It was held that, pending the determination of such writ of error, he was not entitled to a discharge on habeas corpus issued out of the federal Circuit Court. *Ex p. Collins*, (1907) 154 Fed. 980, (1906) 149 Fed. 573.

Federal courts have no power to interfere by habeas corpus with the imprisonment of a person under a judgment of conviction of a crime in a state court, if that court had jurisdiction over the person of the accused, and did not lose such jurisdiction during the trial. *Felts v. Murphy*, (1906) 201 U. S. 123, 26 S. Ct. 366, 50 U. S. (L. ed.) 689; *Valentina v. Mercer*, (1906) 201 U. S. 131, 26 S. Ct. 368, 50 U. S. (L. ed.) 693.

A federal court is without jurisdiction of a habeas corpus proceeding for the discharge of a state prisoner where the only question involved is his identity with an escaped convict, and no diversity of citizenship is alleged. *Ex p. Moebus*, (1906) 148 Fed. 39.

In a criminal prosecution in a state court where the statute creating the offense is not repugnant to the Federal Constitution, and the court has jurisdiction, its determination with respect to the sufficiency of the charge is controlling in the federal courts on an application by the accused for a writ of habeas corpus after conviction. *Erickson v. Hodges*, (1910) 179 Fed. 177, 102 C. C. A. 443.

The determination by the highest court of a state that the offense charged in an indictment is one punishable under the laws of the state is conclusive in a subsequent proceeding by the accused in a federal court for release on a writ of habeas corpus. *Erickson v. Hodges*, (1910) 179 Fed. 177, 102 C. C. A. 443.

A defendant charged with a criminal offense in a federal court, and at large on bail pending a determination of his case by an appellate court, when arrested and held in custody by the authorities of a state, outside of the jurisdiction of the federal courts in which his case is pending, to answer to an indictment in the state court, is not so held in violation of his constitutional rights or contrary to any law of the United States as to entitle him to a discharge by a federal court on a writ of habeas corpus, where neither the United States nor his surety demands such discharge. *Ex p. Marrin*, (1908) 164 Fed. 631.

A federal court or judge will not ordinarily

discharge a prisoner held under process of a state court in violation of the Constitution and laws of the United States in advance of his trial in the state court, unless some exceptional circumstance or emergency exists demanding prompt action. *Ex p. Roach*, (1908) 166 Fed. 344, denying a petition for the writ. To the same point, see *Ex p. Powers*, (1904) 129 Fed. 985; *In re Wyman*, (1904) 132 Fed. 708; *In re Ammon*, (1904) 132 Fed. 714.

*Case of urgency.*—A federal court will discharge from imprisonment by a state, on a writ of habeas corpus, a teamster in the employment of the Quartermaster's Department of the army, where such imprisonment is in violation of the Constitution and laws of the United States and prevents the performance of the duties of his employment, on account of "the importance of this department to the troops" and "the slow process and the delay" of carrying the case through the state courts. *Pundt v. Pendleton*, (1909) 167 Fed. 987.

While "the courts of the United States will not lightly interfere with the action of the state court, and a case must be presented to make action imperative before such action will be taken," where an officer of the Internal Revenue Department was imprisoned for contempt of court for a refusal to testify in a state court or before a grand jury with respect to facts learned by him in his official capacity which he was prohibited from divulging by the regulations of the department, the case is one of urgency, in which a federal court is not required to await the final action of the state courts, but should discharge the prisoner on a writ of habeas corpus. *Stegall v. Thurman*, (1910) 175 Fed. 813.

*Detention on writ of ne exeat from state court.*—Except under unusual and extraordinary circumstances a federal court will not issue a writ of habeas corpus for the release of a person held under process issued by a state court in a civil case, on the ground that such court was without jurisdiction in the particular suit, where it had jurisdiction over such suits in general. *Mackenzie v. Barrett*, (1906) 144 Fed. 954, 76 C. C. A. 8.

*The writ cannot perform the office of a writ of error.*—*Matter of Gregory*, (1911) 219 U. S. 210, 31 S. Ct. 143, 55 U. S. (L. ed.) 184; *Kaizo v. Henry*, (1906) 211 U. S. 146, 29 S. Ct. 41, 53 U. S. (L. ed.) 125, citing numerous cases; *Felts v. Murphy*, (1906) 201 U. S. 123, 26 S. Ct. 366, 50 U. S. (L. ed.) 689; *Valentina v. Mercer*, (1906) 201 U. S. 131, 26 S. Ct. 368, 50 U. S. (L. ed.) 693; *Ex p. Powers*, (1904) 129 Fed. 985; *Connella v. Haskell*, (1907) 158 Fed. 285, 87 C. C. A. 111.

"Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions." *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101.

"Neither *Hyde v. Shine*, [(1905) 199 U. S. 84, 28 S. Ct. 764, 50 U. S. (L. ed.) 97] nor *Tinsley v. Treat*, [(1907) 205 U. S. 20, 27 S. Ct. 430, 51 U. S. (L. ed.) 689] is authority for the proposition that a writ of habeas cor-

pus can be made the basis of a review of the judgment of a court of competent jurisdiction where proceedings were had under a constitutional statute giving the court authority to examine into the charges, and to convict or acquit the accused, when the proceedings show no attempt to exert the jurisdiction of the court in excess of its authority." *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101.

Neither irregularities nor error constitute a legal basis for the writ. Thus on habeas corpus to inquire into a detention on an information filed in the police court of the District of Columbia, "we are not concerned with the question whether the information was sufficient, or whether the acts set forth . . . constituted a crime; that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment." *Matter of Gregory*, (1911) 219 U. S. 210, 31 S. Ct. 44, 143, 55 U. S. (L. ed.) 184, citing numerous cases.

Objection that the order for the impaneling of the grand jury was made by a judge of a federal Circuit Court, who although within his circuit was not within the district where the court was located when the trial was had, cannot be raised by habeas corpus. *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101.

Upon habeas corpus to inquire into a detention under a conviction in a federal Circuit Court, affirmed by the proper Circuit Court of Appeals, the bill of exceptions cannot be examined with a view to determining whether there was any testimony to support the accusation. *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101.

An objection that the indictment in a federal Circuit Court was not properly presented by the grand jury, based on testimony that after the presentation of the original indictment the grand jury were informed by the district attorney that the indictment needed amendment in some particulars, that this amendment was read over in the presence of the grand jury and was incorporated into an indictment which was regularly returned to the court, where it was produced, with the consent of all the grand jurors, if ever available, cannot be first raised on habeas corpus after conviction. *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101.

The objection that the original sentence in a federal Circuit Court, before modification on motion of the government's counsel, exceeded the authority of the court, in that it required service at hard labor, is not available on habeas corpus, since, at most, only that part of the sentence of the law is void. *Harlan v. McGourin*, (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101.

Errors of a federal District Court in sustaining an indictment which fails to charge with sufficient fulness some particular fact cannot be reviewed on habeas corpus to inquire into the legality of an imprisonment under the sentence imposed after a convic-

tion on such indictment. *Dimmick v. Thompson*, (1904) 194 U. S. 540, 24 S. Ct. 780, 48 U. S. (L. ed.) 1110.

That an indictment charged more than one offense, in violation of the laws of the territory where petitioner was convicted, was a mere error of procedure, which did not divest the trial court of its power to render judgment, and was, therefore, not ground for petitioner's discharge on habeas corpus. And in the same case, where petitioner was convicted of two offenses, for each of which he could have been sentenced to seven years' imprisonment, but was sentenced to five years' imprisonment for each offense, the terms to run concurrently, the sentence could not be held void on habeas corpus, because the statute of the territory in which petitioner was convicted required such a sentence to be cumulative. *Connella v. Haskell*, (1907) 158 Fed. 285, 87 C. C. A. 111.

Where a sentence imposed on petitioner was excessive, he could not obtain his discharge on habeas corpus while serving the portion which the court had power to impose. *Connella v. Haskell*, (1907) 158 Fed. 285, 87 C. C. A. 111.

A Circuit Court of Appeals cannot issue a writ of habeas corpus as an original and independent proceeding, although under R. S. sec. 716, 4 Fed. Stat. Annot. 498, and section 12 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 430, which sections are consolidated in Judicial Code, sec. 262 ante, p. 241, it may issue such writ in cases when necessary for the exercise of a jurisdiction already existing. *Whitney v. Dick*, (1906) 202 U. S. 132, 26 S. Ct. 584, 50 U. S. (L. ed.) 963. Prior to that decision it was held that the power of the Circuit Court of Appeals was thus restricted in *Ex p. Moran*, (1906) 144 Fed. 594, 75 C. C. A. 396.

When the court has no jurisdiction. — "No court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the cause or person, or for some other matter rendering

its proceedings void." *Kaizo v. Henry*, (1908) 211 U. S. 146, 29 S. Ct. 41, 53 U. S. (L. ed.) 125.

Disobeying the law governing the selection of grand jurors does not affect the jurisdiction of the court so as to justify the release by habeas corpus of a person convicted under an indictment found by such jurors. *Matter of Moran*, (1906) 203 U. S. 96, 27 S. Ct. 25, 51 U. S. (L. ed.) 105.

The business of issuing and redeeming trading stamps is not so manifestly outside the range of judicial consideration, under District of Columbia R. S. sec. 1177, making it a crime to engage in any manner in any gift enterprise business in the district, as to justify relief by habeas corpus to a person convicted of that offense, on the theory that the trial court was without jurisdiction. *Matter of Gregory*, (1911) 219 U. S. 210, 31 S. Ct. 143, 55 U. S. (L. ed.) 184.

The failure to specify a building in the order of the Supreme Court of the territory of Oklahoma fixing Lawton as the place where the District Court should be held in and for the county of Comanche, there being at the time of making the order and at the time of trial no county or court buildings in such county, did not go to the jurisdiction of such District Court so as to justify relief by habeas corpus in favor of a person convicted of crime therein who made no showing of any opportunities lost because no building was named. *Matter of Moran*, (1906) 203 U. S. 96, 27 S. Ct. 25, 51 U. S. (L. ed.) 105.

The federal courts will not release, on habeas corpus, a person convicted of murder in the first degree in a state court, on the theory that that court lost its jurisdiction to proceed in the trial because it charged the jury, in accordance with the admission of counsel for the accused, that the only question for their consideration was the degree of murder of which the accused was guilty. *Valentina v. Mercer*, (1906) 201 U. S. 131, 26 S. Ct. 368, 50 U. S. (L. ed.) 693.

### Vol. III, p. 167, sec. 753.

"Section 753 contains no grant of power, but is a restriction upon the power of the federal courts, prohibiting the issuance of the writ of habeas corpus in behalf of a prisoner in jail, except under the prescribed conditions enumerated in that section. To meet the conditions existing at the time of South Carolina's attempt to nullify the laws of the United States, and deal with officers of the national government under its criminal laws for acts done in the performance of official duties, Congress enacted . . . Act of March 2, 1833, ch. 57, sec. 7, 4 Stat. L. 634. This law has been recast in the Revised Statutes, and the body of it, with changed phraseology, now constitutes section 753; and as already indicated, there is in it no grant of power, so that it must now be construed with reference to its position, following sections 751 and 752, in order to give it any definite and clear meaning, unless we assume that by implica-

tion it confers power to grant writs of habeas corpus in the excepted cases enumerated." *Clifford v. Williams*, (1904) 131 Fed. 100.

"The jurisdiction of courts of the United States to issue writs of habeas corpus is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States, and cases arising under the law of nations." *Carfer v. Caldwell*, (1906) 200 U. S. 293, 26 S. Ct. 264, 50 U. S. (L. ed.) 488.

"Imprisonment in jail appears to be the first condition recited in that section [753] and is the controlling condition governing all of the cases which, by reason of the exceptions, the federal courts are permitted to take cognizance of." Hence it was held that the federal Circuit Courts have no jurisdiction to determine a controversy between persons who are residents of different states as to the

right of custody of their infant child, who was neither restrained of her liberty nor imprisoned. *Clifford v. Williams*, (1904) 131 Fed. 100.

**Confinement in another federal district.**—Where the chief officer of the Chinese exclusion laws for a state, in his return to a writ of habeas corpus directed to him, has admitted that the Chinese persons in whose behalf the writ was issued are detained by him, and has obtained a stipulation waiving their production in court, the court has jurisdiction to inquire into the legality of their detention, although they may in effect be confined in another district of the state. *Ex p. Fong Yim*, (1905) 134 Fed. 938.

**Act done or omitted in pursuance of an order, process, or decree.**—Under this section a federal Circuit Court had power to discharge on habeas corpus a railway ticket agent, who, acting under and in obedience to an order of a federal Circuit Court which enjoined, as being repugnant to the Federal Constitution, the enforcement by the state corporation commission and the attorney-general of state legislation reducing rates, was imprisoned under a conviction in a state court for disobeying such legislation. *Hunter v. Wood*, (1908) 209 U. S. 205, 28 S. Ct. 472, 52 U. S. (L. ed.) 747.

In *State v. Laing*, (1904) 133 Fed. 887, 66 C. C. A. 617, (1903) 127 Fed. 213, petitioners under imprisonment on a charge of murder for the justifiable killing of a man whom they, as members of a *posse comitatus*, were attempting to arrest under a warrant from a federal court upon an indictment for resisting its officers, were discharged upon habeas corpus by a federal Circuit Court.

**Act done in performance of duty.**—A federal court or judge has power to issue a writ of habeas corpus on petition of the United States for the purpose of an inquiry into the cause of detention of a prisoner held by a state to answer to a criminal charge, where it is alleged by the petitioner that the act charged as a crime was committed by the prisoner in the performance of his duty as a soldier of the United States; and it has authority to determine summarily as a fact whether or not such allegation is true, and if found to be true to discharge the prisoner on the ground that the state is without jurisdiction to try him for such act. *U. S. v. Lipssett*, (1907) 156 Fed. 65.

This section confers jurisdiction on federal courts to release on habeas corpus an officer of the United States held in custody for an act done or omitted under authority vested in him by the law of the United States, though there is no Act of Congress covering the particular case. Thus where petitioner, in his official capacity as assistant United States district attorney, procured the production of State court records before a federal grand jury under an ordinary subpoena duces tecum, and thereafter held possession of such records, as such attorney, he was not subject to punishment for contempt of the state court for failure to return such records on demand, since "whatever duty the relator owed to take care of said records or to return them

to their lawful custodian was a duty incumbent upon him as an officer of the court." *In re Leaken*, (1905) 137 Fed. 680, discharging petitioner from custody.

**"In violation of . . . a law . . . of the United States."**—"The acts of the legislature of a territory are not laws of the United States." *Connella v. Haskell*, (1907) 158 Fed. 285, 87 C. C. A. 111.

A person imprisoned under a conviction in a court of Oklahoma territory was not entitled to his release on habeas corpus, under this section, because the grand jurors were summoned from the body of the county, which resulted in the selection as such jurors of persons who were not electors nor residents of the territory, since the Federal Constitution does not control the method of selection, and if any laws were violated by this method they were territorial enactments, which are not laws of the United States. *Matter of Moran*, (1906) 203 U. S. 96, 27 S. Ct. 25, 51 U. S. (L. ed.) 105. See also *Ex p. Moran*, (1906) 144 Fed. 594, 75 C. C. A. 396. For a like case see *Connella v. Haskell*, (1907) 158 Fed. 285, 87 C. C. A. 111.

**Interstate rendition proceedings.**—Affirming a refusal of a federal Circuit Court to discharge on habeas corpus a person held in custody in Idaho to await a trial for murder there, the court said: "No obligation was imposed by the Constitution or laws of the United States upon the agent of Idaho to so time the arrest of the petitioner, and so conduct his deportation from Colorado, as to afford him a convenient opportunity, before some judicial tribunal sitting in Colorado, to test the question whether he was a fugitive from justice, and as such liable, under the Act of Congress, to be conveyed to Idaho for trial there." *Pettibone v. Nichols*, (1906) 203 U. S. 192, 27 S. Ct. 111, 51 U. S. (L. ed.) 148.

A person held in actual custody by a state for trial in one of its courts under an indictment for a crime against its laws will not be released on habeas corpus by a federal Circuit Court because the methods by which his personal presence in the state was secured may have violated the provisions of article 4, section 2, of the Federal Constitution, or R. S. sec. 5278, 3 Fed. Stat. Annot. 77, relating to extradition proceedings. *Pettibone v. Nichols*, (1906) 203 U. S. 192, 27 S. Ct. 111, 51 U. S. (L. ed.) 148; *Moyer v. Nichols*, (1906) 203 U. S. 221, 27 S. Ct. 121, 51 U. S. (L. ed.) 160.

In *Ex p. Moebus*, (1905) 137 Fed. 154, it was held that a petition for a writ of habeas corpus did not state a case for federal interference on the ground of irregularity in extradition proceedings, in view of the rule of the Supreme Court that a large measure of credence and conclusiveness must be accorded to proceedings before the governor in such cases.

**Fifth amendment.**—Compelling the accused to stand up and walk before the jury, and stationing the jury during a recess so as to observe his size and walk, even if contrary to the Fifth Amendment to the Federal Constitution, do not affect the jurisdiction of

the court so as to justify relief by habeas corpus. *Matter of Moran*, (1906) 203 U. S. 26, 27 S. Ct. 25, 51 U. S. (L. ed.) 105.

A federal court has no power on a writ of habeas corpus to discharge a prisoner confined for contempt by a state court for refusing to answer questions as a witness, on the ground that his answers might incriminate him; the provision of the Fifth Amendment being a limitation solely on the powers of the national government and its courts and officers. *Ex p. Munn*, (1906) 140 Fed. 782.

**Fourteenth amendment. — Due process of law.**—Relief by habeas corpus should not be accorded by a federal court to a person held in custody by the state authorities under an order of commitment entered by a state court after a jury had returned a verdict of not guilty by reason of insanity, although the prisoner may be so held in violation of the Fourteenth Amendment, since he should be left to his remedy by writ of error from the federal Supreme Court to review the final action of the highest court of the state. *Urquhart v. Brown*, (1907) 205 U. S. 179, 27 S. Ct. 459, 51 U. S. (L. ed.) 760, reversing (1905) 139 Fed. 846.

A petitioner for habeas corpus was not deprived of his liberty without due process of law by being convicted of crime upon a trial where the court failed to see to it that the testimony, which he was too deaf to hear, was repeated to him through the ear trumpet which he had with him. *Felts v. Murphy*, (1906) 201 U. S. 123, 26 S. Ct. 366, 50 U. S. (L. ed.) 689.

The federal courts have no jurisdiction to release, by habeas corpus, a person held in the custody of the state authorities to answer for a contempt in refusing to appear and testify before a legislative investigating committee, either because such a committee cannot sit in vacation, or because the subject for investigation is excluded from the jurisdiction of the legislature by the provision of the state constitution for the separation of legislative, executive, and judicial powers, as no question of due process of law is presented. *Carfer v. Caldwell*, (1906) 200 U. S. 293, 26 S. Ct. 264, 50 U. S. (L. ed.) 488.

The Federal Constitution does not guarantee to citizens the right to a jury trial, except in the courts of the United States; nor does the fact that a prisoner, convicted and sentenced for a criminal offense in a state

court, was not given a jury trial, nor entitled to one under the state statute, entitle him to be discharged on a writ of habeas corpus by a federal court, on the ground that his conviction was without due process of law. *Ex p. Brown*, (1905) 140 Fed. 461.

A petition for a writ of habeas corpus, which shows on its face that the petitioner, since his extradition from another state, has been confined in a penitentiary for five years upon no other process of commitment than the governor's warrant, states a case of deprivation of rights under the Constitution of the United States, which authorizes and requires a federal court to take jurisdiction, at least to the extent of requiring the person against whom the restraint is alleged to answer. *Ex p. Moebus*, (1905) 137 Fed. 154.

**"Full faith and credit clause" in Constitution.**—Where, after the remarriage of plaintiff's divorced wife, and her removal to another state, taking with her an infant daughter awarded to her custody in divorce proceedings, another order was made in such proceedings awarding custody of the child to plaintiff, the refusal of his former wife to comply with such decree, and her obtaining a decree of adoption in the state of her domicile, without proof that the courts in such state had refused to recognize plaintiff's decree, did not confer jurisdiction on the federal Circuit Court in the state of the wife's domicile to issue a writ of habeas corpus to determine plaintiff's right to the custody of the child, on the ground that full faith and credit had been denied to plaintiff's decree awarding him the custody of the child. *Clifford v. Williams*, (1904) 131 Fed. 100.

**State statute violating state constitution.**—A federal court has no power to inquire into the legality of the detention of a state prisoner on a writ of habeas corpus, on the ground that it is in violation of the state constitution. *Ex p. Brown*, (1905) 140 Fed. 461.

**Case involving a treaty.**—The federal courts have jurisdiction to determine in habeas corpus proceedings the right of a Chinese merchant domiciled in this country to enter from China, or of members of his family whose right is incidental to his own, where the remedy by appeal to the Secretary of Commerce and Labor has been exhausted, and the right of entry denied. *Ex p. Fong Yim*, (1905) 134 Fed. 938.

## Vol. III, p. 173, sec. 755.

**When writ need not be awarded.**—Where it appears from the petition for habeas corpus that the case is not one which would justify the exercise of federal authority, it may be dismissed, and the court is not required to either award a writ or issue an order to the respondent to show cause. *Ex p. Collins*, (1906) 151 Fed. 358; *Erickson v. Hodges*, (1910) 179 Fed. 177, 102 C. C. 443.

"Notwithstanding its somewhat peremptory language, it has been repeatedly held that it does not require an issuance of the writ instantan, upon application, but that

the court has a reasonable discretion as to the time and mode it will adopt to determine in any instance if it be a proper one for the granting of the writ," and in its discretion the court may make an order on the officer alleged to have petitioner in his custody to show cause on a day certain why the writ should not be issued. *Ex p. Collins*, (1907) 154 Fed. 980.

In jurisdictions where appeals have been provided for in habeas corpus cases, it has come to be the rule, either as one of law or of practical administration, that a judge is not

required to consider an application for a writ which has been denied by another judge, but may remit the petitioner to his remedy by appeal. *Ex p. Moebus*, (1906) 148 Fed. 39.

When the petition for a writ of habeas cor-

pus shows that the petitioner is not legally entitled to it, the writ should not be issued, but the application for it should be denied, and the petition should be dismissed. *In re Dowd*, (1904) 133 Fed. 747.

### Vol. III, p. 174, sec. 761.

A jury trial is not necessary in order to determine the facts of the case. *U. S. v. Lipsett*, (1907) 156 Fed. 66, a case more fully cited under this title, vol. 3, p. 167, sec. 753.

### Vol. III, p. 176, sec. 764.

The right of appeal to the Supreme Court is now restricted to cases described in Judicial Code, sec. 238, *ante*, p. 231. See *In re Lennon*, (1893) 150 U. S. 393, 14 S. Ct. 123, 37 U. S. (L. ed.) 1120, and the last sentence in section 14 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 431. It is further regulated by the Act of March 10, 1908, ch. 76, 35 Stat. L. 40, 1909 Supp. Fed. Stat. Annot. 293. Appeals in other cases are to be taken to the Circuit Court of Appeals as provided in Judicial Code, sec. 128, *ante*, p. 195.

See, for example, *Motherwell v. U. S.*, (C. C. A. 1901) 107 Fed. 437 *sub nom.*; *Tucker v. Alexandroff*, (1902) 183 U. S. 424, 22 S. Ct. 195, 46 U. S. (L. ed.) 264.

As to direct appeal to the Supreme Court where a constitutional question is involved, see *Dimmick v. Tompkins*, (1904) 194 U. S. 540, 24 S. Ct. 780, 48 U. S. (L. ed.) 1110, and note to section 5 of the Circuit Court of Appeals Act of 1891, *infra*, title JUDICIARY, vol. 4, p. 398.

### Vol. III, p. 179, sec. 766.

Acquittal pending habeas corpus. — Where, after the issuance of a writ of habeas corpus out of a federal court to review petitioner's arrest for violation of a state statute, he was tried and acquitted in the state court, such trial and acquittal were null and void, and therefore constituted no ground for dismissal of the writ. *Ex p. Martin*, (1910) 180 Fed. 209.

A reprieve by the governor of a state, postponing, until a fixed date, the execution of a death sentence, evidently granted to permit the prisoner to appeal to the federal Supreme Court from the order of a District Court denying habeas corpus, is not a proceeding "against the person so imprisoned," etc., within the meaning of this section.

## HAWAIIAN ISLANDS.

### Vol. III, p. 183. [*Joint resolution to provide for annexing the Hawaiian Islands to the United States.*]

Title to military reservation at Kahauiki. — By the joint resolution of Congress accepting the cession of the Hawaiian Islands and the transfer to the United States of the ownership of all public lands therein, and by acquiring by purchase from individuals the

leases held by them covering the lands comprising the military reservation at Kahauiki, Oahu Island, the United States acquired complete title to that reservation. (1904) 25 Op. Atty-Gen. 225.

### Vol. III, p. 188, sec. 6.

Federal courts following construction of local statutes by Hawaiian courts. — The federal courts will follow the construction given by the courts of the government of Hawaii to local statutes. *Kealoha v. Castle*, (1908) 210 U. S. 153, 28 S. Ct. 684, 52 U. S. (L. ed.) 998.

Jurisdiction of crime in Honolulu harbor. — There is nothing in the Hawaiian Organic Act which expressly or impliedly deprives the

federal courts of their jurisdiction under R. S. sec. 5339, 3 Fed. Stat. Annot. 231, to punish a murder committed on board a ship lying in the harbor of Honolulu. *Wynne v. U. S.*, (1910) 217 U. S. 234, 30 S. Ct. 447, 54 U. S. (L. ed.) 748.

This section was cited in *Tomikawa v. Gama*, (1902) 14 Hawaii 431; *In re Austin*, (1903) 15 Hawaii 114.

## Vol. III, p. 188, sec. 7.

This section was cited in *Territory v. Ng Kow*, (1904) 15 Hawaii 602.

## Vol. III, p. 189, sec. 8.

This section was cited in *Ninomiya v. Keпоikai*, (1903) 15 Hawaii 273.

## Vol. III, p. 190, sec. 10.

Contempt proceedings.—Enforcement by contempt proceedings of an administrator's official duty to pay a creditor a dividend is not within the prohibition in this section against imprisonment for debt. *Matter of Ahi*, (1908) 19 Hawaii 233.

Imprisonment for debt.—The writ of habeas corpus is not now available in Hawaii in an action of assumpsit to prevent a defendant

from going away from the territory or to compel him to give security for the payment of the judgment that may be recovered. The execution of the writ would subject the defendant to imprisonment for debt contrary to the provisions of this section. *Oahu Lumber, etc., Co. v. Ding Sing*, (1904) 15 Hawaii 413.

Limitations.—See *Kunewa v. Kaanaana*, (1907) 18 Hawaii 252.

## Vol. III, p. 191, sec. 14.

For a case under this section, see *Fairchild v. Smith*, (1903) 15 Hawaii 265.

## Vol. III, p. 191, sec. 15.

This section was cited in *Harris v. Cooper*, (1902) 14 Hawaii 145.

## Vol. III, p. 191, sec. 18.

This section was cited in *Kanealii v. Hardy*, (1905) 17 Hawaii 9; *Territory v. Kanealii*, (1905) 17 Hawaii 245, 7 Ann. Cas. 837.

## Vol. III, p. 191, sec. 19.

This section was cited in *Matter of Davis*, (1904) 15 Hawaii 377.

## Vol. III, p. 194, sec. 34.

For a case under this section, see *Chandler v. Mott-Smith*, (1908) 19 Hawaii 225.

## Vol. III, p. 195, sec. 40.

This section was cited in *Harris v. Cooper*, (1902) 14 Hawaii 145.

## Vol. III, p. 195, sec. 45.

Construction.—The provision of this section that "each law shall embrace but one subject, which shall be expressed in its title," should be liberally construed. The title may be broader than the Act, provided it is not delusive: the Act may cover different matters, provided they have a natural connection and are fairly embraced in one subject. A provision limiting civil jury trials, unless by consent, to the first sixty days of each term in the first circuit, may properly be included in an Act purporting in its title to amend a certain section of the Revised Laws "relating to terms of the Circuit Courts," the other provisions of which Act relate to the length, adjournment, and extension of the terms in the several circuits. *Ahmi v. Buckle*, (1905) 17 Hawaii 200.

Section violated.—In *Dole v. Cooper*, (1903) 15 Hawaii 297, it was held that an Act entitled "An Act providing for the or-

ganization and government of counties and districts, and the management and control of public works and institutions therein," was invalid as to so much thereof as purported to create a territorial board of public institutions and to transfer to it matters theretofore belonging to the territorial superintendent of public works, and with which the counties were to have nothing to do—in view of section 45.

So in *Territory v. Oahu County*, (1904) 15 Hawaii 365, it was held that so much of Act 31, Laws of 1903, known as the County Act, as provides new features in territorial taxation not incidental to county organization or government, was void under the provision of section 45, and that such void portion was such an essential feature as to vitiate the whole Act.

Enactment by reference.—See *Matter of Tom Pong*, (1906) 17 Hawaii 566.

## Vol. III, p. 196, sec. 52.

Dividing the biennial period.—The provision in section 52 that appropriations shall be made biennially does not prevent the legislature from dividing the biennial period into two parts, namely, six months before and

eighteen months after the inauguration of county government, for the purpose of making different appropriations for each of those parts. *In re Boyd*, (1903) 15 Hawaii 361.

## Vol. III, p. 197, sec. 54.

Items not necessary for current expenses.—The legislature may include in an appropriation bill passed at an extra session called under the provisions of this section an item which is not for "necessary current expenses of carrying on the government," provided the matter covered by the appropriation is one for which an appropriation may rightfully be made. *In re Queen's Hospital*, (1904) 15 Hawaii 514.

Section applied.—In *In re Hawaiian Star Newspaper Assoc.*, (1904) 15 Hawaii 532, it appeared that the legislature failed at its regular session in 1903 to provide for the necessary expenses of the government for the succeeding biennial period. In its extra ses-

sion, immediately after, it passed complete appropriation bills for the first six months of the biennial period and bills providing for a portion of the necessary expenses of the last eighteen months, but failed to provide for perhaps a half of the necessary expenses for those eighteen months on the supposition that those expenses would be borne by counties under an Act which turned out to be void. It was held that the expenses so unprovided for could be paid out of the last appropriation bills by the treasurer with the advice of the governor, under section 54, and that "the last appropriation bills," within the meaning of that section, were those of 1901 and not the six months bills of 1903.

## Vol. III, p. 197, sec. 55.

Municipal corporations.—The provisions of this section prohibiting the granting of private charters and special franchises do not apply to municipal corporations. *Emmeluth v. Oahu County*, (908) 19 Hawaii 171.

License of social club.—In view of the provision of section 55, "nor shall spirituous or intoxicating liquors be sold except under such regulations and restrictions as the territorial legislature shall provide," a failure on the part of the legislature, if any there be, to provide for licenses for social clubs would not be a defense for selling without license as provided by law. *Territory v. Pacific Club*, (1905) 16 Hawaii 507.

Garnishment of senators' salaries.—A territorial statute by which the salary of a territorial senator is subject to garnishment for

the payment of his debts is not in conflict with this section. See *Kong v. Chillingworth*, (1909) 19 Hawaii 428.

Limitation of bonded indebtedness.—The limitation in section 55 of bonded indebtedness of a subdivision of the territory to a certain percentage of the assessed value of taxable property of such subdivision refers to property taxable by such subdivision, and therefore a county without the power of taxation has no power to issue bonds. *Robinson v. Baldwin*, (1908) 19 Hawaii 9.

For other cases under this section, see *Tomikawa v. Gama*, (1902) 14 Hawaii 431; *Territory v. Miguel*, (1907) 18 Hawaii 402; *Territory v. Matsubara*, (1909) 19 Hawaii 641.

## Vol. III, p. 198, sec. 56.

For cases under this section, see *Castle v. Atkinson*, (1905) 16 Hawaii 769; *Territory v. McCandless*, (1908) 18 Hawaii 616, 13 Ann. Cas. 795.

## Vol. III, p. 199, sec. 60.

For a case under this section, see *Fairchild v. Smith*, (1903) 15 Hawaii 265.

## Vol. III, p. 199, sec. 63.

For cases under this section, see *Fairchild v. Smith*, (1905) 15 Hawaii 265; *Chandler v. Mott-Smith*, (1908) 19 Hawaii 225.

## Vol. III, p. 200, sec. 64.

This section was cited in *Harris v. Cooper*, (1902) 14 Hawaii 145; *Matter of Contested Election*, (1903) 15 Hawaii 325.



## Vol. III, p. 202, sec. 72.

This section was cited in *Ninomiya v. Kepoikai*, (1903) 15 Hawaii 273.

## Vol. III, p. 202, sec. 73.

This section was cited in *In re Treasurer*, (1904) 15 Hawaii 718; *Lucweiko v. Pratt*, (1907) 18 Hawaii 489.

## Vol. III, p. 203, sec. 75.

Power of superintendent of public works over public lands.—This section gives the superintendent of public works the same limited power of disposing of lands described in the proviso of section 262, R. L. of Hawaii, that the minister of the interior formerly

had, and controls section 73 of the same Act in that regard. *Pratt v. Holloway*, (1906) 17 Hawaii 539.

This section was cited in *McCandless v. Carter*, (1907) 18 Hawaii 221.

## Vol. III, p. 204, sec. 79.

This section was cited in *Kalaniana'ole v. Dimond*, (1904) 15 Hawaii 486.

## Vol. III, p. 204, sec. 80.

Suspension of officer.—In *In re Austin*, (1903) 15 Hawaii 114, it was held that the governor had not authority to suspend an officer who, by the terms of this section, must be appointed and may be removed by the governor by and with the advice and consent of the senate, and who is to hold for four years unless sooner removed.

Repeal.—The provisions of the Hawaiian

Audit Act (Laws of 1898, Act 39) relating to the suspension of the auditor were repealed by implication by the provisions of this section, which are not only inconsistent therewith but indicate an intention to cover the whole subject. *In re Austin*, (1903) 15 Hawaii 114.

This section was cited in *Ninomiya v. Kepoikai*, (1903) 15 Hawaii 273.

## Vol. III, p. 205, sec. 81.

Power of judges in chambers.—The power of the Hawaiian judges at chambers in proceedings not incident or ancillary to some cause pending before a court, conferred by the Hawaiian laws in force at the passage of the Organic Act, was preserved by the provision of section 81 of that Act, continuing in force the previous laws of Hawaii concerning "the civil courts and their jurisdiction and procedure." *Carter v. Gear*, (1905) 197 U. S. 348, 25 S. Ct. 491, 49 U. S. (L. ed.) 787, *affirming* (1904) 16 Hawaii 242.

Misdemeanors committed on naval reservations.—The territorial District Courts have

jurisdiction of misdemeanors committed on land reserved for naval purposes. *Territory v. Carter*, (1908) 19 Hawaii 198.

Creation of board of commissioners of insanity.—The Hawaiian statute (Act 140) creating a board of commissioners of insanity is not in violation of this section of the Organic Act. *Matter of Atcherley*, (1909) 19 Hawaii 535.

For cases under this section, see *Brown v. Goto*, (1904) 16 Hawaii 263; *Territory v. Boyd*, (1905) 16 Hawaii 660; *Territory v. Miguel*, (1907) 18 Hawaii 402.

## Vol. III, p. 205, sec. 83.

Grand and petit juries.—See *Territory v. Ng Kow*, (1904) 15 Hawaii 602; *Matter of Anin*, (1906) 17 Hawaii 341.

This section was cited in *Territory v. Ferris*, (1903) 15 Hawaii 139; *Ex p. Higashi*, (1906) 17 Hawaii 428.

## Vol. III, p. 206, sec. 84.

Disqualification of judges.—A judge is not disqualified under this section from sitting at the trial of a cause upon the facts in issue by reason of having sustained a demurrer to the plaintiff's declaration, which ruling was reversed by the appellate court. *Matsuura v. Hawaii County*, (1908) 19 Hawaii 197.

A justice is not disqualified from sitting in a cause in which a corporation is a party

by the fact of a relative by affinity or consanguinity within the third degree holding shares of stock in the corporation, the justice having no pecuniary interest in the issue of the case either directly or through such relative. *Ewa Plantation Co. v. Holt*, (1907) 18 Hawaii 509.

This section does not prevent a circuit judge who had ordered a nonsuit, which was set aside by the Supreme Court, from enter-

taining a motion for a change of venue based on the ground that an impartial jury cannot be obtained in the circuit in which the action is pending. *Spreckles v. De Bolt*, (1905) 16 Hawaii 476.

An order remanding an equity cause to a judge of the Circuit Court with direction to receive evidence on an issue raised by amended pleadings filed after the close of the original hearing before said judge, and in support of

which evidence was offered and rejected, does not direct a "new trial" and is not within the inhibition of this section disqualifying a judge from sitting "on an appeal, or new trial, in any case in which he may have given a previous judgment." *Hitchcock v. Humphreys*, (1902) 14 Hawaii 1.

For other cases under this section, see also *Matter of Davis*, (1904) 15 Hawaii 377; *Bierce v. Hutchins*, (1907) 18 Hawaii 374.

### Vol. III, p. 206, sec. 86.

**Record must show federal question.**—The failure of the record to show that any federal question was raised or suggested before the assignment of error in the federal Supreme Court precludes the maintenance of a writ of error from that court under this section to review a judgment of the Hawaiian Su-

preme Court. *Honolulu Rapid Transit, etc., Co. v. Wilder*, (1908) 211 U. S. 145, 29 S. Ct. 46, 53 U. S. (L. ed.) 124.

**Jurisdiction to naturalize.**—The Circuit Courts of the territory of Hawaii have power to naturalize. *Territory v. Morita Kaizo*, (1906) 17 Hawaii 295.

### Vol. III, p. 208, sec. 91.

**Sites for federal buildings.**—The President is authorized, under this section, to take such of the public lands of Hawaii as he deems proper for the uses and purposes of the United States. Thus the Secretary of the Treasury may, if authorized by the President, accept a site for a federal building in Honolulu acquired in exchange for public land in Hawaii and assume the custody and control thereof, no objection thereto arising under section 3736, R. S. (6 Fed. Stat. Annot. 122), or otherwise. (1903) 24 Op. Atty-Gen. 600.

**Sale without authorization of Congress.**—In (1905) 25 Op. Atty-Gen. 522, it was held that the sale of a steam tug by the superintendent of public works of Hawaii, which vessel became the property of the United States upon the annexation of the Hawaiian Islands in 1898, not having been authorized by Congress, as provided in section 91, was void.

For another case under this section, see *Territory v. Kerr*, (1905) 16 Hawaii 363.

### Vol. III, p. 209, sec. 95.

**Licenses for fishing boats.**—The Hawaiian statute (Act 96, S. L. 1907) requiring a license fee of five dollars for a fishing boat with a beam of thirty inches or more is not in conflict in this section. *Territory v. Matubara*, (1909) 19 Hawaii 641.

For other cases under this section, see *Matter of Fukunaga*, (1904) 16 Hawaii 306; *Kapiolani v. Territory*, (1907) 18 Hawaii 460.

### Vol. III, p. 209, sec. 96.

For a case under this section, see *Kapiolani v. Territory*, (1907) 18 Hawaii 460.

### Vol. III, p. 210, sec. 100.

**Repeal.**—The provision of this section which authorizes the naturalization as citizens of the United States of persons who had resided in Hawaii for five years prior to its taking effect, without a previous declaration of intention, was repealed by the Naturalization Act of June 29, 1906, ch. 3592, 34 Stat. L.

596, 1909 Supp. Fed. Stat. Annot. 365, which establishes a uniform rule of naturalization throughout the United States, repealing all inconsistent Acts, and requires a declaration of intention in all cases except of persons who have served in the army or navy. U. S. v. Rodiek, (C. C. A. 1908) 162 Fed. 469.

### Vol. X, p. 92, sec. 3. [Review by Supreme Court of the United States.]

**Effect not retroactive.**—This section as amended did not have the effect of altering the law as previously established by judicial decisions any more than as established by statute or usage; nor did it have the effect of reversing the law as established by decisions properly made after the establishment of territorial government but before the

amendment, any more than it had the effect of reversing decisions made previously, or any more than an amendment if made to the Federal Constitution permitting appeal, upon other than federal questions from the state Supreme Courts to the federal Supreme Court, would have the effect of requiring those courts to hold differently thereafter from what they

had previously contrary to decisions of the federal Supreme Court. *Rubenstein v. Hackfeld*, (1906) 18 Hawaii 126.

The words "amount involved," as used in this section, mean the actual amount in dispute between the parties. Thus where there was a dispute as to the proper assessment for purposes of taxation it was held that the amount involved was the taxes on the difference between the assessment as made and the assessment as claimed by the taxpayer. *In re Ewa Plantation Co.*, (1908) 19 Hawaii 72.

**Final judgment.**—The mere entry upon the minutes by the clerk of the Supreme Court of the territory of a decision overruling exceptions taken under Rev. Laws Hawaii 1905, sec. 1862 *et seq.*, which did not bring up the whole case, and called upon the reviewing court merely to pass upon specific questions raised by the bill, was held not to make such decision a final judgment, so as to be subject to review in the federal Supreme Court. *Cotton v. Hawaii*, (1908) 211 U. S. 162, 29 S. Ct. 85, 53 U. S. (L. ed.) 131.

**Not applicable to case determined before Act passed.**—In *Notley v. Brown*, (1908) 208 U. S. 438, 28 S. Ct. 385, 52 U. S. (L. ed.) 559, it was held that a writ of error directed on its face to the supposed judgment of the Supreme Court of the territory of Hawaii, disposing of exceptions on non-federal grounds prior to this Act enlarging the appellate jurisdiction of the federal Supreme Court over the territorial court, could be sustained on the theory that a final judgment in the case was not rendered until after the passage of that Act, when judgment on the verdict was entered in the trial court in connection with a *nunc pro tunc* entry, since such judgment must necessarily have been entered after the judgment which the writ sought to review. It was also held that jurisdiction of a writ of error directed, on its face, to a supposed judgment of the Supreme Court of the territory of Hawaii, disposing of exceptions on non-federal grounds prior to this Act, could be taken by treating the writ

as addressed to a later judgment of that court, quashing a writ of error to the trial court, which judgment was not formally entered until long after the writ of error from the federal Supreme Court was sued out, where to regard the entry as relating back to the time when the opinion of the court was announced would, if the same rule be applied to the *nunc pro tunc* entry of the judgment of the trial court, require an affirmance of the judgment of the territorial Supreme Court on the ground that the writ of error to the trial court was not sued out in time.

**Effect of rehearing after passage of Act.**—A judgment of the Hawaiian Supreme Court did not become final before the enactment of the Act of March 3, 1905, and hence not reviewable in the federal Supreme Court under that Act, where, although the opinion was filed prior to that enactment, a petition for rehearing was duly filed and entertained by the court, and was not denied until after the passage of such statute. *Bierce v. Waterhouse*, (1911) 219 U. S. 320, 31 S. Ct. 241, 55 U. S. (L. ed.) 237. Compare *Harrison v. Mogoon*, (1907) 205 U. S. 501, 27 S. Ct. 577, 51 U. S. (L. ed.) 900.

**Order not appealed from.**—The order of a territorial Supreme Court, reversing the order of the court below, granting a new trial, cannot be reviewed by the federal Supreme Court on a writ of error directed alone to a later decision in the same case, overruling exceptions, the record of which cannot be regarded as embracing the proceedings had below in respect to the matter of a new trial. *Cotton v. Hawaii*, (1908) 211 U. S. 162, 29 S. Ct. 85, 53 U. S. (L. ed.) 131.

**Jurisdictional amount.**—A writ of error from the Supreme Court of the United States to the Hawaiian Supreme Court, to review a judgment sustaining an assessment for taxation, will not lie under this section where the amount of the tax assessed is less than the jurisdictional amount prescribed by the section. *Honolulu Rapid Transit, etc., Co. v. Wilder*, (1908) 211 U. S. 145, 29 S. Ct. 46, 53 U. S. (L. ed.) 124.

## HOLIDAYS.

Vol. III, p. 229. [*Holidays with pay for government employees.*]

Not applicable to Philippine Islands.—(1904) 25 Op. Atty.-Gen. 127.

Vol. III, p. 230. [*Holidays for per diem government employees.*]

Not applicable to Philippine Islands.—(1904) 25 Op. Atty.-Gen. 127.

# HOMICIDE.

## Vol. III, p. 231, sec. 5339.

**Crime committed on land ceded for federal building.**—In *Battle v. U. S.*, (1908) 209 U. S. 36, 28 S. Ct. 422, 52 U. S. (L. ed.) 670, *affirming* (1907) 154 Fed. 540, it was held that a murder committed upon land bought by the United States in the city of Macon, Georgia, on which it was building a post office and courthouse, and over which the state had ceded jurisdiction, was made an offense against the United States, justiciable in the federal courts, this section making it a capital offense to commit murder within any fort, arsenal, dock yard, or in any other place or district of country under the exclusive jurisdiction of the United States.

**Crime in Honolulu harbor.**—A murder committed on board a ship lying in the harbor of Honolulu is cognizable in the District Court of the United States for the territory of Hawaii, under this section, as committed in a haven or arm of the sea within the admiralty and maritime jurisdiction of the United States, and "out of the jurisdiction of any particular state." *Wynne v. U. S.*, (1910) 217 U. S. 234, 30 S. Ct. 447, 54 U. S. (L. ed.) 748.

**Effect of Organic Act of Hawaii.**—There is nothing in the Hawaiian Organic Act (Act of April 30, 1900, ch. 339, 31 Stat. L. 141, 3 Fed. Stat. Annot. 186) which expressly or impliedly deprives the federal courts of their jurisdiction under section 5339, to punish a

murder committed on board a ship lying in the harbor of Honolulu. *Wynne v. U. S.*, (1910) 217 U. S. 234, 30 S. Ct. 447, 54 U. S. (L. ed.) 748.

**Indian reservation within a territory.**—The murder of one negro by another within the limits of an Indian reservation in a territory is committed within a place or district under the exclusive jurisdiction of the United States, within the meaning of this section defining and punishing the crime of murder, as amended by the Act of Jan. 15, 1897, ch. 29, 29 Stat. L. 487, 2 Fed. Stat. Annot. 357, and extended by section 2145 (3 Fed. Stat. Annot. 387) to the Indian country, when not within the exceptions made by section 2146 (3 Fed. Stat. Annot. 388), which by reason of the race of the accused and deceased do not apply. *Pickett v. U. S.*, (1910) 216 U. S. 459, 30 S. Ct. 265, 54 U. S. (L. ed.) 566.

**Jurisdiction over land not open for settlement.**—In *Ex p. Moran*, (1906) 203 U. S. 105, 27 S. Ct. 25, 51 U. S. (L. ed.) 105, it was held that land now embraced within the limits of Comanche county, Oklahoma, had become part of that territory on Aug. 4, 1901, so as to make a murder committed therein on that date an offense against the territorial rather than the federal statutes, although the land had not then been opened for settlement.

This section was cited in *U. S. v. Hart*, (1908) 162 Fed. 192.

## Vol. III, p. 234, sec. 5341.

**Wilfully.**—The word "wilfully," as used in this section defining manslaughter, is synonymous with "intentionally" or "designedly." *O'Barr v. U. S.*, (1909) 3 Okla. Crim. 319, 105 Pac. 988.

**Instructions.**—An instruction defining manslaughter under this section which omits the word "wilfully" is improper. *O'Barr v. U. S.*, (1909) 3 Okla. Crim. 319, 105 Pac. 988.

In a prosecution for homicide, an instruction that the term "wilfully" as used in this section, defining manslaughter as the unlawful and wilful killing of another with-

out malice, means a killing done wrongfully and with evil intent, committed by an act which a person of reasonable knowledge and ability must know to be contrary to duty, and that while that act must be done with evil design and knowingly, a killing under circumstances showing a reckless disregard for the life of another, and the reckless and negligent use of means calculated to take the life of another, would be a wilful killing, as defined, was held to be proper. *Roberts v. U. S.*, (1903) 126 Fed. 897, 81 C. C. A. 427.

This section was cited in *U. S. v. Hart*, (1908) 162 Fed. 192.

## Vol. III, p. 235, sec. 5344.

**Sufficiency of indictment.**—An indictment charging a violation of the statute and rules, in that, of the life preservers supplied and kept on a steamship for use of passengers thereon, upward of nine hundred were unsuitable, inefficient, and useless, and not in accordance with the statutory requirement, was

held not to be bad because it did not also charge a failure to supply the requisite number of good life preservers; the furnishing to a passenger of a useless life preserver being as much a violation of the law as a failure to furnish him with any. *U. S. v. Van Schaick*, (1904) 134 Fed. 593.

**Duties created by inspector's rules.**—Inspector's rule 5, section 15, requiring masters of steam vessels to keep the fire apparatus thereon in complete working order, and to post station bills and exercise the crew in their duties in connection therewith, is within the power conferred on the board by R. S. sec. 405, 6 Fed. Stat. Annot. 10, and valid. It does not purport to create offenses, but merely to prescribe duties; but a breach of it, resulting from a master's misconduct, negligence, or inattention, causing death, is manslaughter, because so provided by Congress in R. S. sec. 5344. *U. S. v. Van Schaick*, (1904) 134 Fed. 592.

**Violation of navigation laws.**—While it is not primarily the duty of the master, under the statutes and inspectors' regulations, to equip a vessel with life preservers or fire apparatus, it is his duty before navigating to exercise care to know whether the ship has such equipment, and whether it is apparently sufficient and in accordance with law, and afterwards to exercise some care respecting its maintenance, the extent of such care being dependent on his opportunities to examine the appliance and perceive its condition; other duties, relating to the posting of station bills for the crew, and their exercise in fire drills and the use of appliances, are imposed directly upon the master by rule 5, section 15, of the inspectors' rules and regulations; and his neglect of any of such duties, whereby the life of any person is destroyed, renders him subject to indictment.

and prosecution for manslaughter under section 5344. *U. S. v. Van Schaick*, (1904) 134 Fed. 593.

**"Violation of law."**—The owner of a steamship who fails to comply with the statute requiring it to be equipped with life preservers and proper fire appliances, either by supplying none or by supplying those that are unsuitable, inefficient, and useless, and do not conform to the inspectors' rules, is guilty of a "violation of law," and subject to prosecution under this section, where such violation results in the death of a person; and in either case the offense is one which may be aided and abetted by a third person who "caused and procures" the omission, and such person may properly be charged in the indictment as a principal. *U. S. v. Van Schaick*, (1904) 134 Fed. 592.

**Corporation.**—A corporation owner of a steam vessel may be guilty of the offense stated in this section, which provides that "every owner . . . through whose fraud, connivance, misconduct, or violation of law the life of any person is destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof . . . shall be sentenced to confinement at hard labor," etc., notwithstanding the fact that it cannot be subjected to the punishment imposed; and such fact does not affect the right of the government to prosecute individuals, under said section, who aid and abet the corporation in the commission of the crime. *U. S. v. Van Schaick*, (1904) 134 Fed. 592.

## HOSPITALS AND ASYLUMS.

### Vol. III, p. 252, sec. 4810.

**Not limited to places where no hospitals exist.**—The authority of the Secretary of the Navy under this section to procure at suitable places proper sites for navy hospitals,

and to cause necessary buildings to be erected thereon, is not limited to the establishment of hospitals at places where none exist. (1908) 27 Op. Atty-Gen. 31.

### Vol. III, p. 256, sec. 4824.

**Authority of governor of home.**—Under this section and section 4835, the governor of the Soldiers' Home, to maintain discipline, may promulgate such special orders as he deems proper, including an order forbidding

the inmates to frequent a public place where they are permitted to obtain liquor, or are afforded degrading and immoral amusements, or exposed to improper temptations. *Rowan v. Butler*, (1908) 171 Ind. 28, 85 N. E. 714.

### Vol. III, p. 259, sec. 4825.

**Liability to action for tort.**—The National Home for Disabled Volunteer Soldiers, being a charitable institution engaged as an agency of the federal government in the discharge of a governmental function, is not subject to suit in an action sounding in tort to recover damages for the alleged unlawful and wrongful or negligent acts of its officers in diverting

and polluting the waters of a spring situated on lands of another, the power "to sue and be sued in courts of law and equity" conferred on the corporation by section 4825 being limited to matters within the scope of the other corporate powers with which it is vested. *Lyle v. National Home for Disabled Volunteer Soldiers*, (1909) 170 Fed. 842.

## Vol. III, p. 259, sec. 4826.

**Eligibility of managers.** — The question whether a congressman can be appointed a member of the board of managers of the Soldiers' Home, and become local manager of one of the homes, is wholly a matter for the decision of Congress itself. There is no con-

stitutional objection to the election of a member of Congress as a member of the board of managers of the National Home for Disabled Volunteers, although such an election would seem to be contrary to sound public policy. (1907) 26 Op. Atty.-Gen. 457.

## Vol. III, p. 265, sec. 4834.

**Authority of governor of home.** — See under this title, vol. 3, p. 256, sec. 4824.

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## IMMIGRATION.

## Vol III, p. 298, sec. 1.

**Contract laborers.** — In *Botis v. Davies*, (1909) 173 Fed. 996, it appeared that the petitioner, who was a Greek boy then sixteen years old, wrote to a distant relative in Chicago to know if the latter would give him employment if he came to the United States, and receiving an affirmative answer he came; his father paying his passage. On his arrival the relative gave him work at fifteen dollars per month and board, where he remained for fourteen months, and then bought a horse and wagon and started in business for himself as a fruit peddler. He had no contract for employment before he came, and no wages were mentioned, and he would have come merely

on the relative's promise to give him a home until he found employment. It was held that he did not come as a "contract laborer" within the meaning of this Act.

**Farm laborers.** — The bringing of an alien into the United States under contract to work on a farm as a laborer, under the direction of others, is within the prohibition of this section. *U. S. v. Parsons*, (C. C. A. 1904) 130 Fed. 681.

**No exception in favor of states.** — See under this title, 1909 Supp., p. 104, sec. 4.

**Effect of Act of March 3, 1903.** — See under this title, vol. 3, p. 304, sec. 1.

## Vol. III, p. 301, sec. 5.

**Learned profession.** — Expert accountants are not members of a recognized learned profession within the meaning of the exception in this Act. *In re Ellis*, (1903) 124 Fed. 637.

## Vol. III, p. 304, sec. 1.

**Effect of Act of March 3, 1903.** — Act Cong. March 3, 1903, ch. 1012, 32 Stat. L. 1213, 10 Fed. Stat. Annot. 102, amending and reenacting the immigration laws pre-existing, and providing for the repeal of all other conflicting provisions, re-enumerated all the excluded classes of aliens specified in this section, with some additions, but specifically omitted the clause relating to contract laborers excluded under Act Cong. Feb. 26, 1885, ch. 164, 23 Stat. L. 332, 3 Fed. Stat. Annot. 298. The Congressional Record (page 3205), as to the passage of the Act of 1903, showed that the omission was intentional, but that Congress thereby intended to leave intact the contract labor laws as they previously existed. It was held that the omission to provide for the deportation of contract labor-

ers in the Act of 1903 did not repeal the provisions of Acts Cong. Feb. 26, 1885, ch. 164, 23 Stat. L. 332, and March 3, 1891, ch. 551, 26 Stat. L. 1084, relative thereto. *In re Ellis*, (1903) 124 Fed. 637. See also (1907) 26 Op. Atty.-Gen. 180.

A native of Porto Rico who was an inhabitant of that island at the time of its cession to the United States by the treaty with Spain, of April 11, 1899, 30 Stat. L. 1754, 7 Fed. Stat. Annot. 814, is not, upon her arrival at the port of New York, an alien immigrant, within the meaning of the Act of Congress of March 3, 1891, providing for the detention and deportation of alien immigrants likely to become public charges. *Gonzales v. Williams*, (1904) 192 U. S. 1, 24 S. Ct. 177, 48 U. S. (L. ed.) 317.

## Vol. III, p. 305, sec. 3.

**Exception of states.**—The only exception made in the contract labor laws in favor of states is contained in this section and section 6 of the Act of March 3, 1903, ch. 1012, 32 Stat. L. 1213, 10 Fed. Stat. Annot. 104, in

reference to advertisements printed and published in foreign countries, stating the inducements they offer for immigration. (1907) 26 Op. Atty.-Gen. 181.

## Vol. III, p. 310, sec. 10.

**Immigrants defined.**—This section applies only to the entry into the United States of immigrants, who, according to standard definitions of the term, are persons removing into the country for the purpose of permanent residence, and the penalty imposed on the master of a vessel for neglecting to detain on his vessel any "alien who may unlawfully come to the United States" on such vessel, or to return him to the port from which he came, must be construed in the light of such general purpose, and limited in its application to cases of alien immigrants. *Moffitt v. U. S.*, (1904) 128 Fed. 375, 63 C. C. A. 117.

**Extent of shipowner's duty.**—Shipowners who have wrongfully brought aliens into the United States, and have received them back on board the vessel for deportation, are not made absolute insurers of the return of the immigrants to the port from whence they came, by this section punishing as a misdemeanor the "neglect" to detain the persons so received, or to return them to that port; but nothing more is required than a faithful and careful effort to carry out the duty so imposed. *Hackfeld v. U. S.*, (1905) 197 U. S. 442, 25 S. Ct. 456, 49 U. S. (L. ed.) 826, *reversing* (1903) 125 Fed. 596, 60 C. C. A. 428, and *overruling* *Warren v. U. S.*, (C. C. A. 1893) 58 Fed. 559. *Followed in* *Hackfeld v. U. S.*, (1905) 141 Fed. 9, 72 C. C. A. 265.

**Evidence of violation of section.**—In *Moffitt v. U. S.*, (1904) 128 Fed. 375, 63 C. C. A. 117, it appeared that the defendant was indicted under this section for neglecting to detain on the steamship of which he was master an alien not entitled to land in the United States, by reason of which neglect the alien escaped and landed in the United States. On the trial the following facts were shown by an agreed statement: When defendant's ship was anchored off shore at a Mexican port a number of native peddlers came on board to sell their wares. When one of them came on deck to go ashore he found that the vessel had started and proceeded some distance. Defendant refused his request that he be taken back and landed, but promised to stop and leave him on the return trip, and

thereupon put him at work, but without placing him on the crew list. On arriving at San Francisco an immigration officer notified defendant not to land the Mexican without permission, but the latter stated he did not wish to land, but wanted to be taken back home, and he was not confined. Just before the vessel sailed, however, he left it without the consent or knowledge of defendant or any of his officers, and had not returned when she left the port. It was held that such facts were not sufficient to warrant the defendant's conviction, the alien not being an immigrant within the meaning and intent of the Act, whom defendant was required to put in irons or keep under guard to secure his return on the vessel, and there being no evidence or claim that defendant did not act in good faith.

**Habeas corpus.**—Whether the executive officers of the government, in deporting an alien immigrant, are proceeding according to law, is a judicial question, which may be inquired into on habeas corpus. *Lavin v. Le Fevre*, (C. C. A. 1903) 125 Fed. 693.

**To what country deported.**—Under this and the following section providing that all aliens unlawfully coming into the country shall, if practicable, be immediately sent back on the vessel by which they were brought in, and that any alien unlawfully coming into the country may be returned as provided by law at any time within a year thereafter, where alien immigrants unlawfully came into the country from France, and after being temporarily absent in British Columbia, returned within a year of their arrival from France, it was held that they were properly deported to France. *Lavin v. Le Fevre*, (1903) 125 Fed. 693, 60 C. C. A. 425.

**Remission of fines.**—The Secretary of Commerce and Labor has no power to remit a fine imposed by a United States court upon a steamship company for its failure to detain and return to the country whence they came aliens whose deportation has been ordered under this section. (1908) 26 Op. Atty.-Gen. 624.

## Vol. III, p. 311, sec. 11.

**Limitation.**—Where a proceeding for the deportation of an alien as authorized by this section was not begun by the seizure of the alien within one year next after his last entry into the United States, as required by section

11, the proceeding was barred. *In re Russomanno*, (1904) 128 Fed. 528.

**To what country deported.**—See under this title, vol. 3, p. 310, sec. 10.

**Vol. III, p. 313.** [*Decision excluding alien final unless reversed by Secretary of the Treasury.*]

**Conclusiveness of decision.**—The decision of the Secretary of Commerce and Labor, affirming the denial by the immigration officers, after examination, of the right of a person of Chinese descent to enter the United States, is no less conclusive on the federal courts under this section in habeas corpus proceedings when citizenship is the ground on which the right of entry is claimed than when the ground is domicile, and the belonging to a class excepted from the Exclusion Acts. *U. S. v. Ju Toy*, (1905) 198 U. S. 253, 25 S. Ct. 644, 49 U. S. (L. ed.) 1040.

**Due process of law.**—The constitutional guaranty of due process of law is not infringed by the provision of this Act making the decision of the appropriate department on the right of a person of Chinese descent to enter the United States conclusive on the federal courts in habeas corpus proceedings, in the absence of any abuse of authority even where citizenship is the ground on which the right of entry is claimed. *U. S. v. Ju Toy*, (1905) 198 U. S. 253, 25 S. Ct. 644, 49 U. S. (L. ed.) 1040.

**Vol. X, p. 102, sec. 1.**

**Citizens of the Philippine Islands** coming to the United States from foreign ports are not required to pay the head tax prescribed by this section. (1904) 25 Op. Atty-Gen. 131.

**Alien diplomatic officials.**—This section applies as well to alien officials coming into the United States on diplomatic missions as to aliens who are private individuals and come here for other purposes. The duty thus imposed is not a tax upon the officials of foreign governments, but is merely a charge imposed upon the transportation company for every passenger brought into the United States by it. (1905) 25 Op. Atty-Gen. 370.

**Validity of department regulations regarding head tax.**—In *Stratton v. Oceanic Steamship Co.*, (1905) 140 Fed. 829, 72 C. C. A. 241,

it was held that a regulation requiring the master or owner of a vessel bringing an alien to a port of the United States for the professed purpose of proceeding directly therefrom to foreign territory, to deposit the amount of the head tax with the collector before such alien shall be permitted to land, the same to be refunded on proof satisfactory to the immigration officer in charge of said port that such alien has passed by direct and continuous journey through and out of the United States, was not an amendment or addition to the statute, but was a reasonable and lawful regulation for the purpose of protecting the United States from fraud and loss, and within the power conferred on the commissioner. See also (1904) 25 Op. Atty-Gen. 109.

**Vol. X, p. 103, sec. 2.**

**Alien residents.**—An alien who in good faith has acquired and maintains his residence in the United States, on his return from a temporary absence in a foreign country is not an alien immigrant within the meaning of the immigration statutes, but has the right to leave and re-enter the United States with the same freedom as a resident who is also a citizen. *In re Buchsbaum*, (1905) 141 Fed. 221; *Rodgers v. U. S.*, (1907) 152 Fed. 346, 81 C. C. A. 454; *U. S. v. Nakashima*, (1908) 160 Fed. 842, 87 C. C. A. 646. *Contra*, *U. S. v. Williams*, (1911) 186 Fed. 354.

Where an alien arrived by water at the port of New York and was subject to deportation, as belonging to one of the classes of aliens whose entry is prohibited, it was held to be no defense to his deportation that he had three years before arrived in the United States by water, and had remained for four months, during which he bought a farm, took out his first naturalization papers, and since his second arrival he had contracted marriage in the United States. *In re Kleibs*, (1904) 128 Fed. 656.

**Insanity developed after debarkation.**—Under this section, where an alien deserted from the vessel on which he was brought to the United States, but there was no evidence that he was either insane, epileptic, a pauper, or a person likely to become a public charge, when the vessel arrived in port, or at any

other time when he was on board, nor until a month later, when he was arrested, and when he first gave evidence of insanity, it was held that the master was not chargeable with bringing an alien not entitled to land into the United States. *Waterhouse v. U. S.*, (1908) 159 Fed. 878, 87 C. C. A. 56.

**Lithographic artists.**—In (1907) 26 Op. Atty-Gen. 284, it was held that two lithographic artists, who came to the United States in pursuance of a contract of employment entered into with the American Lithographic Company, of New York, their passage being prepaid by that company, and who had been excluded upon the ground that their admission would be in violation of this section relating to contract labor, should be admitted, it being shown beyond reasonable doubt that there was not a sufficient number of lithographic artists in the country to meet the demands of business.

**Burden of proof.**—The effect of the payment of the passage of an alien by another is to throw upon the alien the burden of proof that he is not liable to exclusion for the reasons mentioned in this section, or as a contract laborer under the Act of Feb. 26, 1885. 23 Stat. L. 322, 3 Fed. Stat. Annot. 298. (1907) 26 Op. Atty-Gen. 199.

**Deportation of contract laborers.**—See under this title, 1909 Supp., p. 162, sec. 2.



## Vol. X, p. 103, sec. 3.

**Repeal.**—This section in so far as it placed no limitation on the length of the holding of a female alien for prostitution for which the holder might be prosecuted, was repealed by Act Feb. 20, 1907, ch. 1134, sec. 32, 34 Stat. L. 911, 1909 Supp. Fed. Stat. Annot. 178, requiring that the offense of holding must have been committed within three years after the alien entered the United States. *Ex p. Lair*, (1910) 177 Fed. 789.

**Element of offenses.**—To warrant the conviction of a defendant charged with a violation of this section where the charge is that of holding a woman so imported by the defendant and another for the purposes of prostitution, it must be shown that the defendant, either alone or in connection with such other, knowingly and wilfully imported, or caused to be imported, such woman for the purposes of prostitution, and thereafter, to

effect the object of such illegal importation, knowingly and wilfully held such woman for such purposes. It is not necessary that the defendant should have detained such woman by physical force, but it is sufficient to constitute a holding within the meaning of the statute if such woman was detained for the purpose of prostitution by physical means applied to her either directly or indirectly by defendant, or by threats, express or implied, directly made to her by defendant, or by commands made to her directly or indirectly by defendant, and calculated and operating to restrain her freedom of action and will. To warrant a conviction for attempting to hold the same proof is required, except that it is not necessary that the means used should have been successful. *U. S. v. Giuliani*, (1906) 147 Fed. 594.

## Vol. X, p. 104, sec. 4.

**Construction of statute.**—A person is not liable for penalty under this and the following section, unless in addition to assisting, encouraging, or soliciting, it is also charged that the immigration is "by reason" of an offer, solicitation, promise, or agreement to or with him, or that the immigration has been in order that the immigrant may perform labor or service by reason of an offer, solicitation, promise, or agreement to or with him. *Darnborough v. Benn*, (C. C. A. 1911) 187 Fed. 580.

**Transportation paid by state.**—A state may prepay the passage of an alien immigrant out of its public funds, provided he is qualified in other respects, the advertisement being lawful, and neither the state, nor its officers, nor anyone else having otherwise solicited or encouraged the immigration. The status of such an immigrant would be the same as that of any other alien lawfully admitted to this country. (1907) 26 Op. Atty.-Gen. 199. See also (1907) 26 Op. Atty.-Gen. 181.

**"Person."**—The word "person" in this section does not include a state, but it does include an officer of a state professing to act

under its authority. (1907) 26 Op. Atty.-Gen. 199.

**Alien residents temporarily absent.**—In *U. S. v. Aultman Co.*, (1906) 143 Fed. 922, *affirmed* 148 Fed. 1022, 79 C. C. A. 457, it was held that this section did not apply to a man who entered the United States as an immigrant from Germany when young and remained continuously domiciled and working in this country for twelve or more years, although without becoming naturalized, and who then went temporarily into Canada, where he had been for two weeks when the contract alleged to be in violation of the statute was made.

**Promise to father of immigrant.**—Where the immigration of an alien minor was procured by reason of an agreement with him through his father, who was the owner of his services, no promises or offers save those made to him "through his father" as the person entitled to his services being shown, his immigration was not obtained by means of any promise or agreement "with him," and was therefore not a violation of the statute. *Darnborough v. Benn*, (C. C. A. 1911) 187 Fed. 580.

## Vol. X, p. 104, sec. 5.

**Nature of action for recovering of penalty.**—The penalty incurred under this section may be recovered by a civil action of debt brought by the United States. *Hepner v. U. S.*, (1909) 213 U. S. 103, 29 S. Ct. 474, 53 U. S. (L. ed.) 720.

**Payment of transportation.**—The payment of an alien's transportation to enable him to come to the United States, though one of the acts declared unlawful by section 4 of this Act, is not an act for which a penalty is incurred under this section unless it amounts to an assistance, encouragement, or solicitation of the alien's immigration with knowledge, etc., or in order that the alien may per-

form labor or service by reason of an offer, solicitation, promise, or agreement to or with him. *Darnborough v. Benn*, (C. C. A. 1911) 187 Fed. 580.

**Direction of verdict.**—The trial court may direct a verdict in favor of the government plaintiff in an action of debt to recover the penalty incurred under sections 4 and 5 of this Act for inducing an alien to migrate to the United States for the purpose of performing labor there, where it appears by undisputed testimony that the defendant has committed the offense out of which the cause of action arises. *Hepner v. U. S.*, (1909) 213 U. S. 103, 29 S. Ct. 474, 53 U. S. (L. ed.) 720,

## Vol. X, p. 104, sec. 6.

**Advertisement by state.**—It is lawful for a state to advertise its inducements to immigration, and to set forth, as part of such advertisement, the scale of wages generally prevailing within its territory. The status of immigrants induced to come to this country by reason of such advertisements would be the same as that of any other aliens lawfully admitted to the United States. (1907) 26 Op. Atty.-Gen. 181; (1907) 26 Op. Atty.-Gen. 199.

**The contribution of money by individuals to a state fund,** to be used by the state in advertising its inducements to immigrants, which advertisement could not lawfully be published by private persons, and to repay the passage of aliens attracted by such advertisement, though without promise of employment, express or implied, would amount to encouraging or assisting immigration in the form prohibited by this section and render the parties contributing liable to the

penalties provided by section 5. (1907) 26 Op. Atty.-Gen. 199.

**"Promise of employment."**—The words "promise of employment" in this section are used in a broad sense, meaning not merely an offer of employment which, by acceptance, would create a contract enforceable against some definite person or persons, but any form of words which might be reasonably understood as holding out to a possible immigrant the prospect of assured employment. (1907) 26 Op. Atty.-Gen. 199.

**Effect upon immigrants.**—There is nothing in this Act, or in any previous Act, which would authorize the exclusion of alien immigrants because the immigration was induced by advertisement, or even by solicitation or promise of employment, unless there was an enforceable contract existing at the time of application for admission requiring them to render service as laborers. (1907) 26 Op. Atty.-Gen. 199.

## Vol. X, p. 105, sec. 9.

**This section is constitutional.**—*Oceanic Steam Nav. Co. v. Stranahan*, (1909) 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013, *affirming* (1907) 155 Fed. 428; *International Mercantile Marine Co. v. Stranahan*, (1909) 214 U. S. 344, 29 S. Ct. 678, 53 U. S. (L. ed.) 1024, *affirming* (1907) 155 Fed. 428.

**Enforcement by administrative rather than judicial officers.**—The provision in this Act empowering the Secretary of the Treasury (now Secretary of Commerce and Labor) to exact a money penalty for bringing into the United States an alien afflicted with a loathsome or dangerous contagious disease, in violation of this section, when the official medical examination at the port of arrival shows that the alien was suffering from the disease at the time of embarkation, the existence of which might have been detected by a competent medical examination then made, as the statute requires, does not render such statute open to the objection that it defines a criminal offense, and authorizes a purely administrative officer to determine whether the defined crime has been committed, and if so, to

inflict a punishment. *Oceanic Steam Nav. Co. v. Stranahan*, (1909) 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013, *affirming* (1907) 155 Fed. 428; *International Mercantile Marine Co. v. Stranahan*, (1909) 214 U. S. 344, 29 S. Ct. 678, 53 U. S. (L. ed.) 1024, *affirming* (1907) 155 Fed. 428.

**Rules controlling enforcement.**—The enforcement of the exaction of one hundred dollars which the Secretary of the Treasury (now Secretary of Commerce and Labor) is authorized by this section to impose for violations of its provisions against bringing into the United States aliens afflicted with loathsome or dangerous contagious diseases, is not necessarily governed by the rules controlling in criminal prosecutions merely because such exaction is a penalty. *Oceanic Steam Nav. Co. v. Stranahan*, (1909) 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013, *affirming* (1907) 155 Fed. 428; *International Mercantile Marine Co. v. Stranahan*, (1909) 214 U. S. 344, 29 S. Ct. 678, 53 U. S. (L. ed.) 1024, *affirming* (1907) 155 Fed. 428.

## Vol. X, p. 105, sec. 10.

**Due process of law.**—Making the official medical examination at the port of arrival conclusive for the purpose of imposing the penalty enforceable by refusing clearance papers until paid, which is authorized by section 9, *supra*, for violating its provisions by bringing into the United States an alien afflicted with a loathsome or contagious disease from which he was suffering at the time of embarkation, the existence of which might have been detected by means of a competent medical examination then made, does not render such statute repugnant to U. S. Const., Fifth Amendment, as taking property without due process of law. *Oceanic Steam Nav. Co. v. Stranahan*, (1909) 214 U. S. 320, 29 S. Ct. 671, 53 U. S. (L. ed.) 1013, *affirming* (1907) 155 Fed. 428; *International Mercan-*

*tile Marine Co. v. Stranahan*, (1909) 214 U. S. 344, 29 S. Ct. 678, 53 U. S. (L. ed.) 1024, *affirming* (1907) 155 Fed. 428.

**Construction of word "final."**—In the provision of this section making the decision of the board of special inquiry based upon the certificate of the examining medical officer final as to the rejection of aliens affected with a loathsome, dangerous contagious disease, the word "final" is not used in such broad sense as to deprive an alien so rejected of the right of appeal unqualifiedly given by section 25 of this Act, or of the right to invoke the provisions of section 37, relating to the wife and children of a naturalized alien, in a case to which such section is applicable. *Rodgers v. U. S.*, (C. C. A. 1907) 157 Fed. 381.

## Vol. X, p. 107, sec. 15.

**Construction of section.**—This section and rule 24 of the immigration regulations prescribe a penalty of ten dollars for each alien on board a vessel entering a port of the United States concerning whom the master has either not furnished a list or manifest, or has furnished one which does not contain the information required by sections 12, 13, and 14 of this Act, and a collector of customs has no authority to impose a fine or to

collect a sum of less than that amount for each such violation of the statute. (1905) 25 Op. Atty.-Gen. 336.

The proper method of enforcing collection of a penalty imposed for a violation of sections 12, 13, and 14 of this Act, where payment is refused, is by a prosecution for the offense or an action to recover the penalty. (1905) 25 Op. Atty.-Gen. 336.

## Vol. X, p. 108, sec. 18.

**"Landing from vessel."**—The words "landing from vessel," as used in this section, mean "to go ashore," the landing being complete the moment the vessel is left and the shore is reached. *Niven v. U. S.*, (1909) 169 Fed. 782, 95 C. C. A. 248.

**Sailors.**—This section does not apply to seamen landed and placed in a hospital because of illness, who were unable to return to their home port with the vessel as intended. *Niven v. U. S.*, (1909) 169 Fed. 782, 95 C. C. A. 248.

**Sailor deserting.**—The ordinary case of a sailor deserting while on shore leave is not comprehended by the provisions of this section, notwithstanding the omission therefrom of the word "immigrant," which had followed the word "alien" in the earlier Acts. *Taylor v. U. S.*, (1907) 207 U. S. 120, 28 S. Ct. 53, 52 U. S. (L. ed.) 130, *affirming* 152 Fed. 1, 81 C. C. A. 197.

The fact that an alien seaman deserting while on shore leave was a stowaway under order of deportation does not bring the case within the provisions of this section, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers, and punishing him if he lands or permits to land any alien at any other time or place. *Taylor v. U. S.*, (1907) 207 U. S. 120, 28 S. Ct. 53, 52 U. S. (L. ed.) 130, *affirming* 152 Fed. 1, 81 C. C. A. 197.

Where there was no evidence that any one connected with a vessel from which an alien escaped into the United States permitted or in any way connived at the alien's desertion, neither the master nor the agents of the vessel were guilty of an offense under section 18. *Waterhouse v. U. S.*, (1908) 159 Fed. 876, 87 C. C. A. 56.

## Vol. X, p. 108, sec. 19.

**Minor children of naturalized father.**—The status, as aliens, of children born in a foreign country of alien parents is not changed by the naturalization of their father as a citizen of the United States by taking out his second papers while the children are detained in custody as immigrants at Ellis Island, and they remain subject to exclusion under the

immigration laws for a dangerous contagious disease contracted before their embarkment, such children not being affected by R. S. sec. 2172, 5 Fed. Stat. Annot. 209, which provides that the minor children of persons duly naturalized "if dwelling in the United States" shall be considered as citizens thereof. *U. S. v. Williams*, (1904) 132 Fed. 894.

## Vol. X, p. 108, sec. 20.

**Right to hearing.**—Where an alien had deserted from the crew of a vessel on which he was brought into the United States, and had been at large in the country for a month before he developed insanity, when he was arrested and ordered deported by the Secretary of Commerce and Labor, it was held that the secretary's decision was not conclusive on the alien; the secretary, as an executive officer, being without power within the time limited by statute to order the deportation of an alien without giving him an opportunity to be heard on the questions involving his right to remain in the United States. *Waterhouse v. U. S.*, (1908) 159 Fed. 876, 87 C. C. A. 56.

**Meaning of term "transportation."**—In *U. S. v. Hamburg American Line*, (1908) 159 Fed. 104, 86 C. C. A. 294, it was held that

the term "transportation," as used in this section, should be given its ordinary meaning, viz., carriage from one place to another, and that the phrase "cost of inland transportation" therefore only includes the cost of carrying the alien from the inland place where he was found to the port of deportation, and that the government was therefore not entitled to recover under such section from the steamship company bringing the deported alien into the United States any part of the traveling expenses of an officer sent to bring the alien to the port of deportation.

**Finality of decision.**—The direction of the Secretary of Commerce and Labor that an alien should be deported on the vessel by which he was brought to the United States is not conclusive on the officers and agents of the vessel, neither of whom has been a party

to the proceedings before the secretary. *Waterhouse v. U. S.*, (1908) 159 Fed. 876, 87 C. C. A. 56.

**Limitation.**—Under this section which provides that any alien who shall come into the United States "in violation of law" may be deported at any time within two years after arrival, and section 21 which provides that the Secretary of Commerce and Labor

shall deport aliens found in the United States "in violation of this Act" within three years after landing, a "deportation" for entering in violation of any prior law can only be made within two years, which means the actual deportation, and not merely the commencement of proceedings. *Botis v. Davies*, (1909) 173 Fed. 996.

## Vol. X, p. 109, sec. 21.

**Limitation.**—The time fixed in this section was held to govern the deportation of an alien who landed March 3, 1907. *U. S. v. Redfern*, (1910) 180 Fed. 506.

## Vol. X, p. 109, sec. 22.

**Validity of department regulations regarding head tax.**—See under this title, vol. 10, p. 102, sec. 1.

## Vol. X, p. 110, sec. 25.

**Res adjudicata.**—*Pearson v. Williams*, (1906) 202 U. S. 281, 26 S. Ct. 608, 50 U. S. (L. ed.) 1029, *affirming* (1905) 136 Fed. 734, 69 C. C. A. 386, set out in the original note.

**Conclusiveness of findings.**—The rule that the finding of immigration inspectors that a person apprehended for deportation is a Chinese person not entitled to enter the United States, when affirmed by the Secretary of Commerce and Labor, is final, does not prevent a citizen of the United States from invoking the protection of the courts to secure his right to live within the boundaries of his own country, guaranteed by the Constitution. *Ex p. Lung Wing Wun*, (1908) 161 Fed. 211.

**Information of right to appeal.**—Under this section and rule 7 of the regulations established thereunder by the Secretary of Commerce and Labor, an immigrant who, on examination by a board of special inquiry, has been denied the right to enter the United States, has the right to be informed that he has a right of appeal therefrom, and the fact that he has been so informed must be entered of record in the minutes of the board's proceedings, and withholding of that right precludes finality in the decision of the board

which may in such case be reviewed by the courts on a writ of habeas corpus. *Rodgers v. U. S.*, (1907) 152 Fed. 346, 81 C. C. A. 454.

**Questions of fact.**—Congress has by the immigration statutes lawfully conferred upon executive officers final and exclusive jurisdiction to hear and determine whether any particular individual is an alien or a citizen in so far at least as such determination depends upon conclusions which may be reached upon disputed questions of fact. *Ex p. Watchorn*, (1908) 160 Fed. 1014; *U. S. v. Sprung*, (C. C. A. 1910) 187 Fed. 903, *reversing* (1909) 182 Fed. 330.

**Habeas corpus.**—In *Chin Yow v. U. S.*, (1908) 208 U. S. 8, 28 S. Ct. 201, 52 U. S. (L. ed.) 369, it was held that habeas corpus should be granted by the federal courts to a Chinese person, claiming to be a citizen of the United States, who had arbitrarily been denied such a hearing and opportunity to prove his right to enter the United States as the Exclusion Acts demand, and had been placed in custody of a steamship company, to be returned to China, pursuant to the decisions of the Commissioner of Immigration and the Department of Commerce and Labor.

## Vol. X, p. 112, sec. 37.

**Minor children of naturalized father.**—See under this title, vol. 10, p. 108, sec. 19.

## 1909 Supp., p. 161, sec. 1.

**Deserting seaman.**—This section does not render the owner of a vessel liable for the tax upon an alien seaman who deserts after reaching this country, in the absence of any evidence that the officers of the vessel had reason

to suppose that the seaman made the voyage with the intention of so gaining admission, or that such intention in fact existed. *U. S. v. International Mercantile Marine Co.*, (1909) 171 Fed. 841, 96 C. C. A. 420.

## 1909 Supp., p. 162, sec. 2.

**Construction.**—The immigration statutes should be strictly construed. *Redfern v. Halpert*, (C. C. A. 1911) 186 Fed. 160.

This and other sections of this Act regulating the immigration of aliens into the United States, and providing for the depor-

tation of alien prostitutes and such as become public charges within three years, etc., were a re-enactment and extension of Act Cong. March 3, 1903, ch. 1012, 32 Stat. L. 1213, 10 Fed. Stat. Annot. 102, and prior legislation on the same subject enacted in the light of the construction placed on the prior acts by the courts. *Looe Shee v. North*, (1909) 170 Fed. 566, 95 C. C. A. 646.

The construction of the provision of this section for the deportation of aliens likely to become a public charge to include persons likely to become criminals does not conflict with the provision for exclusion of an alien convicted of crime. *U. S. v. Williams*, (1910) 175 Fed. 274.

**Passage paid by state.**—The payment of passage money of immigrants by a state with its funds is not prohibited by this section, but its payment with funds contributed by any society or association renders the immigrant liable to exclusion, even though the payment be made through the agency of the state or its officers, and although the immigrant would otherwise be entitled to admission. The same prohibition does not extend, however, to the payment of passage money by individuals, whether directly through the agency of a state, provided their action is, and is shown to be, in good faith individual, and not attended by such combination or concert of action as would make it substantially the act of an association or a society. (1907) 26 Op. Atty.-Gen. 199.

**Burden of proof.**—While the payment of an immigrant's passage out of state funds does not itself require his exclusion, yet such payment operates to throw upon the immigrant the burden of showing that he does not come within any of the otherwise excluded classes, such as paupers, etc., specifically excluded by the Act. (1907) 26 Op. Atty.-Gen. 410.

Under this section a person whose passage is paid by another must be prepared to show, not merely that he does not come within any of the categories of immigrants to be excluded, but also that his passage was not paid, directly or indirectly, by a corporation, association, society, municipality, or foreign government. (1907) 26 Op. Atty.-Gen. 199.

**Promise of employment by state officer.**—An alien who arrived at New Orleans from Cuba on Aug. 5, 1907, his passage money having been paid by an agent of the Louisiana State Board of Agriculture and Immigration out of funds appropriated by that state, the agent having assured the alien of employment upon his arrival, which assurance operated as a material, if not the principal, inducement to his immigration, the expectation being that the employer would loan the alien the sum so advanced for the reimbursement of the state, was held not to be entitled to admission to the United States. (1907) 26 Op. Atty.-Gen. 410.

**Contract of employment unnecessary.**—The classes of aliens excluded by this section include "aliens solicited or induced to immigrate by reason of offers or promises, even if there is no contract of employment." (1907) 26 Op. Atty.-Gen. 410.

**"Likely to become a public charge."**—The provision in this section for the deportation of aliens "likely to become a public charge" is not limited to likelihood to become a pauper, but extends to likelihood to become periodically inmates of prisons as a result of crime. *U. S. v. Williams*, (1910) 175 Fed. 274.

**Children of naturalized parents.**—Under Act March 2, 1907, ch. 2534, sec. 5, 34 Stat. L. 1229, 1909 Supp. Fed. Stat. Annot. 68, providing that a child born without the United States of alien parents shall be deemed a citizen by virtue of the naturalization of the parent taking place during the minority of the child, provided that the citizenship of such child shall begin when he begins to reside permanently in the United States, until a minor child of a naturalized parent has begun to reside permanently in the United States he is an alien, and he cannot begin to so reside if he belongs to a class of aliens debarred from entry, and the naturalization of a father will not permit his minor child born abroad, and remaining in the country of his nativity until after the naturalization, to come into the United States if prohibited from entering by Act Feb. 20, 1907, ch. 1134, 34 Stat. L. 898, excluding from admission into the United States persons belonging to enumerated classes. *U. S. v. Rodgers*, (C. C. A. 1911) 185 Fed. 334, *affirming* (1910) 182 Fed. 274.

**Married women.**—Where the relator was married to her husband in Cuba, and he had already entered the United States and was employed, earning daily wages sufficient to prevent himself and his wife from becoming public charges, and both were strong, healthy, and intelligent, it was held that the relator was also entitled to enter. *U. S. v. Redfern*, (1910) 180 Fed. 500.

**Prostitute—wife of citizen.**—Where an alien female was found practicing prostitution in the United States within three years after her entry, it was held that she was subject to deportation though her status at the time of entry as the wife of a citizen of the United States entitled her to enter. *Looe Shee v. North*, (1909) 170 Fed. 566, 95 C. C. A. 646.

**Evidence of prostitution.**—Evidence that an alien female was found practicing prostitution within three years after her entry was held to be evidence that she was a prostitute when she entered the United States, and was therefore subject to deportation as provided by this Act. *Looe Shee v. North*, (1909) 170 Fed. 566, 95 C. C. A. 646.

**Aliens not destined for United States.**—The immigration laws apply only to aliens applying for landing within the United States as their destination, so that an alien listed on a ship's manifest and ticketed for Halifax, on being refused admission to enter Canada, not having disavowed any intention to land there, and not having questioned the jurisdiction of the Dominion government in directing his deportation, was not entitled to his release on habeas corpus from the custody of the officers of the steamship while temporarily in port in the United States.

pending his deportation to the place from whence he came in accordance with the direction of the Dominion. *U. S. v. Fielding*, (1909) 175 Fed. 290.

**Deportation of contract laborers.**—Neither Immigration Act March 3, 1903, ch. 1012, 32 Stat. L. 1213, 10 Fed. Stat. Annot. 102, nor this section authorizes the deportation as a contract laborer of an alien who entered the United States before the later Act took effect; the former containing no provision whatever in that regard, and the latter, while making such provision, also expressly providing, in section 28, that it shall not be construed to affect "any act, thing, or matter . . . done or existing" at the time of its taking effect, but that the same shall be governed by prior laws, which are continued in force for that purpose. *Botis v. Davies*, (1909) 173 Fed. 996.

An alien upon promise to employ him on arrival in this country at stipulated wages in a definite occupation, made by one who advanced him money for his passage, secured by mortgage on his property, and who accompanied him on his journey, came to this country, went to work for such person at the stipulated wages and designated occupation, repaid the advance out of his wages, and continued in the employment of the person who made the promise and advance for a year. It was held that he was a contract laborer, expressly excluded by this section. *Ex p. George*, (1910) 180 Fed. 785.

**Criminals.**—Proof that an alien, prior to his immigration, committed a single act of fornication or adultery in the country from which he emigrated, was held to be insufficient to justify his deportation as an alien having been convicted of or having admitted committing a felony or other crime or misdemeanor involving moral turpitude. *U. S. v. Sibray*, (1910) 178 Fed. 144.

**Conviction of crime in foreign country after admission.**—The provisions of this section excluding from admission persons "who have been convicted of or admit having committed

a felony or other crime or misdemeanor involving moral turpitude," and of section 20 requiring the deportation of any alien who shall enter the United States in violation of law, do not authorize the deportation of an alien because of his conviction of a felony in the country from which he came after his admission into the United States. *Ex p. Koerner*, (1909) 176 Fed. 478.

**Superintendent of lumbering company.**—An alien induced to come to the United States by promise of employment as superintendent of a lumbering company, conditioned that he must be a competent woodsman, logger, and mill man, and must be a first-class mechanic, does not come within the provisions of this section, provided the agreement does not require him to perform manual labor. The provisions of the statute are limited to manual labor, skilled or unskilled. (1909) 27 Op. Atty.-Gen. 383.

**Hawaii.**—In (1909) 27 Op. Atty.-Gen. 478, it was held that the President was authorized to sign a blank form of letter addressed to officers of the United States abroad commending to their favorable consideration an agent of the Hawaiian government, who was being sent to the Azores and Madeira to make arrangements for the transportation of immigrants from those islands to Hawaii, their passage being prepaid by the Hawaiian government, and their immigration being induced solely by a representation of the resources of Hawaiian Islands and the industrial conditions existing there, without any offer or promise of employment being made to any of them, such persons to have perfect freedom of action in choosing their places of residence and vocations.

**Chinese.**—The provisions of this section excluding alien immigrants afflicted with certain diseases, etc., are applicable to Chinese immigrants otherwise entitled to admission. *Ex p. Lee Sheer Wing*, (1908) 164 Fed. 506; *Loee Shee v. North*, (C. C. A. 1909) 170 Fed. 566; *Ex p. Li Dick*, (1909) 174 Fed. 674.

## 1909 Supp., p. 163, sec. 3.

**Validity as to maintenance of prostitute.**—*Ex p. Gouyet*, (1909) 175 Fed. 230; *Ex p. Lair*, (1910) 177 Fed. 789, both cases following *Keller v. U. S.*, (1909) 213 U. S. 138, 29 S. Ct. 470, 53 U. S. (L. ed.) 737, set out in the original note.

**Congress has power to prohibit the importation of aliens for immoral or undesirable purposes, and to punish any person who shall import, or attempt to import, an alien for prohibited purposes.** *Ex p. Gouyet*, (1909) 175 Fed. 230.

**Effect of marriage to citizen.**—An alien prostitute who entered the United States and was found an inmate of a house of ill fame and practicing prostitution within three years after landing, having been since lawfully married to a native born citizen of the United States, is to be deemed a citizen, and cannot be deported under the immigration laws for

her conduct precious to her marriage. (1909) 27 Op. Atty.-Gen. 507.

But the Secretary of Commerce and Labor has authority to consider the evidence connected with the marriage of an alien prostitute to a citizen of the United States, and, subject to the principle that the validity of the marriage is to be determined by the law of the place where the contract is made, may deport the woman if the facts justify the conclusion that the ceremony was entered into merely for the purpose of evading the immigration law, and with no intention on the part of the parties to live together as husband and wife. (1909) 27 Op. Atty.-Gen. 578.

**Woman previously domiciled in United States.**—In a prosecution for the importation of an alien woman for the purpose of prostitution, in violation of this section, it is

not a defense that such woman had previously been domiciled for a time in the United States and had departed therefrom with the intention of returning. *U. S. v. Villet*, (1909) 173 Fed. 500.

**Venue.**—The offense of importing a female alien for prostitution in violation of this section is committed and is complete the moment the immigrant is landed in the United States, at which point the offense is triable under Const., art. 3, sec. 2, cl. 3, declaring that the trial of all crimes except cases of impeachment shall be held in the state where the crime has been committed, and the Sixth Amendment, declaring that accused shall enjoy the right to a speedy and public trial in the state and district wherein the crime has been committed. *Ex p. Lair*, (1910) 177 Fed. 789.

**Indictment.**—In *Ex p. Lair*, (1910) 177 Fed. 789, an indictment charged that petitioner, in connection with another, at Chicago, in the eastern division of the northern district of Illinois, unlawfully, etc., imported into the United States for prostitution, and unlawfully, etc., did hold from Jan. 1, 1906, until July 15, 1907, pursuant to such illegal importation, in a house of prostitution in Chicago, for the purpose of prostitution, an alien named P., then a citizen of France, within three years after her entry, and that she came to and entered the United States within three years prior thereto. It was held that such allegations charged the offense of holding and harboring a female alien for the forbidden purpose within three years after entry, and not her illegal importation for such purpose.

### 1909 Supp., p. 164, sec. 4.

**Construction of statute.**—This section being penal in its nature must be strictly construed. *Grant Bros. Constr. Co. v. U. S.*, (Ariz. 1911) 114 Pac. 955.

**Evidence.**—On a trial of an action against a defendant charged with having prepaid the transportation of a contract laborer into the United States in violation of sections 4 and 5, a proposed manifest for the immigrant on the form prescribed under section 12 of the Act, filled out by a third person before sailing of the vessel, and which was not used, but

which contained a statement that the immigrant's passage was paid by the defendant, was held to be incompetent as evidence against him, as the declaration of a third person not made in his presence. *Regan v. U. S.*, (C. C. A. 1910) 183 Fed. 293.

**Measure of proof required.**—In an action brought under sections 4 and 5, the government has the burden of proving the violation of the Act by the defendant beyond a reasonable doubt. *Regan v. U. S.*, (C. C. A. 1910) 183 Fed. 293.

### 1909 Supp., p. 164, sec. 5.

**Criminal prosecutions or criminal action for penalty.**—Congress, by providing in this section for a civil action for the recovery of a penalty for a violation of section 4, did not preclude a prosecution by indictment to enforce such penalty. *U. S. v. Stevenson*, (1909) 215 U. S. 190, 30 S. Ct. 35, 54 U. S. (L. ed.) 153.

**Intent.**—To warrant the recovery of the penalty prescribed by this section for encouraging immigration of alien contract laborers, there must have been a conscious violation of the Act. *Grant Bros. Constr. Co. v. U. S.*, (Ariz. 1911) 114 Pac. 955.

**Jury questions.**—Whether a construction company for which alien contract laborers were imported in violation of sections 4 and 5 had such knowledge of the unlawful acts as to warrant assessment of a penalty was held under the evidence to be a jury question. *Grant Bros. Constr. Co. v. U. S.*, (Ariz. 1911) 114 Pac. 955.

**Costs.**—A successful party in a suit under this section for penalties for encouraging immigration of alien contract laborers is entitled to costs. *Grant Bros. Constr. Co. v. U. S.*, (Ariz. 1911) 114 Pac. 955.

**Evidence.**—In an action under this section for penalties for encouraging immigration of alien contract laborers, evidence of statements made by the associates and employees of one with whom the defendant contracted was held to be admissible to show the acts done under the contract, though the evidence also tended to show defendant's knowledge of the unlawful acts. *Grant Bros. Constr. Co. v. U. S.*, (Ariz. 1911) 114 Pac. 955.

Likewise it was held that a decision of a board of special inquiry of the federal immigration service respecting the status of the particular aliens was properly received in evidence. *Grant Bros. Constr. Co. v. U. S.*, (Ariz. 1911) 114 Pac. 955.

### 1909 Supp., p. 165, sec. 6.

**No exceptions in favor of state.**—This section contains no exceptions in favor of a state in reference to specific promises of employment to individual immigrants, nor any re-

quirements that the promises of employment, in order to work exclusion, must be the sole inducement to exclusion, (1907) 26 Op. Atty.-Gen. 410,

## 1909 Supp., p. 165, sec. 8.

**Venue.**—The offense of bringing into and landing in the United States an alien not lawfully entitled to admission, made a misdemeanor by this section, can be prosecuted only in the district where such alien is landed, and the fact that the person who un-

lawfully brought in a child under sixteen years of age, unaccompanied by one or both of her parents, afterward took such child to another district, does not confer jurisdiction on the court in such district. *U. S. v. Capella*, (1909) 169 Fed. 890.

## 1909 Supp., p. 166, sec. 10.

**Finality of decision.**—Where, on the arrival of an alien, he was examined by the medical officer of the United States public health and marine service, who certified that he was "afflicted with idiocy," and thereafter a board of special inquiry decided on such certificate that the alien was not entitled to enter and directed that he be deported, it was

held that the decision of the board was a conclusive finding as to the existence of the physical disability and that the applicant was within section 2 providing that all idiots shall be excluded. *U. S. v. Rodgers*, (1910) 182 Fed. 274, *affirmed* (C. C. A. 1911) 185 Fed. 334.

## 1909 Supp., p. 166, sec. 12.

**Manifest.**—Where an alien endeavored in Europe to secure passage to New York, and was told that if he purchased a ticket to Halifax and wished to continue to New York he could do so without extra charge, and was thereupon ticketed by the steamship officers and entered on the manifest as destined to Halifax, N. S., when, in fact, his destination was New York, it was held that such acts by the officers of the steamship would constitute a violation of section 12 requiring

the master of a vessel to deliver to the immigration officers at the port of arrival a list or manifest made at the time and place of embarkment, stating the name, nationality, etc., and the final destination, as well as the seaport for landing in the United States, of each alien destined to land therein. *U. S. v. Fielding*, (1909) 175 Fed. 290.

**Hawaii.**—A territorial government, such as Hawaii, is not a municipality or a *quasi-municipality*. (1909) 27 Op. Atty-Gen. 479.

## 1909 Supp., p. 169, sec. 19.

**Construction of statute.**—This section provides that if the owner of any vessel bringing an alien not entitled to enter shall make any charge for the return of such alien, or shall take any security from him for the payment of such charge, he shall be guilty of a misdemeanor. It has been held that such provision applies only to acts done within the United States, since to construe it as applicable to acts occurring wholly within foreign territory would render it violative of international law. *U. S. v. Nord Deutscher Lloyd*, (1911) 186 Fed. 391.

**"Taking security."**—Under this section an indictment alleging that the defendant at Bremen collected return passage from certain proposed immigrants who were within the excluded classes, and held the money as security for a charge to be made for deportation, did not charge the taking of the money as security within the United States, since to

retain money taken in a foreign country was not a continuous repetition of the "taking" within the United States by reason of the fact that the aliens were brought to the United States and ordered deported because not entitled to enter. *U. S. v. Nord Deutscher Lloyd*, (1911) 186 Fed. 392.

**"Charge."**—It has been held that the word "charge," as used in this section, does not import a continuing act, but means an overt act, by which the charging party manifests his purpose to demand the money charged from the person charged, excluding the subsequent relations which are consequences of the act, and that an indictment is fatally defective which fails to allege that the forbidden "charge" was made with the intent to apply the amount so collected to the return of the aliens under deportation. *U. S. v. Nord Deutscher Lloyd*, (1911) 186 Fed. 391.

## 1909 Supp., p. 170, sec. 20.

**Nature of proceedings.**—A proceeding for the deportation of an alien is not criminal in its character, and an order of deportation is not a punishment for crime so as to entitle the alien to the constitutional guaranties and safeguards accorded to a citizen accused of crime. *Sire v. Berkshire*. (1911) 185 Fed. 967, 971; *Ladaux v. Berkshire*. (1911) 185 Fed. 971.

**Not retroactive.**—Where an alien lawfully entitled to enter under the Act of 1903, then in force, not being within one of the prohibited classes, arrived on Feb. 14, 1905, and was arrested on July 29, 1910, and ordered deported as a person practicing prostitution in the United States, the steamship company by which she was brought to the United States was not liable under the Act of 1907



for the cost of her deportation from the port of entry, since the provision of that Act for deportation at the expense of the steamship companies should be construed as prospective and only applicable to aliens brought to the United States after its adoption, since if otherwise construed it would be unconstitutional as depriving such companies of their property without due process of law. *U. S. v. North German Lloyd Steamship Co.*, (1911) 185 Fed. 158.

**Right to counsel.**—Where an alien in deportation proceedings did not deny her alienage nor that at the time of her arrest she was engaged in immoral business, and it appeared that she was represented by counsel on a hearing before the Secretary of Commerce and Labor, the deportation was pursuant to due process of law, though she was not permitted to consult an attorney before she was first examined by the immigration officers. *Sire v. Berkshire*, (1911) 185 Fed. 967; *Ladaux v. Berkshire*, (1911) 185 Fed. 971.

**"Entering in violation of law."**—An alien who falsely represents himself to be a citizen, and by such artifice and fraud secures admission to the United States, is guilty of "entering in violation of law," within the meaning of this section. *Williams v. U. S.*, (C. C. A. 1911) 186 Fed. 479.

**Expiration of time.**—Under Act Cong. March 3, 1903, ch. 1012, 32 Stat. L. 1213, 10 Fed. Stat. Annot. 109, and this section, providing for the deportation of aliens unlawfully in the country within three years after landing, deportation need not be completed within that time, the government having the whole of the last day of the three years in which to make the arrest, and prescription being interrupted by the arrest, the government is entitled to a reasonable time in which to carry out the sentence of deportation. *U. S. v. Redfern*, (1910) 180 Fed. 506. See also *U. S. v. International Mercantile Marine Co.*, (1911) 186 Fed. 669.

In *Matsumura v. Higgins*, (C. C. A. 1911) 187 Fed. 601, it appeared that the petitioner, a Japanese alien, was convicted of importing an alien prostitute into the United States, sentenced to imprisonment, and on investigation by the Acting Secretary of Commerce and Labor was found to belong to the excluded class and ordered deported. It was held that since domiciliary rights could not grow for the benefit of petitioner during the period of his incarceration, the deportation writ was in abeyance during such period, and on its expiration was subject to immediate execution, though petitioner then had been in the United States more than three years.

**Likely to become public charge**—involving moral turpitude.—In *Ex p. Saraceno*, (1910) 182 Fed. 955, it appeared that the petitioner, having immigrated to the United States in 1899, returned to Italy in January, 1909, and was followed about four months thereafter by his wife and children. He remained there until September, 1910, when he returned to the United States alone. He was a barber by trade and had followed that occupation in New York during his residence there, was twenty-nine years of age, and had

twenty-five dollars when he landed. He intended to go to his brother, and was not subject to any mental or physical disability. On his examination it was shown that he had been twice arrested during his former residence in New York, and on the second occasion was convicted of carrying a concealed weapon and sentenced to imprisonment for fifteen days, his offense being a misdemeanor under the New York law. It was held that petitioner was not a person likely to become a public charge, or a person convicted of an offense involving moral turpitude, and was not subject to deportation on either of such grounds.

**Clandestine entry at border port.**—A Chinese alien entering the United States from Canada surreptitiously in the night, avoiding inspection and examination at a designated place of entry, enters in violation of section 36, and, like any other alien so entering, is subject to arrest on a warrant issued by the Secretary of Commerce and Labor and to be deported to Canada or to China, the "country whence he came," under the provisions of sections 20 and 21 of the Act, without regard to the provisions of the Chinese Exclusion Acts. And it is no defense that he is a domiciled merchant in the United States entitled to enter under such Acts; the deportation in such case being without prejudice to his right to subsequently apply for admission in a lawful way. *Ex p. Li Dick*, (1909) 174 Fed. 674.

**Chinese Exclusion Act.**—This and the following section do not affect the previous special provisions of Chinese Exclusion Act of Sept. 13, 1888, ch. 1015, secs. 7 and 13, 25 Stat. L. 477, 479, 1 Fed. Stat. Annot. 770, 772, for deporting Chinese laborers, especially since section 43 of the Immigration Act provides that the Act should not affect existing laws relating to Chinese exclusion, and the Chinese Exclusion Act furnishes an exclusive remedy for deporting Chinese laborers. *Wong You v. U. S.*, (C. C. A. 1910) 181 Fed. 313, reversing order 176 Fed. 933.

**Living in adultery after entry.**—That an alien is living in adultery within the United States is not ground for deportation, such conduct being solely within the police power of the state. *U. S. v. Sibray*, (1910) 178 Fed. 144.

**Country to which deported.**—Under the immigration laws providing for the deportation of aliens not entitled to enter the United States, to the country whence they came when they illegally entered the United States, regardless of their nativity, except aliens intending to enter the United States for the convenience of their voyage, the Secretary of Commerce and Labor has no discretion as to the place to which an alien must be deported; and hence a warrant attempting to deport an alien to a country other than that from whence he came is illegal and void. *U. S. v. Redfern*, (1911) 186 Fed. 603.

**Attendants.**—The Secretary of Commerce and Labor is empowered by sections 20 and 21 to select attendants to accompany aliens ordered to be deported, where they are mentally or physically diseased in such a manner

as to require attendance and care during the voyage. The steamship or transportation companies by which such aliens came to this country are required to receive the attendants so selected at the same time that they receive the aliens to be deported, and convey them, with the aliens, to the foreign places of destination. The steamship companies are required to furnish such attendants transportation to and from the alien's destination and to defray all expenses incident to such employment. (1907) 26 Op. Atty.-Gen. 381.

**Alien resident temporarily absent.**—Under this section which authorizes the deportation of any alien who has entered the United States in violation of law at any time within three years after entry, the fact that an alien entering is a resident of the United States and left temporarily is immaterial, and the legality of the last entry is to be determined as though there had been no previous entry, with the right to deport within three years thereafter if such entry is unlawful. *Ex p. Petterson*, (1908) 166 Fed. 537; *Ex p. Hoffman*, (1910) 179 Fed. 839, 103 C. C. A. 327; *Sibray v. U. S.*, (C. C. A. 1911) 185 Fed. 401, *reversing* (1910) 178 Fed. 144, 150; *U. S. v. Sprung*, (C. C. A. 1910) 187 Fed. 903, *reversing* (1909) 182 Fed. 330. *Contra*, *Redfern v. Halpert*, (C. C. A. 1911) 186 Fed. 150.

In *U. S. v. Hook*, (1908) 166 Fed. 1007, it appeared that the petitioner, a Canadian by birth and citizenship, entered the United States in 1901 and was an inmate of houses of prostitution in various cities until 1905, when she went to Philadelphia to care for an invalid sister. She remained there two years, when she resumed life as a prostitute, and in the fall of 1907 went back to Canada, where she stayed four days, when she returned to the United States and continued her misconduct until she was arrested. It was held that the three-year period within which she was subject to deportation dated from her return from Canada, and that she was therefore unlawfully within the country.

In *U. S. v. Williams*, (1911) 187 Fed. 470, it appeared that an alien of the excluded classes, having been in the United States more than three years, shortly before his arrest as an alien not entitled to enter, while in Niagara Falls, passed from the American to the Canadian side to view the falls, and, after staying there an hour or more, came back to New York, and shortly thereafter was arrested. It was held that his return to the United States after going into Canada constituted a re-entry, after which he was subject to deportation.

**A judgment of acquittal in a criminal prosecution of an alien for falsely claiming citizenship**, entered on a directed verdict, is not a bar to proceedings for his deportation, under this section, for having obtained admission to the United States in violation of law by falsely representing himself to be a citizen. *Williams v. U. S.*, (C. C. A. 1911) 186 Fed. 479.

**Review by courts.**—There is no provision in Immigration Act March 3, 1903, ch. 1012, 32 Stat. L. 1213, 10 Fed. Stat. Annot. 102, nor Act Feb. 20, 1907, ch. 1134, 34 Stat. L.

898, 1909 Supp. Fed. Stat. Annot. 161, making the decision of the immigration officers conclusive as to the right of an alien domiciled in this country to remain, and where such decision involves a question of law as well as of fact it will be reviewed by the courts. *Botis v. Davies*, (1909) 173 Fed. 996.

In proceedings for the deportation of alien immigrants, while the courts are bound by the findings of the Executive Department they cannot properly refuse relief where on the admitted facts it appears as a matter of law that the person sought to be deported is not within the inhibition of the statute. *Ex p. Watchorn*, (1908) 160 Fed. 1014; *Ex p. Petterson*, (1908) 166 Fed. 536; *Ex p. Koerner*, (1909) 176 Fed. 478; *Davies v. Manolis*, (1910) 179 Fed. 818, 103 C. C. A. 310.

**Habeas corpus.**—Where an alien seeking to enter the United States is ordered deported by the Secretary of Commerce and Labor, a district judge has no jurisdiction to set aside such order on habeas corpus, unless the secretary violated the statute in respect to all of the grounds on which the deportation is based. *U. S. v. Williams*, (1910) 175 Fed. 274.

Where an alien not entitled to enter the United States was held under an illegal warrant directing his deportation to a country other than whence he came, it was held that he was entitled to a release on habeas corpus, under the rule that a prisoner is entitled to his liberty where the sentence is illegal. *U. S. v. Redfern*, (1911) 186 Fed. 603.

Where neither the application for the warrant of arrest nor any of the papers on which it was issued were shown to an alien or her counsel during the hearing, and before the passing of an order for deportation, as required by immigration rule 35e, it was held that she was entitled to a writ of habeas corpus to determine the validity of her detention. *Ex p. Avakian*, (1910) 188 Fed. 688.

On habeas corpus to determine the legality of the detention of an alien in deportation proceedings, the only question for review is the legality of the alien's detention on the return day of the writ, and matters subsequent thereto are not proper in a traverse to the return. *Ex p. Avakian*, (1910) 188 Fed. 688.

**Warrant.**—Neither the Immigration Act nor the promulgated regulations require that a warrant of arrest in deportation proceedings shall state the alleged grounds on which deportation will be demanded. *U. S. v. Williams*, (1910) 175 Fed. 274.

A warrant of arrest of an alien for deportation, charging that he had been induced or solicited to migrate to this country by an offer or promise of employment or in consequence of an oral agreement to perform unskilled labor in this country, was held to be sufficient, especially where unobjected to on the hearing and criticised for the first time after deportation was ordered and collaterally on a writ of habeas corpus. *Ex p. George*, (1910) 180 Fed. 785.

A warrant for the deportation of an alien charged to be unlawfully in the country is not insufficient because signed by the Assist-

ant Secretary of Commerce and Labor instead of the Secretary. *U. S. v. Redfern*, (1910) 180 Fed. 506.

A deportation warrant charged that the alien was a member of the excluded classes, in that he was a contract laborer and had been induced to migrate by an offer or promise of employment under an agreement to perform manual labor in the United States. It was held that the charge was sufficiently set forth in the warrant. *Ex p. Michele*, (1911) 188 Fed. 449.

**Necessity of hearing.**—Where a warrant of arrest, under which proceedings for the deportation of an alien were instituted, conducted, and concluded, charged alone a violation of this Act, but the proof and findings of the inspector before whom the hearing was had showed that the accused arrived in this country in 1906, it was held that such proceedings did not authorize a warrant of deportation by the Department of Commerce

and Labor for violation of Act March 3, 1903, ch. 1012, 32 Stat. L. 1213, 10 Fed. Stat. Annot. 102, then in force, without a hearing on such charge, and that a person taken into custody on a warrant so issued was entitled to discharge on a writ of habeas corpus. *Davies v. Manolis*, (C. C. A. 1910) 179 Fed. 818.

**Marriage to citizen after deportation order.**—Where, after an alien had been ordered deported because she was afflicted with a contagious disease, she married a citizen, it was held that she was not thereby relieved from the order of deportation, under R. S. sec. 1994, 1 Fed. Stat. Annot. 786, providing that any woman married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen. *Ex p. Kaprielian*, (1910) 188 Fed. 694.

**Conviction of crime in foreign country after admission.**—See under this title, 1909 Supp., p. 162, sec. 2.

## 1909 Supp., p. 170, sec. 21.

**Class of transportation of attendant.**—A regulation of the department which provides that "attendants will accompany aliens to official destination, and will, when proceeding abroad, be required to travel under the same conditions as the alien," is appropriate, if in nearly all cases the usefulness of the attendants would be seriously impaired unless they went in the same class as the alien; but the second part of the regulation, providing that all attendants "when returning shall travel second class," is not binding upon the vessel owners. If the attendant in going has traveled in a class in which he would not naturally travel, by reason of the necessity for his constant attendance upon the disordered alien, his ticket may be changed on the return trip. If there are a variety of cases properly admitting of the separate classification of the two persons, the Department of Commerce and Labor cannot determine arbitrarily to what class the attendant is to be consigned. The steamship company, on the other hand, cannot nullify the law by insisting that attendants travel in the steerage when they are not needed there and are persons who could not be reasonably expected to accept employment upon such conditions. (1907) 26 Op. Atty.-Gen. 381.

**"Expense incident to such service."**—The phrase "expense incident to such service," as used in the proviso of this section, is all the expense directly and incidentally caused by the fact that such service has been required. This includes the return trip of the attendant and also his compensation. The expression "all the expenses incident to the employment and detail of attendants" comes under the same head. (1907) 26 Op. Atty.-Gen. 381.

**Fair trial.**—An alien was arrested on Sept. 19, 1909, and was accorded a hearing before the immigration officers on the next day, when she was informed of her right to be represented by counsel, but, waiving such right, she was sworn and examined at length.

She was again examined by the officers a few days later, when she was represented by counsel, who also examined three other witnesses before the officers, and she was again examined before one of the immigration inspectors on Nov. 23, 1909. It was held that she was accorded a fair trial before the department, which precluded a review of their conclusions of fact, reached on conflicting evidence, by the courts. *De Bruler v. Gallo*, (C. C. A. 1911) 184 Fed. 566.

**Former jeopardy.**—Const., Amend. 5, providing that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, applies only to criminal proceedings, and hence has no application to proceedings for the deportation of an alien. *Sire v. Berkshire*, (1911) 185 Fed. 967; *Ladaux v. Berkshire*, (1911) 185 Fed. 971.

**Constitutionality.**—The provision of the Immigration Act declaring that an alien woman who subsequent to landing commits a specified offense shall be deported is a proper exercise of police power, but the provision that the cost of her deportation shall be imposed on another person who had nothing to do with the commission of such offense is not an exercise of such power. *U. S. v. North German Lloyd Steamship Co.*, (1911) 185 Fed. 158.

**Review by court.**—After an order of deportation has been entered in deportation proceedings against an alleged undesirable alien, the only issue reviewable on a writ of habeas corpus is whether the alien had been given a fair hearing by executive officers on an order to show cause why she should not be deported, and it is therefore error to refer the proceeding to a commissioner to take testimony on a new issue as to the alien's alleged marriage and whether her husband was a citizen. *De Bruler v. Gallo*, (C. C. A. 1911) 184 Fed. 566.

**Chinese Exclusion Act.**—See under this title, 1909 Supp., p. 170, sec. 20.

dians are the wards of the United States, acting through executive officers pursuant to regulations promulgated under the authority of the President, pursuant to R. S. secs. 463, 465, yet in the absence of such regulations defining what conduct of Indians shall be deemed reprehensible and subject them to correction, it does not rest in executive dis-

cretion to administer corrective punishment as to members of a tribe having a treaty with the United States covenanting that bad Indians shall not be punished by the United States except pursuant to laws defining their offenses and prescribing the punishments therefore. *In re Bi-A-Lil-Le*, (1909) 12 Ariz. 150, 100 Pac. 450.

### Vol. III, p. 348, sec. 2057.

**Conditions of bond.**—That the bond required from and given by an Indian agent contains provisions not required by any statutory provision does not affect its validity, where its conditions are not in violation of law, and it is entered into voluntarily by both principal and surety. *U. S. Fidelity, etc., Co. v. U. S.*, (1907) 150 Fed. 550, 80 C. C. A. 446.

**Criminal prosecution as bar to civil action.**—The conviction and imprisonment of an Indian agent for malfeasance in office is not a bar to a subsequent suit by the United States, on his bond to recover the amount of public money misappropriated or unaccounted for by him. *U. S. Fidelity, etc., Co. v. U. S.*, (1907) 150 Fed. 550, 80 C. C. A. 446.

**Action on bond.**—In an action on an Indian agent's bond, a transcript of the books and proceedings of the Treasury Department is admissible, though it contains some items of credit or debit concerning which it is not competent evidence. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814.

It is not, however, evidence of the receipt

by the agent of moneys that did not come to his hands through the ordinary channels of the department. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814.

Where, in an action on the bond of an Indian agent, the transcript of the books and proceedings in the Treasury Department contained a debit and credit statement of the account and a showing of the items in dispute, it was held not objectionable because it also contained explanatory memoranda showing the grounds of the rulings of the accounting officers concerning the items rejected, and, in some instances, the evidence on which they relied. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814.

In an action on a bond of a United States Indian agent, a transcript from the books and proceedings of the Treasury Department is not conclusive of the claims of the government; the court being authorized to allow disallowed items on facts either appearing on the face of the transcript or established by extraneous evidence. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814.

### Vol. III, p. 349, sec. 2058.

**Disbursement of funds.**—Where, because the members of one of two bands of Indians had committed certain depredations, the federal authorities withheld from them the greater portion of the annuity to which they would otherwise have been entitled, and the Indian agent was instructed to disburse to each member of the offending band \$1.93, and to each of the other band \$11.20, it was held

that such agent had no authority to divide all of the money equally between the members of both bands, because of their threatening attitude, with the consent of the members of the unoffending band, and that his act in so doing rendered him and his sureties liable as for a diversion of the funds. *U. S. v. Pierson*, (C. C. A. 1906) 145 Fed. 814.

### Vol. III, p. 356, sec. 8. [*Officers and others presenting false vouchers to forfeit all claims, etc.*]

**Action on bond of Indian agent.**—This section, which provides that the presentation by an Indian agent of vouchers, accounts, and claims, containing material misrepresentations of fact in regard to the amounts due and paid shall not constitute an accounting, and making it the duty of the accounting officers of the government to reject such vouchers, does not impose a penalty, nor render an action to recover the indebtedness resulting from the rejection of such accounts one for the recovery of a penalty, but merely

prescribes a statutory rule of accounting, which becomes a part of the contract of a surety for an Indian agent, to which his obligation is subject, and it is no defense to such an action on the agent's bond that vouchers so rejected contained correct and true items of expenditure; the agent having the right on their rejection to furnish true vouchers for all items for which he was entitled to credit. *U. S. Fidelity, etc., Co. v. U. S.*, (1907) 150 Fed. 550, 80 C. C. A. 446.

### Vol. III, p. 359, sec. 2086.

**Indians absent from their reservation without permission from the United States** had no individual rights to the annuities prom-

ised to their tribes by treaty, and paid at the tribal agency conformably to the Act of Aug. 30, 1852, 10 Stat. L. 41, ch. 103, from which

this section was taken in part, and which forbade payment to be made to any attorney or agent, and required it to be made directly to the Indians themselves or to the tribe *per capita*, "unless the imperious interest of the Indian or Indians or some treaty

stipulation shall require the payment to be made otherwise, under the direction of the President." *Sac Indians v. Sac Indians*, (1911) 220 U. S. 481, 31 S. Ct. 473, 55 U. S. (L. ed.) 552, *affirming* 45 Ct. Cl. 287.

### Vol. III, p. 367, sec. 2103.

**Contract for services.**—A contract with an Indian not a citizen of the United States, for the payment of money in consideration of services to be rendered to the said Indian relative to lands of his tribe which he pro-

poses to enter as allotments, falls within the provisions of this section, and where not executed and approved as required by the said section is void. *Smith v. Martin*, (1911) 28 Okla. 836, 115 Pac. 866.

### Vol. III, p. 370, sec. 2107.

**Attorney's agreement with other attorney for part of contingent fee.**—An agreement by attorneys having a contract for a contingent fee with Indians, approved by the Secretary of the Interior and the Commissioner of Indian Affairs, as required by R. S. sec. 2103, 3 Fed. Stat. Annot. 367, to pay other attorneys, who had assisted in its pro-

curement, a part of the fee, and creating an equitable lien therefor upon the fee when received, was held not to be an assignment of the contract within the meaning of this section, prohibiting assignments of such contracts except under certain conditions. *Gordon v. Gwydir*, (1910) 34 App. Cas. (D. C.) 508.

### Vol. III, p. 373, sec. 2116.

**Effect of Act of March 1, 1889.**—Act of March 1, 1889, ch. 333, sec. 6, 25 Stat. L. 784, 3 Fed. Stat. Annot. 397, repealed all laws previously existing intended to prevent the Chickasaw Nation from lawfully making leases for mining coal for a period not exceeding ten years. It has been held that leases executed by the national secretary of the Chickasaw Nation, in October, 1890, for the mining of coal and other minerals, were valid, so far as they authorized the mining

of coal for a period not exceeding ten years. *McBride v. Farrington*, (1906) 149 Fed. 114, 79 C. C. A. 56, *affirming* (1904) 131 Fed. 797.

**Invalidity of lease.**—A lease of Indian lands to a white man without the consent of the Indian agent and the Commissioner of Indian Affairs, and without authorization by Act of Congress or treaty regulation, is void. *Coe v. Low*, (1904) 36 Wash. 10, 77 Pac. 1077.

### Vol. III, p. 374, sec. 2118.

**Injuries to personal or property rights.**—By this section and sections 2119 and 2124 the executive branch of the government is bound to protect Indians residing on a reservation in the possession and occupancy of their land; but this affords no remedy to the Indian for an injury to his personal or prop-

erty rights, and for such remedy he must go to some court of competent jurisdiction. *Smith v. Mosgrove*, (1908) 51 Ore. 495, 94 Pac. 970.

**Right of Indian to lay off towns.**—See under this title, vol. 3, p. 447, sec. 16.

### Vol. III, p. 376, sec. 2126. [*Dead timber may be cut, etc.*]

**Selection of trees by government agent.**—Where the United States, through its agents, selected logging superintendents, who were intrusted with the supervision of the cutting of timber on an Indian reservation, and the duty of determining the particular trees which came within the definition of "dead and down timber," which duty required the exercise of judgment and discretion, and such judgment and discretion were honestly exercised, it

was held that the government was bound thereby, and could not charge one to whom it contracted to sell the logs after they should be cut and banked with liability beyond the contract price, on the ground that some of the logs which were cut and banked, and which the purchaser took possession of under his contract, were cut from living green trees. *U. S. v. Bonness*, (1903) 125 Fed. 485, 60 C. A. 321.

### Vol. III, p. 382, sec. 2139.

The words "Indian country," as used in this section, do not, standing alone, embrace territory in which, at the time the Indian title has been extinguished, and over which,

with its inhabitants, the jurisdiction of the state for all purposes of government is full and complete. *Dick v. U. S.*, (1908) 208 U. S. 340, 28 S. Ct. 399, 52 U. S. (L. ed.) 520.

**Former Cass Lake reservation.**—The introduction of intoxicating liquors within the former Cass Lake Indian reservation, though sold by a white man upon lands purchased from the heirs of a deceased allottee, is a violation of article 7 of the treaty of Feb. 22, 1855, 10 Stat. L. 1165, with the Chippewa

Indians, and of section 2139, R. S., as amended. (1905) 25 Op. Atty-Gen. 416.

**Manner of proceeding.**—In case of violation of this section, proceedings may be taken under the section as amended, and under section 2140. (1905) 25 Op. Atty-Gen. 416.

## Vol. III, p. 384, sec. 1.

**Constitutionality.**—In *Matter of Heff*, (1905) 197 U. S. 488, 25 S. Ct. 506, 49 U. S. (L. ed.) 848, it was held that a conviction could not be had under this statute for selling liquor to an Indian, the sale not being on a reservation, and the Indian having been made a citizen and subject to the civil and criminal laws of the state.

But in *Hallowell v. U. S.*, (1911) 221 U. S. 317, 31 S. Ct. 587, 55 U. S. (L. ed.) 750, it was held that a conviction of an Indian of the offense of introducing intoxicating liquor into the Indian country and into an Indian allotment while the title to the same is held in trust by the government may be had under this Act, although the defendant Indian is a citizen of the United States and entitled, under the Acts of Aug. 7, 1882, 22 Stat. L. 341, ch. 434, sec. 7, and Feb. 8, 1887, 24 Stat. L. 388, ch. 119, sec. 8, 3 Fed. Stat. Annot. 496, to the rights, privileges, and immunities of such citizens, and to the benefit of the laws, civil and criminal, of the state in which his allotment is situated, and upon which the offense is alleged to have been committed. And in *U. S. v. Sutton*, (1909) 215 U. S. 291, 30 S. Ct. 116, 54 U. S. (L. ed.) 200, reversing (1908) 165 Fed. 253, the Supreme Court held that Congress could enact so much of this section as makes criminal the introduction of intoxicating liquor upon an allotment within the limits of the Yakima Indian reservation, in the state of Washington, made and patented to the Indian allottees under the Act of Feb. 8, 1887, 24 Stat. L. 388, ch. 119, 3 Fed. Stat. Annot. 494, by which the title is held in trust by the government, and is not alienable by the allottee without the consent of the United States, since, under the provisions with respect to Washington of the Enabling Act of Feb. 22, 1889, 25 Stat. L. 677, ch. 180, sec. 4, 7 Fed. Stat. Annot. 121, jurisdiction and control of Indian lands remain in the United States. See also *U. S. v. Boss*, (1906) 160 Fed. 132; *U. S. v. Hall*, (1909) 171 Fed. 214; *Gearlds v. Johnson*, (1911) 183 Fed. 611.

The provision of article 9 of the agreement made May 1, 1893, with the Nez Perce tribe of Indians, confirmed by Act Aug. 15, 1894, 28 Stat. L. 330, ch. 290, that allottees of such tribe, whether under the care of an Indian agent or not, shall be subject for a period of twenty-five years "to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians," can apply only to Indians who received their allotments and acquired their rights of citizenship pursuant to such agreement, and cannot affect the status of one who had pre-

viously acquired such rights and had become subject to state laws, so as to give force and validity as to him to the unconstitutional Act of Jan. 30, 1897, 29 Stat. L. 506, ch. 109, making it a crime to sell liquor to Indian allottees. *Ex p. Viles*, (1905) 139 Fed. 68.

**Repeal as to Oklahoma.**—Since by the enabling Act by which Oklahoma was admitted into the Union, Act Cong. June 16, 1906, ch. 3335, 34 Stat. L. 267, 1909 Supp. Fed. Stat. Annot. 632, the state was left with jurisdiction of the introduction of intoxicating liquors from Oklahoma into that part of the state known as Indian Territory, and was authorized to control the sale of liquor through its own courts, this section was no longer in force in that part of Oklahoma formerly known as Indian Territory after its admission as a state so as to prevent the introduction therein of liquor from Arkansas in the interstate commerce. *U. S. v. U. S. Express Co.*, (1910) 180 Fed. 1006.

**The Pueblo Indians of New Mexico** are not wards of the government, nor are they in charge of an Indian superintendent or agent, nor are they Indians over whom the government through its department exercises guardianship, within the meaning of this section penalizing the sale or gift of intoxicants to such Indians. *U. S. v. Mares*, (1907) 14 N. M. 1, 88 Pac. 1128.

**"Indian country."**—Since the allotment of lands in severalty to all of the Indians on the Uintah Indian reservation in Utah, subject to the provisions of Act Feb. 8, 1887, ch. 119, 24 Stat. L. 388, 3 Fed. Stat. Annot. 496, and the restoration of the remainder of the lands of the reservation to the public domain, no part of such lands is "Indian country," within the meaning of the Act Jan. 30, 1897, ch. 109, 29 Stat. L. 506; and a prosecution cannot be maintained thereunder for introducing intoxicating liquor thereon, even on a portion which was subsequently reserved by executive order for agency and school purposes. *U. S. v. Boss*, (1906) 160 Fed. 132.

**Appeal by government.**—The decision of a federal District Court sustaining a demurrer to an indictment for introducing liquor into the Indian country is reviewable in the federal Supreme Court by writ of error, under the Act of March 2, 1907, 34 Stat. L. 1249, ch. 2564, 1909 Supp. Fed. Stat. Annot. 292, where the question whether the indictment charges any offense against the United States involves the validity of this section as applied to the facts stated. *U. S. v. Sutton*, (1909) 215 U. S. 291, 30 S. Ct. 116, 54 U. S. (L. ed.) 200, reversing (1908) 165 Fed. 253.

**Carlisle students.**—This section extends to Indian students at the Carlisle school, which

is maintained at the expense of the government under the direction of the Interior Department. *U. S. v. Belt*, (1904) 128 Fed. 168.

**Knowledge or intent.**—It is no defense to

a prosecution for a violation of this section for the defendant to assert that he did not know that the person to whom he sold was an Indian. *U. S. v. Stofello*, (1904) 8 Ariz. 461, 76 Pac. 611.

### Vol. III, p. 387, sec. 2145.

**Murder.**—The murder of one negro by another within the limits of an Indian reservation in a territory is committed within a place or district under the exclusive jurisdiction of the United States, within the meaning of R. S. sec. 5339, 3 Fed. Stat. Annot. 231, defining and punishing the crime of murder, as amended by the Act of Jan. 15, 1897, 29 Stat. L. 487, ch. 29, 2 Fed. Stat. Annot. 357, and extended by this section to the Indian country, when not within the exceptions made by section 2146, which by reason of the race of the accused and deceased do not apply. *Pickett v. U. S.*, (1910) 216 U. S. 456, 30 S. Ct. 265, 64 U. S. (L. ed.) 566.

**Larceny.**—Larceny committed in an Indian reservation in the territory of Oklahoma by one not an Indian is a crime against the laws of the United States and cognizable by the District Courts of the territory while exercising the jurisdiction vested in the Circuit and District Courts of the United States. *Brown v. U. S.*, (1906) 146 Fed. 975, 77 C.

C. A. 173, *affirming* (1904) 13 Okla. 512, 75 Pac. 291.

**Incest.**—The provisions of this and the following section are not affected by any subsequent legislation except by Act March 3, 1885, 23 Stat. L. 385, 3 Fed. Stat. Annot. 388, which makes certain enumerated crimes committed by an Indian against the person or property of another Indian within a territory, either within or without a reservation, subject to punishment in accordance with the laws of such territory. Act March 3, 1887, ch. 397, sec. 4, 24 Stat. L. 635, 1 Fed. Stat. Annot. 709, which defines and prescribes the punishment for the crime of incest, is not therefore in force within an Indian reservation where both parties to the alleged act are Indians and there is no law making such act a crime. *Ex p. Hart*, (1907) 157 Fed. 130.

**Oklahoma.**—To the same effect as the original note, see *Brown v. U. S.*, (1906) 146 Fed. 975, 77 C. C. A. 173, *affirming* (1904) 13 Okla. 512, 75 Pac. 291.

### Vol. III, p. 388, sec. 9.

**Construction of statute.**—This section uses the term "arson" in its common-law meaning and is in effect an extension of the provisions of R. S. sec. 5385, 1 Fed. Stat. Annot. 457, punishing the offense of arson within a fort, dockyard, etc., to the same offense committed by an Indian on a reservation; and an indictment charging an Indian with the burning of a "building" on a reservation, not averred to have been a dwelling house, nor occupied as such, does not state an offense thereunder. *U. S. v. Cardish*, (1906) 143 Fed. 640.

**Conclusiveness of judgment.**—Where an Indian was indicted in a federal court within the district of Oregon for an offense committed on an Indian reservation, and was convicted and sentenced on a plea of not guilty, it was held that the judgment constituted a conclusive adjudication that he was a nonallotted Indian, and therefore triable in the federal court, and hence that he could not obtain his discharge on habeas corpus on the ground that both he and his victim were allotted Indians, and that the federal court had no jurisdiction to try him. *Ex p. Savage*, (1908) 158 Fed. 205.

**Crimes on allotted lands within reservation.**—Land within the Tulalip Indian reservation, in the state of Washington, allotted and patented in severalty, pursuant to the treaty with the Omahas of March 16, 1854, 10 Stat. L. 1043, and the treaty of Point Elliot of Jan. 22, 1855, 12 Stat. L. 927, which provide for a conditional alienation only, is not, by reason of such allotment and patent, excepted from the reservation, so as to defeat the exclusive jurisdiction of the federal courts

under this section of crimes committed on such land by one Indian upon the person of another. *U. S. v. Celestine*, (1909) 215 U. S. 278, 30 S. Ct. 93, 54 U. S. (L. ed.) 195.

**Refers to Indians maintaining tribal relations.**—This section, providing that Indians committing certain crimes within the limits of an Indian reservation shall be subject to the same laws, and be tried in the same courts, and be subject to the same penalties as all other persons committing said crimes within the exclusive jurisdiction of the United States, when construed in connection with the other sections of the Act of which it is the concluding section, which show its purpose to be to make certain appropriations for the benefit of the Indian Department, fulfil treaty stipulations, provide for depredation claims, for schools, and other miscellaneous matters connected with the Indian service, refers only to Indians sustaining tribal relations, and does not deprive the state courts of jurisdiction over crimes committed by Indians who either have never sustained or have severed all tribal relations. *State v. Howard*, (1903) 33 Wash. 250, 74 Pac. 382; *State v. Smokalem*, (1905) 37 Wash. 91, 79 Pac. 603.

**Proof of tribal relations.**—In a prosecution for murder, the jurisdiction of the court was challenged on the ground that the defendant and deceased were Indians; that the crime was committed on a reservation, and that the proof did not show that defendant had severed his tribal relations. While the first two points were sustained by evidence, the defendant's own testimony as to the latter was that he was not by birth a member of the tribe on whose reservation the

crime was committed; nor did he show that he had in any other manner become allied with that tribe, or that he ever lived within the limits of the reservation, but that he had lived for a number of years with members of his own family, among white people, and away from any Indian tribe or reservation. It was held to show that the defendant sustained no tribal relation. *State v. Howard*, (1903) 33 Wash. 250, 74 Pac. 382.

**Record.**—Where, on scire facias on a forfeited recognizance, the record did not disclose that the accused was an Indian or that he stole the property charged from another Indian, it was held that he was not subject to this section. *Hollister v. U. S.*, (C. C. A. 1906) 145 Fed. 773.

**Jurisdiction challenged on appeal.**—In a prosecution of an Indian for murder, the jurisdiction of the state courts on the ground that the defendant and deceased were both Indians, and that the crime was committed within the limits of an Indian reservation, and that there was no proof that defendant had severed his tribal relations, can be challenged for the first time on appeal. *State v. Howard*, (1903) 33 Wash. 250, 74 Pac. 382.

### Vol. III, p. 389, sec. 5.

**Jurisdiction of offense of rape.**—See under this title, vol. 3, p. 496, sec. 6.

### Vol. III, p. 390, sec. 2147.

**Agent cannot evict lessee.**—To the same effect as the original note, see *Stephens v. Quigley*, (C. C. A. 1903) 126 Fed. 148.

**Authority of military.**—Under this section and the section immediately following the

**Indictment.**—Under this section extending all criminal laws to all Indians, excepting offenses committed upon a reservation by one Indian against another, it is not necessary that a state indictment against one Indian, for an offense against another, charge, and that the state prove, that the offense was committed off a reservation, since it is not necessary, in a state prosecution, to negative the federal jurisdiction, nor for the state to prove more than that the offense was committed within the country. *State v. Buckaroo Jack*, (1908) 30 Nev. 325, 96 Pac. 497.

**Evidence.**—That a homicide occurred at a house about a quarter of a mile from an Indian day school was held to be insufficient to show that it occurred on a reservation. *State v. Buckaroo Jack*, (1908) 30 Nev. 325, 96 Pac. 497.

**Burden of proof.**—The burden is on an Indian, accused by the state of an offense against another Indian, to show that the offense was committed on a reservation, so as to give the federal courts exclusive jurisdiction, under the express terms of this section. *State v. Buckaroo Jack*, (1908) 30 Nev. 325, 96 Pac. 497.

### Vol. III, p. 390, sec. 2148.

**Nature of proceeding for recovery of penalty.**—The penalty provided by this section can only be recovered in a civil action, and not as a fine in a criminal proceeding. *U. S. v. Baker*, (1903) 4 Ind. Ter. 544, 76 S. W. 103.

**When penalty accrues.**—Under this section in connection with R. S. secs. 2147 and 2149, it has been held that the penalty imposed by this section is incurred when the return is made after removal under R. S. sec. 2149. *U. S. v. Baker*, (1903) 4 Ind. Ter. 544, 76 S. W. 103.

### Vol. III, p. 390, sec. 2149.

**Confinement after removal.**—This section only authorizes the removal of troublesome persons from a reservation, and does not imply authority to detain them in confinement after such removal. *In re Bi-A-Lil-Le*, (1909) 12 Ariz. 150, 100 Pac. 450.

**Alderman of incorporated town.**—Under this section the commissioner, prior to the Act Cong. May 27, 1902, ch. 888, 32 Stat. L. 245, 3 Fed. Stat. Annot. 486, prohibiting the removal of certain citizens from the Indian Territory, with the approval of the Secretary of the Interior, was authorized to remove a person from the Indian Territory who, in his judgment, was detrimental to the welfare of the Indians, though he was an alderman of an incorporated town in the territory. *Ex p. Carter*, (1903) 4 Ind. Ter. 539, 76 S. W. 102.

**Removal of collectors.**—The Commissioner of Indian Affairs is authorized, with the approval of the Secretary of the Interior, to cause collectors to be excluded and removed from a tribal Indian reservation on days when payments are being made to the Indians, if in his judgment the presence of collectors therein at such times is detrimental to the peace and welfare of the Indians; and this although the reservation be within a state and the Indians be the holders, under trust patents issued to them pursuant to Act Feb. 8, 1887, ch. 119, 24 Stat. L. 388, 3 Fed. Stat. Annot. 494, of allotments adjacent to the reservation, and be, therefore, citizens of the United States and the state. *Rainbow v. Young*, (C. C. A. 1908) 161 Fed. 835.



**Vol. III, p. 408, sec. 31.** [*Constitution and criminal laws of the United States applicable.*]

The full faith and credit clause of the Constitution of the United States applies to Indian Territory courts. *Tootle v. McClellan*, (1907) 7 Ind. Ter. 64, 103 S. W. 766.

**Vol. III, p. 415, sec. 41.**

**Construction.**—This section does not affect the power under R. S. sec. 1014, 2 Fed. Stat. Annot. 321, and Act of May 28, 1896, ch. 252, sec. 19, 29 Stat. L. 184, 4 Fed. Stat. Annot. 79, of a United States commissioner, appointed for a district in a state, to issue a

warrant for the arrest of a person in such district for an offense committed in the Indian Territory against the laws of the United States. *Douglass v. Stahl*, (1903) 71 Ark. 236, 72 S. W. 568.

**Vol. III, p. 422, sec. 4.** [*Arkansas criminal law and procedure in force.*]

**Determination of punishment by jury.**—Since this section puts in force Mansf. Dig. of the Gen. Laws of Arkansas, sec. 2283, providing that the jury on rendering a verdict of guilty must affix the punishment if the amount thereof is not determined by law, one on trial for crime punishable by fine not ex-

ceeding a specified sum, and by imprisonment for not less than a specified time, nor for more than a specified time, is entitled to have the jury determine the punishment on their finding him guilty. *Taylor v. U. S.*, (1906) 6 Ind. Ter. 350, 98 S. W. 123.

**Vol. III, p. 422, sec. 4.** [*In conflicting cases United States laws to prevail, larceny excepted.*]

**Receiving stolen goods.**—While by this section Congress put in force chapters 45 and 46 of Mansfield's Digest of the Laws of Arkansas (ch. 19, 20, Ind. Ter. Ann. Stat. 1899), relative to criminal law and procedure, and such chapters are exclusive of all other laws, yet where the laws of the United States have

provided for the punishment of an offense, defining it and prescribing the punishment, as in case of R. S. sec. 5357, 6 Fed. Stat. Annot. 761, relative to receiving stolen goods, such laws will govern and be in force in the Indian Territory. *Bise v. U. S.*, (1904) 5 Ind. Ter. 602, 82 S. W. 921.

**Vol. III, p. 423, sec. 4.** [*Appeals.*]

**Constitutionality.**—The provision that no appeal shall be allowed from a commissioner's court in civil cases where the "judgment" does not exceed twenty dollars, is violative of the constitutional provision guaranteeing

the right of trial by jury where the value in controversy exceeds twenty dollars. *Missouri, etc., R. Co. v. Phelps*, (1903) 4 Ind. Ter. 706, 76 S. W. 285.

**Vol. III, p. 424, sec. 8.**

**Effect of Act of Jan. 30, 1897.**—This section was not impliedly repealed by the Act of Congress of Jan. 30, 1897, 29 Stat. L. 506, ch. 109, 3 Fed. Stat. Annot. 384. *U. S. v. Buckles*, (1906) 6 Ind. Ter. 319, 97 S. W. 1022.

**Still in force.**—This section is still in force in Indian Territory and has been since its enactment. *Burch v. U. S.*, (1907) 7 Ind. Ter. 284, 104 S. W. 619.

**Sale by agent.**—Where an agent solicited orders in Indian Territory for the sale of intoxicating liquors, and forwarded the order to his principal, a nonresident, who shipped the liquors pursuant to the orders to the buyers therein named, the agent, whether he collected the purchase price or not, violated the statute. *Taylor v. U. S.*, (1906) 6 Ind. Ter. 350, 98 S. W. 123.

**Presumptions.**—On a prosecution for introducing liquor into Indian Territory, an instruction that the possession of liquor in the territory was *prima facie* evidence of the

introduction of the same by the party in whose possession it was found was held to be error. The court should have instructed that if the jury found beyond a reasonable doubt that defendant was in possession of liquor within the territory the law presumed him guilty of having introduced it, unless he could show otherwise by a reasonable, truthful explanation. *Ellis v. U. S.*, (1906) 6 Ind. Ter. 291, 97 S. W. 1013.

**Indictment.**—An indictment alleged that accused "did . . . introduce" from without the limits of the Indian Territory intoxicating liquors. It was held that the indictment charged the offense denounced by this section, and not the offense denounced by the Act of Congress of Jan. 30, 1897, 29 Stat. L. 506, ch. 109, 3 Fed. Stat. Annot. 384, making it an offense for a person to "introduce or attempt to introduce" any intoxicating liquors into the Indian country, for the word "introduce" in the indictment is synonymous

with the words used in the Act of 1895. U. S. v. Buckles, (1906) 6 Ind. Ter. 319, 97 S. W. 1022.

An indictment charging in one count that the accused sold intoxicating liquors within

the Indian Territory to a person named, and in a second count that he furnished intoxicating liquor to the person named, is not bad as charging two distinct offenses. Taylor v. U. S., (1906) 6 Ind. Ter. 350, 98 S. W. 123.

### Vol. III, p. 426, sec. 11.

**Jurisdiction.**—Under Act June 10, 1896, ch. 398, 29 Stat. L. 339, 3 Fed. Stat. Annot. 431, conferring on the Dawes Commission the power of determining applications to be enrolled as members of one of the tribes of Indians, and providing that appeal may be had from it to the District Court, and Act July 1, 1898, ch. 545, 30 Stat. L. 591, 3 Fed. Stat.

Annot. 467, allowing appeal in certain cases direct to the United States Supreme Court, the Court of Appeals of the Indian Territory has no jurisdiction of an appeal from the District Court from an order as to taxation of costs in such a case. Chickasaw Nation v. Roff, (1903) 4 Ind. Ter. 535, 76 S. W. 101.

### Vol. III, p. 431. [*Applications for citizenship.*]

**Constitutionality.**—The legislation authorizing the commission to the Five Civilized Tribes to determine citizenship in the Five Nations is constitutional. *Dukes v. Goodall*, (1904) 5 Ind. Ter. 145, 82 S. W. 702; *Dick v. Ross*, (1905) 6 Ind. Ter. 85, 89 S. W. 664.

**Effect of application for enrolment.**—The application for enrolment under this Act, notwithstanding the fact that applicants were already on the rolls, was a waiver of the conclusiveness of the rolls in their cases, the Act providing that the commission shall bear and determine the application of all persons who may apply to them for citizenship in any of said nations. (1907) 26 Op. Atty.-Gen. 127.

**Right to enrolment.**—In (1907) 26 Op. Atty.-Gen. 127, it appeared that K. and L., children of white parents who had become affiliated with the Choctaw Nation by an act of the Choctaw council, and thereby granted

all rights, privileges, and immunities of the Choctaw citizens, were born in the Choctaw Nation, have always resided there as its recognized citizens, and their names appear upon various tribal rolls. They applied to the Commission to the Five Civilized Tribes under this Act and were enrolled, and no appeal was taken by the nation. It was held that they are clearly entitled to enrolment.

**Parties.**—Since Indian lands apportioned to the Indians of the Chickasaw and Choctaw Nations are still public lands, and are not held by the allottees in their individual capacity as tenants in common, prior individual Indian allottees, members of the Chickasaw and Choctaw Nations, are not necessary parties to suits brought to determine citizenship rights of others, as authorized by this Act. *Dukes v. Goodall*, (1904) 5 Ind. Ter. 145, 82 S. W. 702.

### [*Present tribal rolls confirmed.*]

**Construction of paragraph.**—This paragraph has reference to a previous denial or failure of the tribal authorities to act, and

not to action or nonaction of the commission. (1907) 26 Op. Atty.-Gen. 127.

### Vol. III, p. 439, sec. 2.

**Scope of statute.**—The provision of this section that when in any suit in the courts of the Indian Territory it should appear that the property of any tribe would be affected such tribe should be brought in as a party, applies only to suits relating to membership

in the tribes and the right to tribal lands or funds, and does not have the effect of abolishing the general exemption of the tribes from civil suits. *Adams v. Murphy*, (1908) 165 Fed. 304, 91 C. C. A. 272, *reversing* (1907) 7 Ind. Ter. 395, 104 S. W. 658.

### Vol. III, p. 439, sec. 3. [*Jurisdiction of United States courts, etc.*]

**Purchaser pending suit.**—In a suit under this section the general rule applies that a stranger cannot, by a conveyance or transfer of possession from the defendant *pendente lite*, acquire any rights which are not subject to the judgment subsequently rendered in the suit, whether or not he is made a party there-

to; and where such a purchaser or transferee is brought in by an amended complaint it is not necessary to allege that his membership in the tribe has been disallowed. *Hargrove v. Cherokee Nation*, (1904) 129 Fed. 186, 63 C. C. A. 276.

### [*Defense of noncitizen holding under lease, etc.*]

**Nature of action.**—The provisions in this Act for the recovery of value of improvements placed on lands belonging to certain Indian

tribes, or members thereof, by persons in possession under contracts executed prior to Jan. 1, 1898, did not change the character of an

action by a member of one of those tribes of forcible detainer from a law action to a suit in equity. *Sharrock v. Kreiger*, (1906) 6 Ind. Ter. 466, 98 S. W. 161.

**Rental value.**—The term "rental value," as used in this section, means the sum mentioned in the rental contract up to the year

1900, the time when it was intended by the statute that all leases should terminate, and after that whatever was fair and reasonable for the use and occupation of the premises. *Swinney v. Kelley*, (1903) 5 Ind. Ter. 12, 76 S. W. 303.

### Vol. III, p. 440, sec. 5.

**Sufficiency of notice.**—Under this section proper notice by the person bringing the action is sufficient, although an Indian nation is afterward joined as party plaintiff. *Har-*

*grove v. Cherokee Nation*, (C. C. A. 1904) 129 Fed. 186; *Price v. Cherokee Nation*, (1904) 5 Ind. Ter. 518, 82 S. W. 893.

### Vol. III, p. 441, sec. 6.

**Substitution of parties.**—A suit under this Act to dispossess an intruder on lands owned by an Indian tribe or nation, although brought by a member of the tribe, as permitted by the Act, when the tribe fails or refuses to bring it, is based primarily on the right of the tribe, and the court may properly permit it to be substituted as plaintiff, and to allow the name of the original plaintiff to be stricken out, with his consent. *Brought v. Cherokee Nation*, (C. C. A. 1904) 129 Fed. 192.

**Complaint.**—In *Price v. Cherokee Nation*, (1904) 5 Ind. Ter. 518, 82 S. W. 893, a complaint in an action of ejectment by a Chero-

kee Indian against a citizen of the United States, in which plaintiff sought to recover land and the improvements thereon, under various acts of the Cherokee national council, set out in the complaint, was held to state a cause of action.

**Verification of complaint.**—It is sufficient compliance with the requirement of this Act that a "sworn complaint" shall be filed if the complaint is verified by the authorized attorney of the tribe or nation which is plaintiff, who states that the facts alleged are within his knowledge. *Brought v. Cherokee Nation*, (C. C. A. 1904) 129 Fed. 192.

### Vol. III, p. 442, sec. 11.

**Curtsey.**—In *Sanders v. Sanders*, (Okla. 1909) 117 Pac. 338, it was held that a citizen of the Creek Nation in possession of lands of said nation, who fled thereon before the Commission to the Five Civilized Tribes, under this Act, and died April 28, 1900, without receiving her certificate of allotment therefor, was seized of no estate of inheritance, and that curtesy therein did not attach.

**Descent and distribution.**—The allotment of a citizen of the Creek Nation set apart

to her under this Act, who died in possession thereof prior to Act Cong. March 1, 1901, ch. 676, 31 Stat. L. 861, without receiving her certificate of allotment therefor, was distributable to her heirs under patent therefor to them subsequently issued according to the laws of descent and distribution of the Creek Nation, as provided in sections 6 and 7 of such Act. *Sanders v. Sanders*, (Okla. 1909) 117 Pac. 338.

### Vol. III, p. 443, sec. 13.

**Authority of Secretary of Interior.**—An instrument dated July 9, 1901, purporting to be a mineral lease from a Delaware Indian of certain lands in the Indian Territory, was held to be void at its inception, as the power to make such a lease was, at that time, vested exclusively in the Secretary of the Interior. This authority was taken from the Secretary of the Interior by section 73 of the Act of July 1, 1902, 32 Stat. L. 727, and it is now impossible for him to give validity to the lease, either in whole or in part. (1904) 25 Op. Atty-Gen. 168.

**Validity of leases.**—By treaty of 1855, 10 Stat. L. 1116, a certain district within the Indian Territory was set off to the Choctaw and Chickasaw Nations, to be held in common, under the control of the tribal organizations in the district of its own jurisdiction. By Act of the Chickasaw national legislature, passed in 1886 (Laws Chickasaw Nation, p. 188) any resident citizens (not less

than three) were authorized to form a corporate company to engage in developing coal mines. This Act was amended Sept. 24, 1887 (Laws Chickasaw Nation, p. 190), so as to include petroleum, natural gas, and asphaltum. Reservation of all lands containing deposits of such minerals was made by Act Cong. June 28, 1898, ch. 517, sec. 13, 30 Stat. L. 498, which required payment of royalties for the benefit of the Indians; and the Chickasaw statute also provided that after the formation of the company, and on compliance with such statute, the corporation was authorized to contract with capitalists to develop and work the mines. It was held that such Acts impliedly authorized the leasing of coal and oil lands allotted to such Indians for a limited period for the tribal or individual benefit of such Indians, and that such leases were not void on their face. *McBride v. Farrington*, (1904) 131 Fed. 707, affirmed (C. C. A. 1906) 149 Fed. 114.

**Vol. III, p. 446, sec. 15.** [*Owner of improvements to deposit appraised value, etc.*]

**Improvements.**—This section did not terminate the interest of a Creek Indian in a town lot, unimproved by him, but improved by one to whom he had leased the lot. *W. O. Whitney Lumber, etc., Co. v. Crabtree*, (1907) 7 Ind. Ter. 635, 104 S. W. 862.

**Obligation to restore possession to lessor.**—The provision in this Act which gives the owner of improvements on a lot in the Indian

Territory a preferred right to purchase the same after it shall have been appraised does not affect the obligation of a white man, who was at the time of its passage in possession of a lot under a lease from an Indian, to restore possession to the lessor on the termination of the lease in accordance with its terms. *Fraer v. Washington*, (1903) 125 Fed. 280, 60 C. C. A. 184.

**Vol. III, p. 447, sec. 16.** [*Royalties and rents to be paid into treasury—to credit of tribe.*]

**Retrospective operation of Act.**—The collection of royalties due and owing to the lessors of coal mines in the Choctaw Nation for coal mined under valid leases prior to this Act was not prohibited by the provisions of section 16, making it unlawful for any person after the passage of such Act to demand or

receive any such royalty, or for any one to pay any such royalty to any individual. *Southwestern Coal Co. v. McBride*, (1902) 185 U. S. 499, 22 S. Ct. 763, 46 U. S. (L. ed.) 1010, *affirming* (1906) 104 Fed. 1007, 43 C. C. A. 683.

**Vol. III, p. 448, sec. 16.** [*Retention of lands, etc., until allotment.*]

**Illegitimate children.**—The first proviso of this section does not authorize a citizen to hold lands as a prospective allotment for an illegitimate child. *Walker v. Roberson*, (1908) 21 Okla. 894, 97 Pac. 609.

**Lease before allotment.**—Under this proviso it was held that a lease of lands mentioned in this section by an Indian to a citizen of the United States was good until the allotment took place. *Choctaw, etc., R. Co. v. Bond*, (1906) 6 Ind. Ter. 515, 98 S. W. 335.

**Right of Indian to lay off towns.**—This section provides that any citizen in possession of such lands as would be his reasonable share of the lands of his nation or tribe may rent them until allotment has been made, and section 23 provides that individuals may rent their proportionate share of tribal lands until allotments are made. R. S. sec. 2118, 3 Fed. Stat. Annot. 374, provides that every person who makes a settlement on any land belonging to any Indian tribe, or surveys it,

or attempts to designate boundaries, shall be subject to a certain penalty, and the Curtis Act (Act of June 28, 1898, ch. 517, 30 Stat. L. 495, 3 Fed. Stat. Annot. 439), provides for the laying off of towns under the direction of the Secretary of the Interior. It has been held that inasmuch as section 2118 was intended to prevent white men from settling Indian lands, and the provision of the Curtis Act in regard to laying off towns applies only to the laying off and incorporation of a legal subdivision, a Chickasaw Indian in possession of his prospective allotment has a right to lay out a town and rent lots on such allotment, no political or legal subdivision being created. *U. S. v. Lewis*, (1903) 5 Ind. Ter. 1, 76 S. W. 299.

**Complaint.**—Under this section a complaint in an action for rent should show that the plaintiff is a citizen and that the lands come within the proviso. *Hubbard v. Chiam*, (1904) 5 Ind. Ter. 95, 82 S. W. 686.

**Vol. III, p. 448, sec. 17.**

**Subsequent birth of child.**—A member of the Creek tribe of Indians, who in violation of sections 17, 18, held possession of land in excess of that to which he, his wife, and minor children were entitled as allotments,

acquired no rights thereto for the benefit of a child subsequently born to him, as against a Creek citizen who had prior to the birth of such child filed upon such land. *Walker v. Roberson*, (1908) 21 Okla. 894, 97 Pac. 609.

**Vol. III, p. 448, sec. 18.**

**Jurisdiction.**—Under this section and other Acts conferring exclusive jurisdiction upon the Commission to the Five Civilized Tribes under the direction of the Secretary of the Interior to determine all matters relative to the appraisal and allotment of lands, the commission had jurisdiction, exclusive of the

courts, to determine a question as to whether one should be enrolled as a citizen of the Cherokee Nation and whether he should participate in the distribution of the property of the Cherokee tribe. *Dick v. Ross*, (1905) 6 Ind. Ter. 85, 89 S. W. 664.

Vol. III, p. 449, sec. 21. [*Enrolment of Cherokees, etc.*]

**Right to go behind roll.**—In (1907) 26 Op. Atty-Gen. 171, it appeared that one G., a white man, intermarried into the Cherokee Nation in 1873, and his name appeared on the Cherokee authenticated tribal roll of 1880. He applied to the Commission of the Five Civilized Tribes in 1901 for enrolment, which application was finally denied Feb. 9, 1907, upon the authority of the case of *Red Bird v. U. S.*, (1906) 203 U. S. 76, 27 S. Ct. 29, 51 U. S. (L. ed.) 96, he having abandoned his wife in 1878. Section 667 of the Cherokee Constitution also provides that every intermarried person who abandons his wife shall thereby forfeit every right and privilege of citizenship in that nation. It was held that

the applicant was entitled to enrolment under section 21, which specifically directs the Commission "to enroll all persons now living whose names are found on said roll."

**Names placed on tribal rolls by fraud.**—The only names which this section declares shall be eliminated from the tribal rolls are those placed thereon by fraud or without authority of law. (1907) 26 Op. Atty-Gen. 127.

The authority given the commission to eliminate from the tribal rolls those placed thereon by fraud or without authority of law is expressly limited to "any other rolls," meaning any other than the roll of 1880, which was confirmed. (1907) 26 Op. Atty-Gen. 171.

## Vol. III, p. 451, sec. 23.

**Unlawful detainer.**—A lease of agricultural Indian land being void and terminated on Jan. 1, 1900, by this section a lessee under such a lease cannot after such date maintain unlawful detainer against his subtenant holding over. *Owens v. Eaton*, (1904) 5 Ind. Ter. 275, 82 S. W. 746.

**Denying landlord's title.**—In such an action one who enters as sublessee of such land may deny title of the person under whom he entered. *Owens v. Eaton*, (1904) 5 Ind. Ter. 275, 82 S. W. 746.

**Right of Indian to lay off towns.**—See under this title, vol. 3, p. 447, sec. 16.

## Vol. III, p. 451, sec. 25.

**Extent of jurisdiction.**—Inquiry into the validity of the method by which certain amendments to the constitution of the Cherokee Nation were adopted, or revision of the political or administrative action of that nation, was not authorized by this section, empowering the Delaware Indians residing in

the Cherokee Nation to bring suit in the Court of Claims for the purpose of determining the contractual rights of the Delawares in Cherokee national lands and funds. *Delaware Indians v. Cherokee Nation*, (1904) 193 U. S. 127, 24 S. Ct. 342, 48 U. S. (L. ed.) 646, (1903) 38 Ct. Cl. 455.

## Vol. III, p. 452, sec. 26.

**Laws relating to marriage.**—Under this section the Cherokee statute relating to marriage with one not a citizen and who moves away cannot be enforced by the federal courts. *McAllaster v. Edgerton*, (1901) 3 Ind. Ter. 704, 64 S. W. 583.

**Vested rights.**—A woman's rights as widow and heir under the Cherokee statute of descent, having vested on death of her husband, are not affected by the subsequent repeal of the statute by this section. *Nivens v. Nivens*, (1903) 4 Ind. Ter. 574, 76 S. W. 114.

Vol. III, p. 454, sec. 29. [*ALLOTMENT OF LANDS.*]

**Contract to sell.**—Under the provision of this section "that all contracts looking to the sale or incumbrance of any of the land of an allottee, except the sale heretofore provided, shall be null and void," and Act of July 1, 1902, ch. 1362, 32 Stat. L. 642, 10 Fed. Stat. Annot. 150, providing that allotted land shall not be affected by any deed, debt, or obligation contracted prior to the time when such land may be alienated under the Act, a con-

tract by one not an Indian citizen before allotment to buy land is void; such person having no authority to purchase or sell Indian lands before allotment and the expiration of the period of restrictions upon alienation. *Kelly v. Harper*, (1907) 7 Ind. Ter. 541, 104 S. W. 829. See also *Sayer v. Brown*, (1907) 7 Ind. Ter. 675, 104 S. W. 877; *Lewis v. Clements*, (1908) 21 Okla. 167, 95 Pac. 769.

Vol. III, p. 456, sec. 29. [*MEMBERS' TITLES TO LANDS.*]

**Approval of Secretary of Interior.**—The Secretary of the Interior is authorized to approve the patents executed by the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation for the lands allotted to the members of those tribes of In-

dians in accordance with the provisions of this Act, and his approval thereof is essential to constitute such patents a transfer of the allottees of such title as was intended by the Act. (1905) 25 Op. Atty-Gen. 460.

Vol. III, p. 458, sec. 29, sixth par. [*It is agreed, etc.*]

Validity of regulations by Secretary of Interior.—In *U. S. v. McMurray*, (1910) 181 Fed. 723, it was held that regulations by the Secretary of the Interior were void which required lessees of coal and asphalt lands to mine on each lease 3,000 tons the first year,

4,000 tons the second, 7,000 tons the third, 8,000 tons the fourth, and 15,000 tons the fifth and each succeeding year, or pay the royalties on such quantities if not mined, and prescribing that a failure to do so would subject the lease to cancellation.

Vol. III, p. 469. [*Continuance of authority — no enrolment unless citizen.*]

Rights of intermarried whites.—See under this title, vol. 3, p. 449, sec. 21.

Vol. III, p. 485. [*Commission to five civilized tribes — Creek roll — rules for descent.*]

Descent and distribution.—Chapters 49 and 155, Mansf. Dig. (Ind. Ter. Annot. Stat. 1899, ch. 21, 58), entitled "Descent and Distribution," and "Wills and Testaments," respectively, as modified by Acts of Congress (Act May 2, 1899, ch. 182, 26 Stat. L. 81; Act June 30, 1902, ch. 1323, 32 Stat. L. 500), were in force in the Creek Nation on the 13th day of November, 1905. In *re Brown*, (1908) 22 Okla. 216, 97 Pac. 613.

Where a child was born to citizens of the Creek Nation on May 6, 1901, died in November, 1901, was enrolled by the commission on Oct. 8, 1902, allotment selected on April 28, 1904, and patent issued to his heirs on Oct. 10, 1904, it was held that the Arkansas law of descent and distribution embodied in chapter 49, secs. 2522-2545 of Mansfield's Digest (Ind. Ter. Annot. Stat. 1899, secs. 1820-1843), nominated the heirs of such deceased child and fixed the shares and portions the heirs derived in such allotment. *Shulthis v. MacDougal*, (1907) 162 Fed. 331.

Time section took effect.—The provision of this section repealing the provisions of the original agreement made by the Creeks, in so far as it provided for descent and distribution according to the Creek law of descent and distribution, and substituting therefor chapter 49 of Mansfield's Digest (Ind. Ter. Annot. Stat. 1899, ch. 21), did not, by virtue of the joint resolution of Congress, take effect until July 1, 1902. *De Graffenreid v. Iowa Land, etc., Co.*, (1908) 20 Okla. 687, 95 Pac. 624.

Dower.—The noncitizen widow of an allottee of a quarter section of land of the Creek Nation, whose husband died in June, 1906, was held to be entitled to dower in his estate, and until it was assigned to her was entitled to remain and possess the home or house of her late husband, together with the farm thereto attached, free from all rent. *Hawkins v. Stevens*, (1908) 21 Okla. 849, 97 Pac. 567.

Vol. III, p. 491. [*Further application of homestead laws to Indians — patented lands held in trust.*]

Ejectment.—An Indian patentee of public land, who was entitled to present and exclusive possession thereof, though the land was held in trust for him by the United States for a period of twenty-five years, at the end of which time he would acquire the fee, could maintain ejectment therefor alone without joining the United States; his title being sufficient to support a possessory action. *Frazee v. Piper*, (1908) 51 Wash. 278, 98 Pac. 760.

Restriction on alienation.—Where an Indian held under this section, extending the homestead privilege to Indians, but inhibiting the alienation of land patented thereunder for a period of twenty-five years after patent, an attempted sale within that period was void. *Frazee v. Piper*, (1908) 51 Wash. 278, 98 Pac. 760.

Laws governing issuance of patent.—Though an Indian entered upon public land under Act Cong. March 3, 1875, ch. 131, 18 Stat. L. 402, 3 Fed. Stat. Annot. 490, extending the privileges of the homestead laws to Indians who have abandoned their tribal relations, and prohibiting alienation until five years after patent is issued, but was not entitled to make final proof until after the enactment of this section continuing the homestead privilege but extending the prohibition of alienation to twenty-five years, it was held that the patent was issuable under the latter Act so that the twenty-five years' prohibition of alienation applied to such land. *Frazee v. Piper*, (1908) 51 Wash. 278, 98 Pac. 760.

## Vol. III, p. 492, sec. 1, note.

Construction of statute.—Under the general Indian Allotment Act of 1887, a continuing power was vested in the President, which

was not exhausted by the first order for allotments. *U. S. v. Fairbanks*, (1909) 171 Fed. 337, 96 C. C. 4, 229.

## Vol. III, p. 493, sec. 2.

**Right to allotment.**—Where the mother of P., a Walla Walla Indian, married an Iroquois, and P., who was born within the Walla Walla region, was a minor when her mother again married a French Canadian, but never severed her tribal relations, which were subsequently expressly recognized by a general Indian council, it was held that the marriage of her mother did not deprive P. of the right to select lands held for allotment in the Umatilla Indian reservation for herself and her children. *Smith v. Bonifer*, (1907) 154 Fed. 883, *affirmed* (1909) 166 Fed. 846, 92 C. C. A. 604.

In *La Clair v. U. S.*, (1910) 184 Fed. 128, it was held that the plaintiffs were not debarred from the right to receive allotments on the Yakima reservation by the fact that their parents had received allotments on the Puyallup reservation as heads of families, and that the plaintiffs were named in the patents as members of such families.

**Recovery of lands from divorced wife.**—In *Morrisett v. U. S.*, (1904) 132 Fed. 891, it appeared that the plaintiff, an Indian of the Walla Walla tribe, selected and claimed the allotment to him of 160 acres of land in the Umatilla reservation as the head of a family consisting of himself and his wife. He alleged that through the misrepresentation of his wife that she was a single woman, eighty acres of the tract so selected was allotted to her, and the remainder only to him as a single person. His wife afterwards obtained a divorce. It was held that the extra allotment of eighty acres to which the plaintiff was at the time entitled under the law resulted from his status as a married man, and that after he had lost such status, presumably through his own fault, he had no standing in equity

to recover from his wife the land which, if allotted to him, would have been on her account, if not in her right.

**Allotment to adopted members of tribe.**—In *La Clair v. U. S.*, (1910) 184 Fed. 128, it appeared that the plaintiffs, who were formerly members of the Puyallup tribe of Indians, but were of Yakima half blood, were invited by the Yakimas to become members of that tribe for the purpose of sharing in the allotment of the lands of their reservation in severalty, which they did, having been formally adopted by the tribe in accordance with its customs. The Indian agent and the allotting agent were fully advised of such action, which was taken with their approval, and with full knowledge of the facts recommended the plaintiffs for allotments, and their recommendation was approved by the Secretary of the Interior, and patents were issued to the plaintiffs, which recited that they were Indians "residing on the Yakima Indian reservation," who had been allotted land therein. None of plaintiffs had received allotments elsewhere. The lands have since been for the most part resided upon and improved by the allottees, and have become valuable. It was held that the things done were all that were required to make plaintiffs members of the Yakima tribes, and that, even if official ratification of the adoption was required, the action of the department amounted to such ratification.

**Person born after Act passed.**—The fact that a member of an Indian tribe was born after the passage of this Act or of the Nelson Act of 1889 (Act Jan. 14, 1889, ch. 24, 25 Stat. L. 642), does not exclude such persons from the right to an allotment under either of such Acts. *U. S. v. Fairbanks*, (C. C. A. 1909) 171 Fed. 337.

Vol. III, p. 494, sec. 5. [*Patent to issue, etc.*]

**Taxation.**—To the same effect as the original note, see *U. S. v. Thurston County*, (1906) 143 Fed. 287, 74 C. C. A. 425, *reversing* (1905) 140 Fed. 456.

**Validity of restrictions on alienation.**—Restrictions placed by Act of Congress upon the alienation by Indians of lands allotted to them in severalty, and embodied in the patents issued for such lands, are pursuant to a general and beneficent policy of the government for the protection of the Indians, and are valid. *Nelson v. John*, (1906) 43 Wash. 483, 86 Pac. 933.

**Conveyance of Indian lands.**—Where a conveyance by an Indian of land allotted to him was void because the title remained in the United States, the fact that subsequently the Indian obtained a patent and could convey did not inure to the benefit of the purchaser; the rule that where a vendor having no title sells and title subsequently procured by him inures to the benefit of the purchaser, not applying where such sale was prohibited by law. *Starr v. Long Jim*, (1909) 52 Wash. 138, 100 Pac. 194.

**Right to maintain trespass.**—Although the government by this Act holds in trust the legal title to land allotted in severalty to an Indian, the latter, who is in the rightful possession of the land and has the beneficial use therein, may recover damages for an unlawful trespass upon it. *Smith v. Mosgrove*, (1908) 51 Ore. 495, 94 Pac. 970.

**White persons as "heirs."**—The term "heirs," as used in the first paragraph of this section, includes white persons adopted as members of a tribe of Indians. *Reed v. Clinton*, (1909) 23 Okla. 610, 101 Pac. 1055.

**Jurisdiction of state courts.**—So long as the United States recognizes the national character of the Indians and that they are under the protection of treaties and laws of Congress, their property is outside the operation of state laws, and the state courts have no jurisdiction over controversies concerning the titles to Indian allotments while the same are held in trust by the United States. *Smith v. Mosgrove*, (1908) 51 Ore. 495, 94 Pac. 970.

**Title and control.**—Under this Act the United States retains title and control over

the allotted lands during the trust period without any right in the allottee, except to occupy and cultivate the lands under a paper or writing showing that at a particular time in the future, unless extended by the President, the allottee would be entitled to a patent for the fee. *U. S. v. Gardner*, (1904) 133 Fed. 285, 66 C. C. A. 663; *Bond v. U. S.*, (1910) 181 Fed. 613.

**Effect of allotment.**—An Indian allottee by accepting an allotment does not cease to be a ward of the government, but still remains in a condition of pupillage and dependency; the determination of all disputes concerning the allotment, its occupancy and possession, and the general control of the Indian remaining within the jurisdiction of the Secretary of the Interior. *Bond v. U. S.*, (1910) 181 Fed. 613.

**Right of United States to maintain suit.**—The United States may maintain a suit in its own name to cancel a deed to allotted Indian lands, although made under an order of court, if the sale was in violation of the statutory restrictions on alienation. *U. S. v. Bellm*, (1910) 182 Fed. 161. See also *U. S. v. Dooley*, (1906) 151 Fed. 697.

**Cancellation of patents.**—Where the Interior Department by its officers and agents has recognized the right of Indians to allotments of land as members of a tribe, after full investigation, with full knowledge of the facts and without fraud, and allotments have been made and patents issued to the allottee, the department is without authority to subsequently cancel such patents because of a change in its interpretation of the law; nor

is there any equity which warrants a court in canceling the patents at suit of the government, the allotment being satisfactory to the tribe from whose lands they were made. *La Clair v. U. S.*, (1910) 184 Fed. 128.

**Title of allottee.**—The selection of and the filing upon an allotment of land are the inception of the title of the Indian allottee or his heirs, and when the patent, which is only the evidence of title, is issued, it relates back to the inception of the title. *Hooks v. Kennard*, (1911) 28 Okla. 457, 114 Pac. 744.

**Construction of proviso.**—The proviso to this paragraph does not contemplate that the President may extend the period of twenty-five years as to all trust patents issued to Indian allottees of land, but only that such extension may be made in particular cases, in the discretion of the President. (1905) 25 Op. Atty.-Gen. 483.

**Power to will.**—It has been held that an allottee under this Act who died within the twenty-five year period had no power to devise his interest in the land allotted. *In re House*, (1907) 132 Wis. 212, 112 N. W. 27.

**Dower.**—The widow of an Indian to whom an allotment of lands in severalty had been made, as authorized by this Act, is entitled to dower in such lands. *Wheeler v. Petite*, (1907) 153 Fed. 471.

**Effect of citizenship.**—The conferring of the rights of citizenship upon an Indian allottee does not authorize him to alienate or lease the land allotted to him, or to make any contract in relation thereto in violation of this section. *Williams v. Steinmetz*, (1905) 16 Okla. 104, 82 Pac. 986.

## Vol. III, p. 495, sec. 5. [*Laws of descent and partition.*]

**Construction.**—The statute of Kansas relating to descent (Gen. Stat. 1889, ch. 33, secs. 20, 21, 29), which by this section is made to govern the descent of lands allotted in severalty to the members of certain tribes in Indian Territory, provides that if an intestate leaves neither husband, nor wife, nor issue, his estate shall go to his parents, and, if his parents be dead, shall be disposed of in the same manner as if they, or either of them, had outlived the intestate and died in the ownership and possession of the portion thus falling to their share, or to either of them, and that "children of the half blood shall inherit equally with children of the whole blood." It has been held that the word "children," as so used, should be construed as meaning "kindred," and that under such provision, where an Indian woman, whose parents were dead, died unmarried and without issue, but leaving a half-brother, he inherited her land, to the exclusion of her uncles and cousins. *Finley v. Abner*, (C. C. A. 1904) 129 Fed. 734.

**Minnesota.**—Under this Act where the allottee of land in Minnesota dies after his trust patent has issued, his allotment descends to his heirs, as provided by the laws of that state, to be ascertained by the probate court of the county in which the lands are located. *U. S. v. Park Land Co.*, (1911) 188 Fed. 383.

**Washington.**—Under the laws of descent of Washington which by this section are made applicable to allotted and patented Indian lands therein, the estate of a Puyallup Indian, allotted land under a patent from the United States which contained restrictions on alienation, and provided for forfeiture upon neglect to till the soil or on return to a nomadic life, was an inheritable estate in the lands on his death in 1888. *Little Bill v. Swanson*, (1911) 117 Pac. 481.

**Right to partition land.**—In *U. S. v. Bellm*, (1910) 182 Fed. 161, it was held that the proviso in this paragraph of section 5, adopting the laws of descent of Kansas, was merely for the purpose of providing a rule by which the heirs should be determined, and that the partition statutes were adopted only so far as they provided for a division of the land in case the heirs could not agree to hold it in common; that there was no intention of abrogating the trust in any case, and that the clause "except as herein otherwise provided" excluded the application of a provision of a state partition statute authorizing a sale of the land where it could not be advantageously divided; and that such a sale of land in the Indian Territory, although under an order of court based on the Kansas statute, was null and void.



## Vol. III, p. 496, sec. 6.

**When citizenship attaches.**—An Indian allottee on the receipt of his first patent must be deemed within the provision of section 6 that, "upon the completion of said allotments and the patenting of the lands to said allottees," each allottee shall have the benefits of, and be subject to, the laws of the state where he resides, in view of the further grant of citizenship which that section extends to every allottee, and of the fact that the issue of the final patent provided for by section 5 was to be delayed for twenty-five years, when it was to be issued to the first patentee or his heirs. *Matter of Heff*, (1905) 197 U. S. 488, 25 S. Ct. 506, 49 U. S. (L. ed.) 848.

**Effect of granting citizenship.**—The grant of citizenship to the Indians was intended for their protection, and was not a renunciation by the United States of the authority which it had always exercised to adopt such measures as in its judgment were wise for the protection of the Indian in his rights. *U. S. v. Allen*, (1910) 179 Fed. 13, 103 C. C. A. 1.

**Effect on laws of descent.**—Under the various provisions of this Act providing for the allotment of Indian lands, the laws of descent of the state apply to these lands. *Guyatt v. Kautz*, (1905) 41 Wash. 115, 83 Pac. 9.

**Jurisdiction of state courts.**—The provision in this section and other sections of this Act, providing for the allotting of lands constituting an Indian reservation to the Indians in severalty, and the issuing of patents to the allottees therefor, and further providing that, upon the completion of said allotments and the issuing of patents to each of the allottees constituting the tribe, each allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state in which he may reside, upon completion of the allotments and the issuing of patents to each of the allottees, confers jurisdiction on the state courts to try and punish an allottee for any violation of the laws of the state, though the offense committed be one against the person or property of an Indian or other person within the limits of an Indian reservation. *Es p. Savage*, (1908) 158 Fed. 205; *In re Now-ge-zhuck*, (1904) 69 Kan. 410, 76 Pac. 877.

After public land has been allotted to an Indian under this Act he is not subject to prosecution for violating Act of Cong. Jan. 15, 1897, ch. 29, sec. 5, 29 Stat. L. 487, 3 Fed. Stat. Annot. 389, prohibiting the commission of rape within the limits of an Indian reservation, but which contains no express provision that it should be applicable to Indians residing on allotted lands, but is subject to the laws of the state in which the crime was alleged to have been committed. *U. S. v. Kiva*, (1903) 126 Fed. 879.

**Restrictions upon alienation** contained in patents issued to Indian allottees of lands in severalty, as required by different Acts of Congress, were not repealed by this section.

*Nelson v. John*, (1906) 43 Wash. 483, 86 Pac. 933.

**Federal control of proceeds of land after citizenship.**—A patent issued to an Indian allottee, pursuant to the treaty of Sept. 30, 1854, authorizing the President to assign land to Indians with such restrictions on the power of alienation as he may impose, stipulated that neither he nor his heirs should sell the tract without the consent of the President. Regulations approved by the President provided that the proceeds of timber taken from allotted lands should be deposited in a national bank subject to check of the Indian owner of the allotment, countersigned by the Indian agent. It has been held that, though an allottee becomes a citizen under this section, his power to dispose of the proceeds received from the sale of his timber is subject to the approval of the Indian agent. *Tomkins v. Campbell*, (1906) 129 Wis. 93, 108 N. W. 216.

**Alaska Indians.**—Under this Act those Indians or half-breeds in Alaska who have voluntarily taken up their residence separate and apart from any tribe of Indians, and have adopted the habits of civilized life, become thereby citizens of the United States by naturalization. *In re Minook*, (1904) 2 Alaska 200.

**Government control of liquor traffic not disturbed.**—*Contra* to the original note, see *Matter of Heff*, (1905) 197 U. S. 488, 25 S. Ct. 506, 49 U. S. (L. ed.) 848, set out in note to this title, vol. 3, p. 384, sec. 1.

**Who become citizens.**—When lands composing an Indian reservation have been allotted and patented in severalty among the members of the band or tribe of Indians occupying such lands, each and every allottee becomes a citizen of the state wherein such reservation is located, and subject to the laws thereof. *Moore v. Nah-con-be*, (1905) 72 Kan. 169, 83 Pac. 400.

**Taxation.**—Land allotted under an Indian treaty which exempts such land from levy, sale, or forfeiture until the state legislature shall, with the consent of Congress, remove the restriction, can no longer escape taxation after the Indian patentee has become a citizen under this section, which in addition to the grant of citizenship provides that Indians to whom allotments have been made shall have the benefit of, and be subject to, the laws, both civil and criminal, of the state or territory in which they may reside, and the ten years during which Congress, by the Act of March 3, 1893, 27 Stat. L. 612, 633, ch. 209, postponed the operation of the provision of Wash. Laws 1889, 1890, p. 499, granting the power of alienation "in like manner and with like effect as any other person may do under the laws of the United States and of this state," and removing all restrictions in reference hereto, have expired. *Goudy v. Meath*, (1906) 203 U. S. 146, 27 S. Ct. 48, 51 U. S. (L. ed.) 130, affirming (1905) 38 Wash. 126, 80 Pac. 295.

## Vol. III, p. 500, sec. 3.

**Action for use and occupation.**—An Indian may recover, in an action for mesne profits, the rental value of lands allotted to him by the United States government, from a person who has used and occupied the same under a lease that is void because not sanctioned and approved by the officers of the Interior Department. *Phillips v. Reynolds*, (1907) 79 Neb. 626, 113 N. W. 234.

**Approval by Secretary of Interior.**—This section does not authorize the leasing of the lands embraced within an Indian allotment, unless it is made to appear to the Secretary of the Interior that the allottee cannot, by reason of age or other disability, personally and with benefit to himself occupy or improve his allotment or any part thereof. *Williams v. Steinmetz*, (1905) 16 Okla. 104, 82 Pac. 986.

The statutory requirement that leases made by Indian allottees of the Cherokee and other civilized tribes in the Indian Territory should be subject to approval by the Secretary of the Interior before being effective confers on the secretary only the power of approval or disapproval, and gives him no authority to initiate or make a lease, or to change or ignore its provisions, and his approval of an assignment of a lease, made without the consent of the lessor, in direct violation of its conditions, does not validate such assignment. *Midland Oil Co. v. Turner*, (1910) 179 Fed.

74, 102 C. C. A. 388, *modifying* (1909) 167 Fed. 646.

Where a party holds a lease of Indian lands which has been approved by the proper officers of the Interior Department, such lease containing a provision that the party holding the lease will not, at any time during the period for which the said lands and premises are leased, sublet the same to any person without the consent thereto of the party of the first part and the approval of the same by the Secretary of the Interior, a subleasing of the same without the consent of the Secretary of the Interior is void, and conveys no right by such subleasing, and the sublease cannot be enforced. The doctrine of estoppel between landlord and tenant does not apply. *Reeves v. Sheets*, (1905) 16 Okla. 342, 82 Pac. 487.

A lease of an Indian allotment which has not been approved by the Secretary of the Interior is absolutely null and void; and where a party under such a lease plants the land to corn and cultivates it, and the cattle of the allottee, in connection with the cattle of another, break down the fence and destroy such corn, the lessee cannot recover for the value of his share thereof. The lease having been made in violation of a positive statute, the law will grant him no relief. *Williams v. Steinmetz*, (1905) 16 Okla. 104, 82 Pac. 986.

## Vol. III, p. 501, sec. 5.

**Jurisdiction of state courts to determine descent.**—Where, in the proceedings for the settlement of the estate of an Indian allottee, there being other property than the land which warranted administration, the parties, by stipulation and mutual consent, submitted to the state court the question whether S. was heir of the decedent, it was held that the court had jurisdiction to determine the question, though the judgment did not transfer the title to, or disturb the possession of, the allotted land held by the United States in trust for decedent and his heirs; the government being entitled to recognize, or refuse to recognize, the order as conclusive or *prima facie* evidence of the fact. *Smith v. Smith*, (1909) 140 Wis. 599, 123 N. W. 146.

**Legitimacy of issue.**—Though Act Cong. Feb. 8, 1887, ch. 119, 24 Stat. L. 390, 3 Fed. Stat. Annot. 496, declares Indians receiving allotments in severalty thereunder to be citizens of the United States, subject to the laws of the state in which they live, and Act Cong. March 3, 1885, ch. 319, 23 Stat. L. 340, makes the state law of alienation and descent applicable to such allotments, yet, under the direct provisions of this section the issue of a male and female Indian, who cohabited as husband and wife according to the custom of Indian life, is deemed legitimate, to determine the descent of land. *Kalyton v. Kalyton*, (1903) 45 Ore. 116, 74 Pac. 491, 78 Pac. 332; *In re House*, (1907) 132 Wis. 212, 112 N. W. 27; *Smith v. Smith*, (1909) 140 Wis. 599, 123 N. W. 146.

## Vol. III, p. 503, sec. 1.

**Repeal.**—In so far as this Act conferred jurisdiction upon the courts to determine questions of heirship and descent as they may affect allotted lands during the trust period it was repealed by implication by the Act of June 25, 1910, ch. 431, 36 Stat. L. 855, making the Secretary of the Interior a special tribunal to determine such questions and declaring that his decision shall be "final and conclusive," thus making the jurisdiction conferred upon him exclusive. *Bond v. U. S.*, (1910) 181 Fed. 613; *Pel-Ata-Yakot v. U. S.*, (1911) 188 Fed. 387.

**Retrospective effect.**—An invalid retrospective effect is not given to the provision of this section authorizing Indians claiming to be entitled to an allotment of land to prosecute, in the proper federal Circuit Court, any action in relation to their right thereto, by construing such Act to include a suit by an Indian to obtain an allotment to which she claims she was, at the time of the passage of such Act, entitled, under the Allotment Act of March 3, 1885, 23 Stat. L. 340, ch. 319, and to have canceled the alleged improper allotment of such land to another. *Hy-Yu-*

*Tse-Mil-Kin v. Smith*, (1904) 194 U. S. 401, 24 S. Ct. 676, 48 U. S. (L. ed.) 1039, *affirmed* (1902) 119 Fed. 114, 55 C. C. A. 216.

**Exclusive federal jurisdiction.**—State courts were not given jurisdiction of controversies necessarily involving a determination of the title, and, incidentally, of the right to the possession of Indian allotments while the same were held in trust by the United States, by the provision of the Act of Aug. 15, 1894, 3 Fed. Stat. Annot. 504 note, 28 Stat. L. 286, ch. 290, delegating to the federal Circuit Courts the power to determine such questions, since the purpose of that Act to continue the exclusive federal control over disputes concerning allotments which, prior to that Act, could only have been decided by the Secretary of the Interior, is manifested by its provision that a judgment or decree in any such controversy shall be certified by the court to the Secretary of the Interior, and by the provision of this section that in such suits "the parties thereto shall be the claimant as plaintiff and the United States as party defendant." *McKay v. Kalyton*, (1907) 204 U. S. 458, 27 S. Ct. 346, 51 U. S. (L. ed.) 566, *reversing* (1904) 45 Ore. 116, 74 Pac. 491, 78 Pac. 332.

Under this section the United States Circuit Courts had jurisdiction of a suit by the only child of a deceased Indian to recover lands allotted to him in the Umatilla reservation under Act March 3, 1885, ch. 319, 23 Stat. L. 341, which provided that the lands allotted thereunder should be held in trust by the United States for the sole use and benefit of the allottee, "or in case of his decease, of his heirs, according to the laws of the state of Oregon," although it was alleged that the lands were withheld by complainant's stepmother under a claim of dower therein. *Patawa v. U. S.*, (1904) 132 Fed. 893.

The District Court of the territory of Oklahoma had jurisdiction of suits brought therein by persons of Indian blood or descent to establish their rights to allotments, pursuant to this section. *Young v. U. S.*, (1910) 176 Fed. 612.

**Scope of action.**—In an action brought by a person claiming the right to an allotment of land on an Indian reservation against the United States to establish such right, as authorized by this section the jurisdiction of the court is not restricted to a determination of the right of the plaintiff to any allotment; but, where a particular tract is claimed, the right of any adverse claimant may also be litigated, and for that purpose he may, and should, be joined as a party defendant. *U. S. v. Fairbanks*, (1909) 171 Fed. 337, 96 C. C. A. 229.

**Joinder of actions.**—Where several claimants of allotments sued jointly to establish their rights to separate allotments in a District Court of the territory of Oklahoma, it was held that a demurrer to their petition was properly sustained by the District Court, where one of the grounds of the demurrer was a misjoinder of causes of action. *Young v. U. S.*, (1910) 176 Fed. 612.

**Parties.**—The United States cannot be regarded as a necessary party to a suit brought under the Act of Aug. 15, 1894, 28 Stat. L. 286, 305, ch. 290, prior to the amendatory Act of Feb. 6, 1901, 31 Stat. L. 760, ch. 217, to determine the respective rights of two Indians, each claiming under the Allotment Act of March 3, 1885, in view of the provision of the Act under which the action was brought, that the judgment or decree of the court in favor of any claimant to an allotment upon being properly certified to the Secretary of the Interior, shall have the same effect as if the allotment had been allowed and approved by the Secretary. *Hy-Yu-Tse-Mil-Kin v. Smith*, (1904) 194 U. S. 401, 24 S. Ct. 676, 48 U. S. (L. ed.) 1039, *affirmed* (1902) 119 Fed. 114, 55 C. C. A. 216.

The jurisdiction of suits by Indians, involving their right to lands allotted under any law or treaty, conferred on the Circuit Courts of the United States by this section, is exclusive, but in all such actions the United States must be made a party defendant as therein provided. *Parr v. U. S.*, (1904) 132 Fed. 1004.

**Decision of land department.**—In an action brought under this section, which gives to a person in whole or in part of Indian blood or descent the right to bring such action to establish the right to an allotment of land by virtue of an Act of Congress, which he claims to have been unlawfully denied him, the decision of the Land Department, upon the question whether or not the plaintiff when a person of mixed blood was recognized as a member of the tribe entitled to the benefit of the Act, will not in all cases be followed, since in case of an adverse ruling such rule would leave the plaintiff without the remedy which it was the purpose of the statute to give him. *Waldron v. U. S.*, (1905) 143 Fed. 413.

**Appointment of receiver.**—Under this section the courts have power to appoint a receiver for the lands involved in a suit where a proper showing therefor is made. *Smith v. U. S.*, (1905) 142 Fed. 225.

**Selection of specific land necessary before suit.**—This section contemplates the selection of specific land for allotment by the claimant before the institution of a suit, upon which the judgment or decree may operate as a complete allotment. *Reynolds v. U. S.*, (1909) 174 Fed. 212, 98 C. C. A. 220.

**Right to share in tribal property.**—Originally the test of the right of individual Indians to share in tribal lands and other tribal property was existing membership in the tribe; but this rule has been so broadened by Act March 3, 1875, ch. 131, sec. 15, 18 Stat. L. 420, 3 Fed. Stat. Annot. 490, and Act Feb. 8, 1887, ch. 119, sec. 6, 24 Stat. L. 390, 3 Fed. Stat. Annot. 496, and other Acts, as to place individual Indians who have abandoned tribal relations once existing, and have adopted the customs, habits, and manners of civilized life, upon the same footing in respect of this right as though they had maintained their tribal relations. *Oakes v. U. S.*, (1909) 172 Fed. 305, 97 C. C. A. 139.

## Vol. III, p. 505, sec. 7.

**Approval of Secretary of the Interior.**—Under this section the approval of the Secretary of the Interior is necessary to the validity of any conveyance, whether by an adult or a guardian. *U. S. v. Leslie*, (1909) 167 Fed. 670.

**Effect on trust.**—Where lands were allotted to an Indian citizen under the Allotment Act of 1877, restraining alienation for twenty-five years, it was held that this section did not vacate the trust of such lands held by the United States, but that on the sale of the lands, with the consent of the Secretary of the Interior, by the heirs of the deceased allottee, the trust attached to the proceeds, which was only payable to such heirs under rules prescribed by the Interior Department. *National Bank of Commerce v. Anderson*, (1906) 147 Fed. 87, 77 C. C. A. 259.

**Lien of judgment.**—A judgment of the District Court against an adult Indian is not a lien upon his inherited lands situated in the county where such judgment is rendered.

*Beall v. Graham*, (1907) 75 Kan. 98, 88 Pac. 543.

**Illegitimate child.**—Where a child was born out of wedlock to an Indian woman to whom Indian reservation lands were allotted, and such child survived her, it was held that he was her heir at law. *Beam v. U. S.*, (1907) 153 Fed. 474, *affirmed* (C. C. A. 1908) 162 Fed. 260.

**Exemption from taxation.**—The proceeds of the sales of allotted lands by the Indian heirs of the allottees under this section, which have been deposited by direction of the Secretary of the Interior in a bank selected by the commissioner of Indian affairs to the credit of the heirs in proper proportions, subject to their checks only when approved by the agent or officer in charge, are held in trust by the United States for the same purposes as were the lands, and are exempt from taxation by any state or county for the same reason. *U. S. v. Thurston County*, (1906) 143 Fed. 287, 74 C. C. A. 425, *reversing* (1905) 140 Fed. 456.

## Vol. III, p. 510. [No appropriation hereafter for sectarian schools.]

The declaration of policy that the government shall make "no appropriation whatever for education in any sectarian school," contained in the various Indian Appropriation Acts, has reference only to gratuitous appropriations of public moneys, and has no application to appropriations made to fulfil obligations under the Sioux treaty of April 29, 1868, 15 Stat. L. 635, 637, or to expenditures

of the income of the trust fund set apart by the Act of March 2, 1889, 25 Stat. L. 888, 894, 895, ch. 405, sec. 17, for the use of the Sioux Nation, in part consideration of cessions of lands to the United States. *Quick Bear v. Leupp*, (1907) 30 App. Cas. (D. C.) 151, *affirmed* (1908) 210 U. S. 50, 28 S. Ct. 690, 52 U. S. (L. ed.) 954.

## Vol. III, p. 517, sec. 2.

**Cattle issued for stockraising purposes.**—Under the Act of Congress ratifying agreements made with Indian tribes in Montana, including the Blackfeet, which provides *inter alia* for the issuance of cattle to such Indians for stockraising purposes, and that all such cattle and their increase shall bear the brand of the Indian Department, and shall not be sold, exchanged, or slaughtered except by consent of the agent in charge, an Indian to whom such cattle are issued acquires only a conditional ownership for the purposes stated in the Act, and it is the right and duty of the United States to protect such ownership, for which purpose it may main-

tain an action in a federal court in behalf of an Indian from whom cattle so issued have been unlawfully taken; and such right is not affected by the fact that an Indian in whose behalf such an action is brought is a woman who is married to a white man, and has thereby become a citizen of the United States, but who remains on the reservation with her tribe—it being expressly provided by this section that such marriage and citizenship shall not "impair or in any way affect the right or title of such married woman to any tribal property or interest therein." *McKnight v. U. S.*, (1904) 130 Fed. 659, 65 C. C. A. 37.

## Vol. III, p. 517. [Children of white man and Indian woman to have rights of mother.]

**Children of woman not recognized by tribe as member.**—This section does not embrace the children of a mother who was living at the time of its passage and was not then

recognized by the tribe as one of its members. *Oakes v. U. S.*, (1909) 172 Fed. 305, 97 C. C. A. 139.

## Vol. X, p. 121, sec. 1.

**Constitutionality.**—This section fixed the punishment for the offenses as provided by the laws of South Dakota at the time the Act was passed, and is not objectionable as

delegating to the state authority to fix the punishment in the future for such federal offenses. *Hollister v. U. S.*, (C. C. A. 1906) 145 Fed. 773.

Vol. X, p. 138, sec. 2. [*Act of April 28, 1904.*]

**Authority of Secretary of Interior.**—In (1905) 25 Op. Atty.-Gen. 532, it was held that the courts for the northern district of Indian Territory had no jurisdiction or power to decree partition and sale of an inherited

Indian allotment covered by a patent, without the approval of the Secretary of the Interior, whose authority to approve or disapprove such sales is not disturbed by this section.

## Vol. X, p. 139, sec. 12.

**Appeal from courts in Indian Territory.**—Subsequent to March 3, 1905, appeals and writs of error and proceedings therefor and therein to review the decisions of the United States courts of the Indian Territory were

governed by this section and the practice in the national courts, and not by the statutes of Arkansas or the practice in its courts. *Laurel Oil, etc., Co. v. Galbreath Oil, etc., Co.*, (C. C. A. 1908) 165 Fed. 162.

Vol. X, p. 141. [*Errors in allotments and patents to be corrected.*]

**Scope of statute.**—This Act was not intended to render the general statute of limitations inapplicable by retaining jurisdiction over the lands during the whole of the trust period, except in the cases specified, and a suit by the United States to cancel such patents on other grounds is subject to the

limitation of six years from the date of their issuance imposed by Act March 3, 1891, ch. 561, sec. 8, 26 Stat. L. 1099, 6 Fed. Stat. Annot. 526, on suits generally to cancel patents. *La Clair v. U. S.*, (1910) 184 Fed. 128.

## Vol. X, p. 150, sec. 12.

**Repeal.**—The provision in this section as to the twenty-one-year restriction was superceded as to full-blooded Indians by section 19 of the Act of April 26, 1906, 34 Stat. L. 137, 144, 1909 Supp. Fed. Stat. Annot. 199, which forbids full bloods to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to them for the period of twenty-five years after the passage and ap-

proval of that Act, unless the restrictions be removed by Congress prior to the period indicated. (1907) 26 Op. Atty.-Gen. 351.

The words "alienable" and "inalienable," used to restrict the disposition of lands in sections 12, 15, and 16 of this Act, include disposition by will. *Hayes v. Barringer*, (C. C. A. 1909) 168 Fed. 221, *affirming* (1907) 7 Ind. Ter. 697, 104 S. W. 937.

## Vol. X, p. 150, sec. 15.

**Mechanics' liens.**—In *Keel v. Ingersoll*, (1910) 27 Okla. 117, 111 Pac. 214, it was held that where a building is situated in the Indian Territory upon the homestead allotment of a Chickasaw Indian, whose restrictions upon her power to alienate said allotment have not been removed, and said building was erected before the admission of the state, in the absence of an agreement between the parties to the contrary, the building attaches to the estate of the allottee in the

land, and becomes part of the realty, and by reason of this section no materialman's lien can attach to it, since the only estate of the allottee in the land to which the building can and does attach is one that can neither be alienated by her nor subjected to any lien.

**Contracts for speculation.**—See under this title, vol. 3, p. 455, sec. 29.

**Control for sale of surplus allotment.**—See under this title, vol. 3, p. 455, sec. 29.

## Vol. X, p. 150, sec. 16.

**Alienation of land.**—By reason of Act of Cong. June 28, 1898, ch. 517, sec. 29, 30 Stat. L. 507, 3 Fed. Stat. Annot. 453, and by this section, it has been held that a sale by a full-blood Choctaw Indian to a white man of a portion of her allotment before the removal of restrictions upon her power to alienate and an agreement to convey same when her restrictions are removed is void; and that notes executed by such Indian to the purchaser for

the purpose of indemnifying him against loss in the event she fails to convey said land after her restrictions are removed are also void; and recovery thereon cannot be had, although the purchaser paid the purchase price of the land at the time of the sale. *Howard v. Farrar*, (1911) 28 Okla. 490, 114 Pac. 695. See also *Simmons v. Whittington*, (1910) 27 Okla. 356, 112 Pac. 1018.

## Vol. X, p. 151, sec. 22.

The word "person," as used in this section, includes members, citizens, and freedmen. *Hancock v. Mutual Trust Co.*, (1909) 24 Okla. 391, 103 Pac. 566.

**Alienation by heirs.**—Lands allotted, homestead and surplus, under the provision of this section, in the name of a deceased mem-

ber of the Choctaw tribe of Indians, are alienable by his heirs after lawful selection, prior to the lapse of one, three, or five years, and prior to the issuance of a certificate or patent. *Hancock v. Mutual Trust Co.*, (1909) 24 Okla. 391, 103 Pac. 566.

## Vol. X, p. 151, sec. 23.

**Jurisdiction of court over Secretary of Interior.**—The fact that the legal title to allottable Indian lands is still in the government does not defeat the jurisdiction of a court over a suit to compel the Secretary of the Interior to undo, as wholly unwarranted and unauthorized by law, his action in summarily erasing from the approved rolls of citizenship in the Choctaw and Chickasaw Nations the name of one who has received an allotment certificate and is in possession of the land. *Garfield v. U. S.*, (1908) 211 U. S. 249, 29 S. Ct. 62, 53 U. S. (L. ed.) 168, *affirming* (1907) 30 App. Cas. (D. C.) 177.

**Burden of proof.**—In an action of ejectment by an allottee of the Chickasaw tribe of Indians, where the plaintiffs, in support of their title, show that the lands in controversy

were allotted to them and certificates of allotment issued to them therefor, and that said certificates have never been canceled, and where the defendants' only defense to the action is that their grantor selected said lands as his allotment before the same were allotted to plaintiffs, but admit that the selection of said lands as allotment for their grantor has been canceled by the Secretary of the Interior, the burden is upon defendants to show facts rendering the order of cancellation invalid in order to overcome the presumption of plaintiffs' right to possession of the lands arising from the certificates of allotment to them, and obtaining by reason of section 23. *Sorrels v. Jones*, (1910) 26 Okla. 569, 110 Pac. 743.

## Vol. X, p. 154, sec. 27.

**Rights of intermarried whites.**—See under this title, vol. 3, p. 449, sec. 21.

## Vol. X, p. 154, sec. 30.

**Review of judgment of citizenship court.**—No authority has been conferred upon the Secretary of the Interior by this section and Act of April 26, 1906, 34 Stat. L. 137, 1909

Supp. Fed. Stat. Annot. 190, to review the judgments of the citizenship court. (1907) 26 Op. Atty-Gen. 127.

## Vol. X, p. 154, sec. 31.

**Constitutionality.**—This and the following two sections, establishing a Choctaw and Chickasaw citizenship court for the purpose of determining citizenship in such tribes, and providing the procedure therein, are constitutional. *Wallace v. Adams*, (1905) 6 Ind. Ter. 32, 88 S. W. 308.

**Jurisdiction.**—In (1907) 26 Op. Atty-Gen. 127, it appeared that R. and T. were children of a white father by his third wife, a white woman, his first and second wives having been Choctaws. Both parents and these children lived in the Choctaw Nation and were recognized and regarded as Choctaw citizens. The children were enrolled by the Choctaw Committee on Citizenship in 1892. Their application to the Commission to the Five Civilized Tribes for enrolment under the Act of June 10, 1896, 29 Stat. L. 321, 339, 3 Fed. Stat. Annot. 430, was denied, which decision was reversed by the United States court in the Indian Territory, and its judgment affirmed by the Supreme Court, (1899) 174 U. S. 445, 469, 19 S. Ct. 722, 43 U. S. (L. ed.) 1041. Subsequently, on appeal by

the Nation under the Act of July 1, 1902, 32 Stat. L. 641, 646-649, their application was denied by the Choctaw and Chickasaw citizenship court. It was held that the citizenship court had jurisdiction and that its judgment was final.

**Effect as to persons not parties.**—A decree of the Choctaw and Chickasaw citizenship court in a test case against ten persons who had been admitted to citizenship or enrolment by the United States courts in the Indian Territory, vacating, for certain irregularities, the judgments of those courts, was held to be binding on a person similarly situated who was not made a party, but who did not avail himself of his privilege, under the Act of July 1, 1902, to transfer his individual case from the territorial court to the citizenship court, but chose to abide the outcome of the case against the ten representatives of his class. *Wallace v. Adams*, (1907) 204 U. S. 415, 27 S. Ct. 363, 51 U. S. (L. ed.) 547, *affirming* (C. C. A. 1906) 143 Fed. 716.

**Duty of transferring cause to citizenship court.**—The annulment by the Choctaw and

Chickasaw citizenship court of a judgment of the United States court for Indian Territory affirming a favorable decision of the Commission to the Five Civilized Tribes, upon an application for enrolment as a citizen, as provided in the Act of June 10, 1896, 29 Stat. L. 339, 3 Fed. Stat. Annot. 431, so far deprived

the applicant of a favorable judgment as to devolve upon him the duty of transferring his cause to the citizenship court for hearing therein, as provided in section 31, in order to protect and preserve his claimed rights. (1904) 25 Op. Atty.-Gen. 152.

### Vol. X, p. 155, sec. 32.

**Jurisdiction.**—This Act contemplated that the citizenship court should have a revisory jurisdiction of all judgments of the United States courts in the Indian Territory admitting persons to citizenship on appeal from the judgments of the commission, whether the applicants were on the tribal rolls or not. (1907) 26 Op. Atty.-Gen. 127.

**Summarily erasing name from citizenship**

**roll.**—The Secretary of the Interior is without authority to erase from the approved rolls of citizenship in the Choctaw and Chickasaw Nations, without notice or hearing, the name of one who has received an allotment certificate and is in possession of the land. *Garfield v. U. S.*, (1908) 211 U. S. 249, 29 S. Ct. 62, 53 U. S. (L. ed.) 168, *affirming* (1907) 30 App. Cas. (D. C.) 177.

### Vol. X, p. 156, sec. 33.

**Constitutionality of Act.**—Congress could constitutionally empower the Choctaw and Chickasaw citizenship court, created by this section, to review and annul, for irregularities, the judgments of the United States courts of the Indian Territory in Indian citizenship

cases, although by the terms of the Act of June 10, 1896, 29 Stat. L. 339, 340, ch. 398, those judgments had become final. *Wallace v. Adams*, (1907) 204 U. S. 415, 27 S. Ct. 363, 51 U. S. (L. ed.) 547, *affirming* (C. C. A. 1906) 143 Fed. 716.

### 1909 Supp., p. 190, sec. 1.

**Review of judgment of citizenship court.**—See under this title, vol. 10, p. 154, sec. 30.

### 1909 Supp., p. 191, sec. 2.

**Children of Choctaw freedmen.**—The children of Choctaw freedmen who were minors living March 4, 1906, are entitled to enrolment. (1907) 26 Op. Atty.-Gen. 127.

### 1909 Supp., p. 192, sec. 3.

**Construction of statute.**—The language of this section constitutes a legislative interpretation of article 9 of the treaty of Aug. 11, 1866, and supersedes *pro tanto* that treaty. *Garfield v. U. S.*, (1909) 34 App. Cas. (D. C.) 70.

The Secretary of the Interior, after due notice and a hearing, has authority to reverse his action in enrolling the names of persons claiming to be members of the Cherokee Nation and to cancel allotment certificates issued to them, where such action was taken before

the expiration of the time fixed by Congress for the completion of the rolls, notwithstanding the provision in this section which reads as follows: "But this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes, or its successor, and has been adjudged entitled to enrollment by the Secretary of the Interior. *Garfield v. U. S.*, (1909) 34 App. Cas. (D. C.) 70.

### 1909 Supp., p. 194, sec. 10.

**Construction of section.**—The provisions of this section in regard to the control of the tribal schools and the lands and property pertaining thereto by the Secretary of the Interior, and the use of the tribal funds for the purpose of defraying the necessary expenses of such schools, is purely a governmental and administrative matter, involving no taking of

the property of the nation. (1907) 26 Op. Atty.-Gen. 340.

The purpose of Congress in sections 10 and 11 of this Act was to give the Secretary of the Interior exclusive control, within limitations stated, of the revenues of the Five Civilized Tribes, including the Seminole Nation. (1907) 26 Op. Atty.-Gen. 340.

### 1909 Supp., p. 195, sec. 11.

**Control of finances.**—The Secretary of the Treasury may safeguard all disbursements on behalf of the Seminole Nation now authorized and require that all Seminole warrants issued after Jan. 1, 1907, shall be approved by the

United States inspector for the Indian Territory and paid by the United States Indian agent, instead of being paid by the treasurer of the nation. (1907) 26 Op. Atty.-Gen. 340.

## 1909 Supp., p. 198, sec. 18.

**Suit to cancel patents or deeds.**—A suit by the United States for the use of the Creek Nation of Indians to cancel patents or deeds to town lots belonging to said nation in its tribal capacity and sold by the United States for its benefit under Act March 1, 1901, ch. 676, sec. 10, 31 Stat. L. 864, on the ground that such deeds were obtained by fraud for less than the price at which lots were authorized by such Act to be sold, and to recover such lots for the tribe, is within the authority given by this section, which authorizes the Secretary of the Interior to bring suit in the name of the United States for the use of any of the Five Civilized Tribes "for the collection of any moneys or recovery of any lands claimed by any of said tribes." *U. S. v. Rea-Read Mill, etc., Co.*, (1909) 171 Fed. 501.

**Prosecution by private counsel.**—The provision of this section authorizing the Secretary of the Interior to bring suit in the name of the United States for the use of any of such tribes for the collection of any moneys or the recovery of any lands claimed by it, and "to pay from the funds of the tribe interested the costs and necessary expenses incurred in maintaining and prosecuting such suits," is within the power of Congress, and under such authority the secretary may employ private counsel to conduct such suits; the United States having no interest therein as a suitor. And in any event a defendant in such a suit cannot be heard to object that it was not brought by a law officer of the government. *U. S. v. Rea-Read Mill, etc., Co.*, (1909) 171 Fed. 501.

## 1909 Supp., p. 199, sec. 19.

**Right of Congress to impose restrictions.**—The lands of the Seminole Nation having been granted to it merely in its corporate capacity as a nation, the United States government may, as a condition of their allotment in severalty and the extinguishment of its own ultimate interest therein, impose the restrictions upon their alienation provided by this section. (1907) 26 Op. Atty-Gen. 340.

**Bond given by lessee of Indian lands.**—It is competent for the Secretary of the Interior to require by rules and regulations that all payments under a lease shall be made to an Indian agent, and that the lessee shall give a bond to the United States to secure the performance of the lease, and in such case the United States may maintain an action against the lessee and his surety on the bond for

breach of such conditions. *U. S. v. Comet Oil, etc., Co.*, (1911) 187 Fed. 674.

**Taxation.**—Under this section providing that "all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottees," and Act May 27, 1908, ch. 199, sec. 4, 35 Stat. L. 313, 1909 Supp. Fed. Stat. Annot. 233, which provides that "all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes," the exemption from taxation does not exist any longer, in any case, than the time during which the land is inalienable. *U. S. v. Shock*, (1911) 187 Fed. 862.

## 1909 Supp., p. 199, sec. 20.

**Jurisdiction of Secretary of Interior.**—Leases of allotments of Indian minors in the Indian Territory, confirmed and approved by the trial courts of that territory since April 26, 1906, are not subject to the approval or

disapproval of the Secretary of the Interior, but the orders of the courts confirming and approving them are final. *Morrison v. Burnette*, (1907) 154 Fed. 617, 83 C. C. A. 391.

## 1909 Supp., p. 200, sec. 22.

**Constitutionality.**—The rights of the Creek Indians in the Indian Territory who were made citizens of the United States by the Act of March 3, 1901, ch. 868, 31 Stat. L. 1447, with all of the rights, privileges, and immunities of such citizens, were not unconstitutionally impaired by this section, extending the prohibition against the alienation of allotted lands by the allottee or his heirs without the approval of the Secretary of the Interior, created by the supplemental Creek agreement of June 30, 1902, ch. 1323, 32 Stat. L. 500, beyond the five-year limitation therein expressed. *Tiger v. Western Invest. Co.*, (1911) 221 U. S. 286, 31 S. Ct. 578, 55 U. S. (L. ed.) 738, *reversing* (1908) 21 Okla. 630, 96 Pac. 602.

**Effect upon alienation of land.**—The prohibition against the alienation of allotted lands by the allottee or his heirs, without the approval of the Secretary of the Interior, created by the supplemental Creek agreement of June 30, 1902, ch. 1323, 32 Stat. L. 500, was continued, as to conveyances by full-blooded Indian heirs, beyond the five-year limitation therein expressed by this section, which, after empowering adult heirs of a deceased Indian of either of the Five Civilized Tribes to convey their inherited lands, provided that "all conveyances made under this provision by heirs who are full-blooded Indians are to be subject to the approval of the Secretary of the Interior," and in section 29 repealed all inconsistent legislation. *Tiger*



*v. Western Invest. Co.*, (1911) 221 U. S. 286, 31 S. Ct. 578, 55 U. S. (L. ed.) 738, *reversing* (1908) 21 Okla. 630, 96 Pac. 602; *U. S. v. Shock*, (1911) 187 Fed. 862.

This section had the effect of removing the restrictions on alienation imposed by section 19 of this Act on lands allotted to Indians of the full blood on their descent to either adult or minor heirs of less than full blood, and on such descent the lands become alienable and therefore taxable. *U. S. v. Shock*, (1911) 187 Fed. 862.

A deed to an undivided interest in the allotment of a citizen of the Creek Nation, set apart to her under Act of June 28, 1898, ch.

517, 30 Stat. L. 495, and who died in possession thereof prior to Act of March 1, 1901, ch. 676, 31 Stat. L. 861, made, executed, and delivered by heirs of said allottee after the expiration of five years from the ratification of the agreement with the Creek Nation contained in said Act of March 1, 1901, and after Act of April 26, 1906, ch. 1876, 34 Stat. L. 145, is valid. *Sanders v. Sanders*, (Okla. 1909) 117 Pac. 338.

The term "inherited."—See *Shulthis v. McDougal*, (1909) 170 Fed. 529, 95 C. C. A. 615, *affirming* (1907) 162 Fed. 331, set out in the original note.

### 1909 Supp., p. 201, sec. 24.

**Effect on existing allotments.**—This section is prospective in its operation, and does not authorize the highway officials of the state to take and condemn without compensation a strip one rod on each side of the sec-

tion line traversing the allotment of a full-blood Indian, whose land was allotted prior to the passage of the Act. *Good v. Keel*, (Okla. 1911) 116 Pac. 777.

### 1909 Supp., p. 221, sec. 2, cl. fourth.

**Restrictions on alienation.**—While the title of the Osage Indians to their lands in Oklahoma, acquired from the Cherokee Nation, pursuant to the treaty with such nation of July 19, 1866, 14 Stat. L. 804, was in fee simple, such title was in the tribe, and did not vest in the individual members, and it was within the power of Congress to provide for their allotment in severalty, to prescribe the manner of their conveyance to the allottees, and to impose restrictions upon their alienation by the allottees. *U. S. v. Aaron*, (1910) 183 Fed. 347.

**Right of United States to enforce restric-**

**tions on alienation by suit.**—The United States may maintain a suit to set aside a conveyance of lands allotted to an Indian of the Osage tribe in Oklahoma, in violation of the restrictions imposed by Congress on their alienation. *U. S. v. Aaron*, (1910) 183 Fed. 347.

**Restriction of alienation follows land.**—The provision in this clause against alienation is impersonal to the allottee, and runs with the land, and is effective against alienation after the land has descended to the heirs of the allottee. *U. S. v. Aaron*, (1910) 183 Fed. 347.

### 1909 Supp., p. 225, sec. 8.

**Necessity for approval of Secretary of Interior.**—The approval of a deed by the Secretary of the Interior is essential to the

validity of the deed, and without it the grantee acquires no title. *U. S. v. Aaron*, (1910) 183 Fed. 347.

### 1909 Supp., p. 232, sec. 1.

**Right of United States to enforce restrictions.**—The plan of the United States government in dissolving the Five Civilized Tribes of Indians and distributing their land in severalty was a great governmental project, having for its object the social and industrial advancement of the Indians, and the various Acts pertaining thereto must be construed in consonance with such purpose and not merely as real estate transactions. The relation of government to the Indians is not to be measured by the law governing the ordinary relation of guardian and ward, nor are the limitations imposed on the alienation of land governed by the strict rules of law relating to grantor or grantee, but the United States, by virtue of its peculiar relationship to the Indians and to prevent the policy to be worked out through such legisla-

tion from being defeated, may enforce such restrictions on alienation in the courts although retaining neither a legal nor an equitable estate in the lands after the allotment. *U. S. v. Allen*, (C. C. A. 1910) 179 Fed. 13, *reversing* (1907) 171 Fed. 907.

**The sixty days specified in this section refers entirely to the status of lands as specified and fixed by this section, and the other sections take effect as of the date of the approval of the Act, unless some other date is specified.** (1909) 27 Op. Atty-Gen. 530.

**Sale by probate court.**—By reason of this section and sections 2 and 6 of this Act the restrictions on the alienation of the allotments of minor Indians of the Creek tribe of Indians, having less than half Indian blood, are removed, and allotments of such allottees may be sold under the order and supervision

of the probate courts of the state. *Jefferson v. Winkler*, (1910) 26 Okla. 653, 110 Pac. 755.

**Minors.**—A minor within the meaning of that term as used in this section and sections 2 and 6 of this Act includes males under the age of twenty-one years and females under the age of eighteen years, and the marriage of such minor does not confer upon him or her the authority to sell his or her allotted lands independent of the jurisdiction and supervision of the probate courts of the state. *Jefferson v. Winkler*, (1910) 26 Okla. 653,

110 Pac. 755. See also *Kirkpatrick v. Burgess*, (Okla. 1911) 116 Pac. 764.

**Power of Congress to extend period of prohibited alienation.**—It is within the power of Congress to enlarge the period within which an Indian allottee is prohibited from alienating his land beyond that imposed when the allotment was made, so long as the land is held by the allottee, although in the meantime he may have been made a citizen. *U. S. v. Allen*, (C. C. A. 1910) 179 Fed. 13, *reversing* (1909) 171 Fed. 907; *U. S. v. Shock*, (1911) 187 Fed. 870.

## 1909 Supp., p. 233, sec. 4.

**Taxation.**—This section is valid, and under and by virtue thereof lands of all allottees of the Five Civilized Tribes of Indians, from which restrictions have been or shall be removed, are subject to taxation under the general laws of the state equally with the property of all other persons. *English v. Rich-*

*ardson*, (1911) 28 Okla. 408, 114 Pac. 710; *Gleason v. Wood*, (1911) 28 Okla. 502, 114 Pac. 703; *Choate v. Trapp*, (1911) 28 Okla. 517, 114 Pac. 709; *Alexander v. Rainey*, (1911) 28 Okla. 518, 114 Pac. 710. See also under this title, 1909 Supp., p. 199, sec. 19.

## 1909 Supp., p. 234, sec. 6.

**Parties.**—The allottee is not an indispensable party to a suit brought by the United States under the authority conferred by this Act to set aside a deed, lease, or contract

made by an Indian allottee in violation of the statutory restrictions on alienation. *U. S. v. Allen*, (C. C. A. 1910) 179 Fed. 13, *reversing* (1909) 171 Fed. 907.

## 1909 Supp., p. 235, sec. 6, last paragraph.

**Construction of statute.**—This paragraph is more than a saving clause, and when read in connection with the part of the section appropriating \$50,000 to cover the expenses incurred in litigation regarding allotments is an implied grant of power to maintain such

suits, and such power extends to suits relating to allotments which were freed from restrictions by section 1 of the Act in respect to conveyances or contracts previously made. *U. S. v. Allen*, (C. C. A. 1910) 179 Fed. 13.

## 1909 Supp., p. 235, sec. 9.

**Construction of statute.**—This section provides that all allotted lands of enrolled full-blood Indians of the Five Civilized Tribes, and enrolled mixed bloods or three-quarters or more Indian blood "shall not be subject to alienation . . . prior to April 26, 1931, except that the Secretary of the Interior may remove such restrictions." It further provides that "nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this Act." It has been held that the latter provision does not apply to the supplemental agreement with the Creek Indians approved June 30, 1902, ch. 1323, 32 Stat. L. 500, under which the restrictions on alienation of surplus allotments expired Aug. 8, 1907, but only to restrictions theretofore removed by the Secretary of the Interior, under authority of law, and to restrictions removed by Act of Congress theretofore passed, not for the purpose of imposing but of removing restrictions imposed by prior legislation; that under the first provision all allotments, whether of homestead or surplus lands, made to enrolled full bloods and mixed bloods of three-quarters or more Indian blood are not alienable nor

taxable until the restrictions thereby imposed have been removed. *U. S. v. Shock*, (1911) 187 Fed. 870.

**Taxation of lands inherited from allottees.**—The provision of this section that "the death of an allottee of the Five Civilized Tribes shall operate to remove all the restrictions upon the alienation of said allottees' land" is qualified by the further provision, first, that the full-blood heirs of such allottee cannot dispose of their interest in such inherited lands without the approval of the court having jurisdiction of the settlement of the estate of the deceased allottee, and second, if the deceased allottee be of one-half or more Indian blood, leaving children surviving him born since March 4, 1906, the homestead remains inalienable during the life or lives of such children, or until April 26, 1931, unless restrictions are sooner removed by the Secretary of the Interior. In view of such provisions, the interests of such full-blood heirs and the homesteads of deceased allottees of one-half or more Indian blood leaving children born since March 4, 1906, are not alienable or taxable until such restrictions are removed, but all other interests in such in-

herited lands are subject to taxation. U. S. v. Shock, (1911) 187 Fed. 870.

**Effect of statute.**—This section applies to conveyance of interest of heirs of deceased allottee, whether such death occurred before or after May 27, 1908. *Harris v. Gale*, (1911) 138 Fed. 712. *Compare* (1909) 27 Op. Atty-Gen. 530.

**Approval of Secretary of Interior.**—The approval of the Secretary of the Interior was not necessary to the validity of the deed of full-blood Indian heirs executed Sept. 16, 1909, whose ancestor died August, 1907, the approval of the court having jurisdiction of the settlement of the ancestor's estate being all that is required by section 9. *MaHarry v. Eatman*, (Okla. 1911) 116 Pac. 935.

### 1909 Supp., p. 239. [*Kaw or Kansas and Osage Indians, etc.*]

**Sale of surplus lands.**—The provision of this Act which authorizes the Secretary of the Interior, pursuant to rules and regulations prescribed by him, to sell the "surplus lands" of any member of the Osage tribe of Indians,

and requires his approval before any such sale has validity, is applicable to the lands of deceased allottees. *U. S. v. Aaron*, (1910) 183 Fed. 347.

## INTERIOR DEPARTMENT.

### Vol. III, p. 536, sec. 439.

**Authority to approve leases of Indian lands.**—Under this section the Secretary of the Interior may delegate to the Assistant Secretary authority to approve leases of Indian lands and assignments thereof, and so long as such authority remains unrevoked the ap-

proval of the Assistant Secretary is equivalent to that of the Secretary. *Turner v. Seep*, (1909) 167 Fed. 646, *modified on another point* (1910) 179 Fed. 74, 102 C. C. A. 368.

### Vol. III, p. 537, sec. 441.

**Indians.**—Under this section and sections 463, 2058, 2149, R. S., 3 Fed. Stat. Annot. 337, 349, 390, the Commissioner of Indian Affairs is authorized, with the approval of the Secretary of the Interior, to cause collectors to be excluded and removed from a tribal Indian reservation on days when payments are being made to the Indians, if in his judgment the presence of collectors therein at such times is detrimental to the peace and welfare of the Indians; and this although the reservation be within a state and the Indians be the holders, under trust patents issued to them pursuant to Act Feb. 8, 1887, ch. 119, 24 Stat. L. 388, 3 Fed. Stat. Annot. 494, of allotments adjacent to the reservation and,

therefore, citizens of the United States and the state. *Rainbow v. Young*, (1908) 161 Fed. 835, 88 C. C. A. 653.

**For cases citing this section**, see *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, (1903) 190 U. S. 309, 23 S. Ct. 692, 24 S. Ct. 860, 47 U. S. (L. ed.) 1064; *U. S. v. Hitchcock*, (1907) 205 U. S. 80, 27 S. Ct. 423, 51 U. S. (L. ed.) 718; *U. S. v. Schliergolz*, (1904) 133 Fed. 333; *Buster v. Wright*, (1905) 135 Fed. 947, 68 C. C. A. 505; *U. S. v. Thurston County*, (1906) 143 Fed. 287, 74 C. C. A. 425; *Neff v. U. S.*, (C. C. A. 1908) 165 Fed. 273; *Robinson v. Lundrigan*, (C. C. A. 1910) 178 Fed. 230.

## INTERNAL REVENUE.

### Vol. III, p. 556, sec. 321.

**Authority of commissioner.**—This section, while relating generally to "matters pertaining to the assessment and collection of internal revenue," does not authorize a limitation of the duties of internal revenue officers and agents in special matters otherwise provided by law. (1908) 26 Op. Atty-Gen. 517.

**Regulations as evidence.**—On the trial of persons charged with a violation of the internal revenue laws, the instructions, rules, and regulations prescribed by the Commissioner of Internal Revenue, as authorized by statute, are admissible in evidence where pertinent to the issues. *Sprinkle v. U. S.*, (1905) 141 Fed. 811, 73 C. C. A. 285,

**Vol. III, p. 557, sec. 3140.**

**Applicability to agents of a state.**—See under this title, vol. 3, p. 605, sec. 3232.

**Vol. III, p. 563, sec. 3149.**

**Effect of vacancy in office of collector.**—A vacancy occurring in the office of collector of internal revenue, and the appointment of a successor, would seem to have the effect, under this section, of vacating the offices of the deputy collectors. (1907) 26 Op. Atty.-Gen. 363.

**Appointment of deputies.**—This section seems to require that a deputy collector of internal revenue should be appointed by the collector in commission, by an instrument in writing under his hand. (1907) 26 Op. Atty.-Gen. 363.

**Vol. III, p. 573, sec. 3164.**

**Witness in state court.**—A collector or deputy collector of internal revenue cannot be compelled by a court to disclose as a witness before the court or a grand jury the names of persons in whose places of business special tax stamps are posted, or the places in which the same are posted; his information

on the subject being obtained in an official capacity, and primarily from the records of his office, copies of which he is forbidden to furnish by the lawful regulations of the Treasury Department, as against public policy. *In re Lamberton*, (1903) 124 Fed. 446.

**Vol. III, p. 573, sec. 3166.**

**Probable cause as a defense.**—In an action against an internal revenue officer for a wrongful seizure of property which has been returned to the claimant intact, proof of probable cause for such seizure is a complete defense, and may be made, although the court in rendering judgment for the claimant in a proceeding for the forfeiture of the property failed to make the certificate of probable cause provided for by R. S. sec. 970, 2 Fed.

Stat. Annot. 287; and where the proof shows that the defendant made the seizure by direction of the Commissioner of Internal Revenue, based upon information received from his special agents which justified a suspicion that the plaintiff was violating the law, the court is warranted in charging the jury as matter of law that there was a probable cause. *Agnew v. Haymes*, (C. C. A. 1905) 141 Fed. 631.

**Vol. III, p. 574, sec. 3167.**

**Witness in state court.**—Under the regulations of the Internal Revenue Department, promulgated with the approval of the Secretary of the Treasury, providing that officers of the department "will decline to testify as to facts contained in the records, or coming to their knowledge in their official capacity; and this prohibition is hereby extended to include also internal revenue storekeepers

and gaugers and agents," a storekeeper and gauger stationed at a distillery has no right to divulge information in regard to the business of the distiller obtained by him solely in his official capacity as an internal revenue officer, even when called as a witness in a state court. *Stegall v. Thurman*, (1910) 175 Fed. 813.

**Vol. III, p. 575, sec. 3169, cl. seventh.**

**Intent.**—On the trial of a government storekeeper and gauger at a distillery charged under this section with having negligently and designedly permitted a violation of the law by another person by leaving the door of a cistern room unlocked, in consequence of which distilled spirits were unlawfully removed therefrom, proof that the room was negligently left open or unlocked is sufficient

to warrant a conviction, and it is not essential that it should have been with intent that the spirits should be removed. *Mason v. U. S.*, (C. C. A. 1908) 162 Fed. 23.

**Not applicable to Oleomargarine Act.**—*Schafer v. Craft*, (1906) 144 Fed. 907; *Grier v. Tucker*, (1907) 150 Fed. 658; *Craft v. Schafer*, (C. C. A. 1907) 153 Fed. 175.

**Vol. III, p. 584, sec. 3184.**

**Limitation of action.**—Under this section providing for the collection of delinquent internal revenue taxes, with a penalty of five per cent. thereon and interest at the rate of one per cent. a month, such interest is not a penalty, but is recoverable as interest, and the limitation of five years, prescribed by

R. S. sec. 1047, 3 Fed. Stat. Annot. 100, 4 Fed. Stat. Annot. 865, for suits to recover penalties, does not apply to a suit to recover such interest as a part of the debt. *U. S. v. Guest*, (C. C. A. 1906) 143 Fed. 456, affirmed 150 Fed. 121,

## Vol. III, p. 586, sec. 3187.

**Concurrent remedies.**—The remedy afforded by this section was not superseded by the Act of July 20, 1868, 15 Stat. L. 125, 167, ch. 186, sec. 106, which was substantially re-

enacted by R. S. sec. 3207, 3 Fed. Stat. Annot. 592. *Blacklock v. U. S.*, (1908) 208 U. S. 75, 28 S. Ct. 228, 52 U. S. (L. ed.) 396, *affirming* (1906) 41 Ct. Cl. 89.

## Vol. III, p. 587, sec. 3190.

**Rights of third persons.**—A sale of property by an internal revenue officer under a distraint warrant for the collection of a tax does not cut off the title of a third person who does not owe the tax and against whose property the warrant is not directed, and the true owner may assert his title and right of possession by replevin against the purchaser after the officer has made the sale and transferred possession, and has thus completed his

official acts with respect to the property. A sale of property by a collector under a distraint warrant is clearly distinguishable from a sale of property seized and condemned in forfeiture proceedings for violation of the customs or internal revenue laws, and passes only the interest of the tax debtor. *Sheridan v. Allen*, (C. C. A. 1907) 153 Fed. 568, *modifying* (1906) 145 Fed. 963.

## Vol. III, p. 590, sec. 3199.

**The deed is only prima facie evidence.**—Under this section providing that the collector's deed of sale of land for internal revenue taxes against the owner shall be *prima facie* evidence of the name of the person for whose taxes the land was sold, of the name of the purchaser, of the real estate purchased, and of the price paid, the deed is not *prima facie* evidence as to other recitals. *Stewart v. Pergusson*, (1903) 133 N. C. 276, 45 S. E. 585.

**Proof of title under collector's deed.**—Rev. Stat. sec. 3182, 3 Fed. Stat. Annot. 583, requires the Commissioner of Internal Revenue to make assessments of all taxes under the Internal Revenue Act; section 3183, 3 Fed. Stat. Annot. 584, directs that returns by persons liable for taxes shall be made by a certain date; section 3188, 3 Fed. Stat. Annot. 586, provides that on failure to pay the taxes

the collector may levy or by warrant may authorize the deputy collector to levy on all property, except such as is exempt, belonging to the delinquent; and section 3187, 3 Fed. Stat. Annot. 589, requires the collector, on sale of property for taxes, to give the purchaser a certificate of purchase. It has been held that a purchaser claiming land under a sale for internal revenue taxes against the owner cannot sustain his title under a collector's deed where he fails to show, independently of the mere recitals in the records or in the deed, that a return was made by the person liable to be assessed, that the Commissioner of Internal Revenue had made the assessment, that a warrant of distraint had issued, or that a certificate of purchase had been given to him. *Stewart v. Pergusson*, (1903) 133 N. C. 276, 45 S. E. 585.

## Vol. III, p. 594, sec. 3213.

**Not applicable to Oleomargarine Act.**—*Grier v. Tucker*, (1907) 150 Fed. 658.

## Vol. III, p. 597, sec. 3220.

**Conclusiveness of award.**—An allowance by the Commissioner of Internal Revenue for the refund of a tax illegally collected is not the simple passing of an ordinary claim by an ordinary accounting officer, but an award upon which an action may be brought, and which is conclusive unless impeached for fraud or mistake. *Edison Electric Illuminating Co. v. U. S.*, (1903) 38 Ct. Cl. 208.

**Reconsideration of claim determined by Supreme Court.**—In (1906) 25 Op. Atty.-Gen. 605, it was held that the Commissioner of Internal Revenue had no power, under this section, to reopen and allow the claim of a steamship company for taxes voluntarily paid under a mutual mistake of law, as the judgment of the Supreme Court (200 U. S. 488, 26 S. Ct. 327, 50 U. S. (L. ed.) 569), in sustaining the ruling of the commissioner that the company had no legal claim against the

government, deprived the commissioner of jurisdiction to again entertain the claim.

**Taxes voluntarily paid.**—The Commissioner of Internal Revenue has no power, under this section, to refund taxes voluntarily paid without protest, under a mutual mistake of law. The rule is firmly established and unqualified that protest is indispensable to the right to recover taxes claimed to have been illegally exacted. (1908) 26 Op. Atty.-Gen. 472.

**Persons liable.**—Act Cong. June 13, 1898, 3 Fed. Stat. Annot. 776, imposing an internal revenue tax on certain legacies, required the executor to sign a statement to the collector and to pay the tax to him, and section 30 gave the Commissioner of Internal Revenue control of the assessment. R. S. secs. 3182, 3183, 3 Fed. Stat. Annot. 583, required the collector to pay the tax into the treasury, and declared that on the death of the collector

all lists should be transferred to his successor; and Act Cong. Feb. 8, 1899, 6 Fed. Stat. Annot. 614, declared that an action against such collector should not abate by his death, but that his successor should be substituted as defendant. It has been held that where the collector wrongfully received an in-

heritance tax on bequests which were not taxable, on his death the liability to refund was enforceable against his successor in office, it being the duty of the commissioner to pay any judgment rendered against the collector as provided by section 3220. *Armour v. Roberts*, (1907) 151 Fed. 846.

### Vol. III, p. 599, sec. 3221.

**Defense to action on bond.**—This section confers upon the owner of distilled spirits deposited in a warehouse a legal right which is enforceable in the courts, and is not dependent on the discretionary action of the Secretary of the Treasury, and therefore a destruction of spirits in a warehouse by accidental fire may be set up as a defense to an

action by the government on a distiller's bond to recover the taxes thereon. *Freeman v. U. S.*, (1907) 157 Fed. 195, 84 C. C. A. 643.

**Spirits lost after seizure by an internal revenue officer, through the latter's mere negligence, were not lost by reason of "casualty" within this section.** *U. S. v. Siak*, (1910) 176 Fed. 885, 100 C. C. A. 355.

### Vol. III, p. 600, sec. 3224.

**Suit to restrain collection of personal property tax.**—Both under this section and on general principles of equity an injunction suit cannot be maintained to restrain the collection by town authorities of a personal property tax; there being an adequate remedy at

law to be had by paying the tax and bringing an action to recover it, and it being contrary to public policy to tie up the collection of taxes. *Nye v. Washburn*, (1903) 125 Fed. 817.

### Vol. III, p. 601, sec. 3226.

**Effect of application to refund.**—A written application to the Commissioner of Internal Revenue to refund a sum expended in the voluntary purchase of revenue stamps from a collector, to be affixed to a conveyance, though it may be sufficient to justify favorable action by the commissioner, under R. S. sec. 3220, 3 Fed. Stat. Annot. 597, is not the equivalent of an appeal to him from an adverse decision by the collector, which, under sections 3226-3228, is essential to the maintenance of a suit for the recovery of internal taxes alleged to have been erroneously or illegally assessed or collected. *Chesebrough v. U. S.*, (1904) 192 U. S. 253, 24 S. Ct. 262, 48 U. S. (L. ed.) 432.

**Remedy when claim rejected.**—If a claim is rejected by the commissioner a judicial remedy is given the party by an action against the collector. If the claim is allowed by the commissioner and payment refused by the accounting officers, a suit may be brought directly against the government in the Court of Claims. *Edison Electric Illuminating Co. v. U. S.*, (1903) 38 Ct. Cl. 208.

**Appeal as condition precedent.**—The provision in this section that no suit shall be maintained to recover back any internal revenue tax claimed to have been illegally or erroneously collected until an appeal shall have been taken to the commissioner and a decision had therein, unless such decision shall have been delayed more than six months, is not merely a statute of limitations, but prescribes an absolute condition precedent, which is not waived by a failure to plead it, and without compliance with which a suit cannot be maintained; but where, before payment of the tax, a claim for its abatement was presented to the commissioner in accordance with the rules of the department, and

rejected, the same was equivalent to an appeal, and an appeal after payment on the same grounds was not necessary to authorize a suit. *De Bary v. Dunne*, (1908) 162 Fed. 961.

Where an appeal for a rebate of the tax, taken after its assessment, but before its payment, in accordance with the regulations of the department, has been adversely decided by the commissioner on the merits, a second appeal after payment of the tax is not required before bringing suit. *Schwarzchild, etc., Co. v. Rucker*, (1906) 143 Fed. 656.

**Splitting causes of action.**—In *Johnson v. Herold*, (1907) 161 Fed. 593, it was held that a manufacturer of surgical supplies, which purchased internal revenue stamps from time to time under protest for use on articles made and sold by it, might maintain different actions against successive collectors to recover the amounts paid to each, and different actions against the same collector, when required to prevent the bar of limitations, or when they related to different classes of articles, and the questions involved might be different, and that a recovery in one such suit was not a bar to the prosecution of the others pending, where no motion was made to consolidate.

**Duress.**—The purchase of documentary stamps at various times without protest, and the affixing of such stamps to manifests of cargoes on vessels bound to foreign ports, cannot be deemed to have been under duress, so as to sustain a recovery from the United States of the amount of the illegal tax so collected, because clearance papers for vessels so bound could not be procured without delivery to the collector of the district of the stamped manifests, without which clearance

papers the vessels would be prevented from sailing, or would be liable, under R. S. sec. 4197, 7 Fed. Stat. Annot. 45, for the penalty therein prescribed. *U. S. v. New York, etc., Mail Steamship Co.*, (1906) 200 U. S. 488, 26 S. Ct. 327, 50 U. S. (L. ed.) 569, *reversing* (1903) 125 Fed. 320.

**Assessment list as evidence.**—In the assessment of special taxes the officers of the internal revenue act in a quasi-judicial capacity, and in an action to recover such taxes the introduction in evidence of the assessment list, regular in form, makes a *prima facie* case for the government. *Western Express Co. v. U. S.*, (1905) 141 Fed. 28, 72 C. C. A. 516.

### Vol. III, p. 603, sec. 3227.

**Effect of Act of March 3, 1887.**—Act of March 3, 1887, ch. 359, sec. 1, 24 Stat. L. 505, 2 Fed. Stat. Annot. 80, providing generally for the bringing of suits against the United States, and limiting such suits to six years after the right accrued, did not supersede R. S. secs. 3226, 3227. *Christie-St. Commission Co. v. U. S.*, (1903) 126 Fed. 991; *Christie-St. Commission Co. v. U. S.*, (1905) 136

**Proviso not compulsory.**—The proviso in this section is permissive only, and does not compel a claimant to bring suit within two years and six months after taking appeal in any case, but he may at his election await the decision of the commissioner, and, if adverse, bring suit within two years thereafter. *Merck v. Treat*, (1909) 174 Fed. 388, 98 C. C. A. 606.

**Limitations.**—Actions brought under this section are exclusively subject to the limitations imposed by this and the following section. *Christie-St. Commission Co. v. U. S.*, (1904) 129 Fed. 506, *affirming* (1905) 136 Fed. 326, 69 C. C. A. 464.

**Sufficiency of protest.**—See *Johnson v. Herold*, (1907) 161 Fed. 593.

Fed. 326, 69 C. C. A. 464, *affirming* (1904) 129 Fed. 506.

The running of the statute is not suspended during the pendency of the appeal before the Commissioner of Internal Revenue. *Christie-St. Commission Co. v. U. S.*, (1904) 129 Fed. 506, *affirmed* (1905) 136 Fed. 326, 69 C. C. A. 464.

### Vol. III, p. 603, sec. 3228.

**Time statute begins to run.**—Under this and the preceding section it is held that on the expiration of six months after an appeal to the Commissioner of Internal Revenue without its having been cited upon, a right of action accrues and becomes barred after

two years. *Christie-St. Commission Co. v. U. S.*, (1903) 126 Fed. 991; *Christie-St. Commission Co. v. U. S.*, (1905) 136 Fed. 326, 69 C. C. A. 464, *affirming* (1904) 129 Fed. 506; *Schwarzchild, etc., Co. v. Rucker*, (1906) 143 Fed. 656.

### Vol. III, p. 605, sec. 3232.

**Applicability to agents of a state.**—The dispensing and selling agents of a state which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors, are fairly within the scope of

sections 3232, 3244, 2040, under which an excise tax is to be collected from all sellers of intoxicating liquors. *South Carolina v. U. S.*, (1905) 199 U. S. 437, 26 S. Ct. 110, 50 U. S. (L. ed.) 261, *affirming* (1904) 39 Ct. Cl. 257.

### Vol. III, p. 607, sec. 3240.

**Certified copy of record as evidence.**—A certified copy by the Collector of Internal Revenue for the state of Georgia, from the records of his office, showing the names of all the persons who have paid special taxes within his district, is admissible evidence for the

purpose of showing that a particular person has paid the special taxes as a retail liquor dealer. *Huckabee v. State*, (1910) 7 Ga. App. 677, 67 S. E. 837. See also *State v. Dowdy*, (1907) 145 N. C. 432, 58 S. E. 1002.

### Vol. III, p. 608, sec. 3242.

**Delivery at customer's residence.**—One who has paid a special tax entitling him to retail liquor at his regular place of business does not violate this section by delivering liquor

to a customer at the latter's residence, though the sale be completed there. *Benbrook v. U. S.*, (C. C. A. 1911) 186 Fed. 153.

### Vol. III, p. 609, sec. 16.

**Purposes of law.**—While the cardinal purposes of the provisions of the internal revenue law imposing taxes on dealers in liquors is

the raising of revenue for the United States, the federal courts may properly, in the exercise of the powers vested in them, rigidly

enforce the penalties provided for a violation of such law, for the secondary purpose of aiding in the enforcement of the laws of a state regulating or prohibiting the sale of liquors. *In re Charge to Grand Jury*, (1908) 162 Fed. 736.

**Place of sale.**—In *Jones v. U. S.*, (1909) 170 Fed. 1, 95 C. C. A. 213, it was held that a retail liquor dealer who has his internal revenue tax paid stamp duly posted in his place of business is not subject to prosecution for carrying on business without paying the special tax therefor because of the shipment of a quantity of liquor from his stock on an order received by mail by an express company C. O. D. to the purchaser at another place. In such case the sale is completed and the property passes when the goods are delivered to the carrier; the collection and transmission of the price being merely an incident of the express business.

**Retail dealers — Members of illegal clubs.**—Under the statute law of Georgia which makes it unlawful for any person to sell or barter either directly or indirectly or to keep or furnish at any public place, or to keep on hand at any place of business, intoxicating liquors, a municipal corporation cannot lawfully license or charter a so-called "locker club" which, in fact, sells or furnishes liquors to its members, and such illegal charter is no protection to its members, each one of whom, who by his money, name, or patronage contributes to its support and maintenance, is a retail liquor dealer within the internal revenue law of the United States, subject to special tax as such and to the penalty imposed for carrying on the business without payment of such tax where a single tax stamp only is taken out in the name of the club. *In re Charge to Grand Jury*, (1908) 162 Fed. 736.

### Vol. III, p. 614, sec. 3244, cl. third.

**Construction of statute.**—The phrase "through continuous closed vessels and pipes until the manufacture thereof is complete" refers to the exception, to wit, "other than by original and continuous vessels and pipe until the manufacture is complete," and not to "every person who rectifies, purifies, or refines distilled spirits or wines by any process." *U. S. v. Twitchell Co.*, (1911) 184 Fed. 525.

**"Rectifiers."**—In *U. S. v. Smith, etc.; Co.*, (1911) 184 Fed. 532, it appeared that the defendants manufactured fluid extract of ginger by pouring distilled spirits on ginger root. After drawing off the fluid, the distilled spirit remaining in the dregs was separated therefrom by the distillation, and this product, less in quantity and lower in grade than that previously placed in the receptacle with the ginger root, was re-used in repeating the process and in the manufacture of medicinal preparations. It was held that the defendant was a person engaged in the business or occupation of rectifying, purifying, and refining distilled spirits and subject to internal revenue taxation imposed by this section. To the same effect see *U. S. v. Hance*, (1911) 184 Fed. 528.

**Flavoring extracts**, composed of from forty to fifty per cent. alcohol, three per cent. flavoring principle, and the remainder water,

the quantity of alcohol being no greater than is required to hold the flavoring principle in solution, which are not made, sold, or used, or capable of being used, as a beverage, but which are chiefly used in flavoring soda water syrups, the quantity of extract used in each glass of the beverage being about three or four drops, are not "beverages" or "liquors" within the meaning of this section, and the manufacturer is not subject to special tax thereunder as a rectifier or wholesale or retail dealer in liquors. *Allen v. Liquid Carbonic Co.*, (1909) 170 Fed. 315, 95 C. C. A. 11.

**Making of ginger ale paste.**—In *U. S. v. S. Twitchell, Co.*, (1911) 184 Fed. 525, it appeared that the defendant manufactured a ginger ale paste used for making ginger ale. The paste was manufactured by placing a quantity of ginger in a percolator and adding alcohol. The oleoresin thus obtained from the ginger containing unnecessary alcohol was distilled and the alcohol separated. This alcohol was of a low grade, and was charged with ginger essence so as not to be commercially salable and could not be used except in repeating the process of extracting oleoresin from ginger root and in the manufacture of flavors. It was held that the defendant in so distilling the alcohol was engaged in the business of rectifying, purifying, and refining distilled spirits within this section.

### Vol. III, p. 615, sec. 4.

**Place of sale.**—In *De Bary v. Dunne*, (1909) 172 Fed. 940, it appeared that the plaintiffs, who were wholesale liquor dealers in New York city, paid the special internal revenue tax there and kept imported wines on storage with McC. & Co. at Portland, Oregon, from which jobbers in that city and vicinity were supplied. The plaintiffs delivered to McC. & Co. a list of dealers to whom they were authorized to deliver wines from the stock on storage when requested to do so by such dealers, not exceeding a certain number of cases in any one month. The persons or

firms on such credit list, when desiring to purchase wines of plaintiff, delivered to McC. & Co. a written order for the number of cases desired, and if the maximum limit to which the purchaser was entitled for the current month had not been exceeded McC. & Co. immediately delivered the goods without consulting plaintiffs, and reported the sale to them at New York, from whence an invoice for the goods at the current price would be shipped to the buyer and the price remitted to plaintiffs in New York. There was no contract that the accredited purchasers should



buy any particular quantity per month, or any at all. It was held that sales made under such arrangements were made in Portland and not in New York, and that the plaintiff was therefore subject to the payment of a federal wholesale liquor dealer's tax in Oregon.

**Express companies.**—In *Western Express Co. v. U. S.*, (1905) 141 Fed. 28, 72 C. C. A. 516, it appeared that the local agents of an express company in a prohibition state took orders from persons desiring beer and forwarded the same to breweries in another state. The breweries delivered the beer to the company for shipment to the agent who sent the order, charging the price to the company, and having no knowledge of the local customer. On its receipt the agent stored the beer in the company's warehouse until it was called for, and then delivered it to the customer, collecting the price and the express charges, and accounting to the company for the same. He sometimes also sent orders which had not been requested, and delivered the beer to persons who thereafter applied for it. No receipts were taken from persons to whom beer was delivered, and their names did not appear on the company's books. When beer was not called for it was returned to the breweries, and the company given credit therefor. The company received nothing except

the usual charges for transportation. It was held that the company was not merely a carrier nor a commercial broker in the transaction, but was, in effect, a commission merchant, and as such was subject to special tax under this section as a dealer in malt liquors at each of the agencies where such business was carried on.

**Druggist.**—Under this section and section 3248, 3 Fed. Stat. Annot. 630, it was held that where a druggist, without paying the internal revenue tax on retail liquor dealers, sold a medicinal preparation which was eighty-eight per cent. proof spirits, more than sufficient to preserve the medicinal properties of any herbs, roots, or drugs contained therein, he was a retail liquor dealer within such sections. *U. S. v. Morfey*, (1905) 136 Fed. 491.

**Ownership not essential.**—To render one who "sells or offers for sale" malt liquors subject to special tax as a dealer in malt liquors, under this section, his ownership of such liquors is not essential. *Western Express Co. v. U. S.*, (1905) 141 Fed. 28, 72 C. C. A. 516.

**Applicability to agents of a state.**—See under this title, vol. 3, p. 605, sec. 3232.

**Casks.**—See under this title, vol. 2, p. 656, sec. 3287.

### Vol. III, p. 622, sec. 3246.

**"Apothecaries."**—A distiller of alcohol from oleoresin, obtained from ginger root in the manufacture of a ginger ale paste, which alcohol so obtained is again used in obtaining ginger extract by percolation, is not engaged in business as an "apothecary," and is not exempt from liability for the internal revenue taxation as a rectifier, purifier, or refiner of

distilled spirits by this section, exempting apothecaries from liability to taxation for the distillation of spirits used exclusively in the preparation of medicines. *U. S. v. S. Twitchell Co.*, (1911) 184 Fed. 525; *U. S. v. Hance*, (1911) 184 Fed. 528; *U. S. v. Smith, etc.*, *Co.*, (1911) 184 Fed. 532.

### Vol. III, p. 630, sec. 3248.

**"Bay rum"** is a fragrant spirit, obtained by distilling the leaves of the pimento acris with rum, or by mixing the volatile oil procured from the leaves by distillation with alcohol, water, and acetic ether. It is also defined as an aromatic liquid obtained by distilling the leaves with the bayberry, or by mixing various oils, as the oils of myrica, or

orange peel, and of pimenta, with alcohol. It has been held that it is neither a "distilled spirit," as that term is defined by this section, nor a "product of distillation" within section 3254, providing for internal revenue taxation of products of distillation as distilled spirits. *Roche v. Jordan*, (1909) 175 Fed. 234.

### Vol. III, p. 632, sec. 48.

**Forfeiture after sale — redemption of stamps.**—In *Harkins v. Williard*, (1906) 146 Fed. 703, 77 C. C. A. 129, it appeared that a distiller sold certain casks of unstamped spirits to the plaintiff, which were then in the government warehouse, and on March 10, 1902, the plaintiff paid the tax on the spirits, but before the attachment of stamps the spirits were seized on the same day for violation

of the internal revenue law by the distiller, discovered March 4, 1902, after which the spirits were forfeited to the government and sold. It was held that as this section requires the payment of the tax by the distiller and the issuance of stamps to him, the plaintiff was not entitled to recover from the United States the internal revenue tax so paid.

### Vol. III, p. 634, sec. 3254.

**Bay rum.**—See under this title, vol. 3, p. 630, sec. 3248.

## Vol. III, p. 634, sec. 3257.

**Burden of proof.**—In a proceeding by information for the forfeiture of property under this section and section 3281, as being used by one carrying on the business of a distiller without giving bond and attempting to defraud the government of the tax on spirits distilled by him, the burden of proof rests

on the United States to establish the facts alleged, and every reasonable intendment and effect must be given to answers filed by third persons who claim the property as their own. *U. S. v. One Engine*, (1910) 179 Fed. 698, 103 C. C. A. 43.

## Vol. III, p. 638, sec. 3260.

**Defenses set up by sureties.**—A distiller's official or annual bond binds the sureties for the payment of the tax on all the spirits distilled by the principal during its term, and they are not relieved from such liability by the execution of a warehousing bond covering certain of such spirits, which is not a substituted, but a cumulative, security. *U. S. v. Richardson*, (1904) 127 Fed. 893.

On a seizure and sale of distilled spirits under the internal revenue law for nonpayment of the tax thereon, the proceeds are applicable on such tax, and, if sufficient, extinguish the same; and in an action by the government on a distiller's bond to recover a tax on spirits an answer containing allegations under which the defendant is entitled to prove such a state of facts is not demurrable. *U. S. Fidelity, etc., Co. v. U. S.*, (1907) 158 Fed. 604, 85 C. C. A. 426, *affirming* (1906) 144 Fed. 866.

**Negligence of revenue officer.**—This section not only contemplates that the distiller shall comply with all the law relating to distilleries, and pay all penalties and fines imposed on him for violation of its provisions, but also that he shall pay taxes on spirits distilled within the required fifteen days, and hence, in an action on a distiller's bond for failure to pay taxes on spirits within such time, it was no defense that the spirits were seized by a revenue officer under a distress warrant and lost through the officer's negligence; the breach of the bond being the distiller's failure to pay the taxes within the time, or to warehouse the spirits according to law. *U. S. v. Sisk*, (1910) 176 Fed. 885, 100 C. C. A. 355.

A surety on a distiller's bond is not relieved from liability for the tax upon spirits lost in a distillery warehouse, by the fact that at the time of the loss the warehouse was in the possession of the collector, who had seized it for an alleged violation of law, and that the loss was through the negligence of the custodian; his remedy in such case being by an appeal to the Secretary of the Treasury for an abatement of the tax, under R. S. sec.

3221, 3 Fed. Stat. Annot. 599. *U. S. v. Guest*, (C. C. A. 1906) 143 Fed. 456, *affirmed* 150 Fed. 121.

**Spirits lost in warehouse.**—The sureties on a distiller's bond are not liable, in the first instance, for taxes on spirits which were lost after being placed in a warehouse, and thus brought within the express terms of the warehousing bond, whatever their ultimate liability may be should the remedy by suit on the latter bond prove unavailing. *U. S. v. Guest*, (C. C. A. 1906) 143 Fed. 456, *affirmed* 150 Fed. 121.

**Declaration on bond.**—In *U. S. v. Zemel*, (1905) 137 Fed. 989, it appeared that a declaration on an indemnity bond, the condition of which was that the principal should in all respects comply with the requirements of law and regulations in relation to the duties of distillers, was demurred to on the grounds that the breach of said condition assigned did not set forth with sufficient certainty the law and the regulations of the Commissioner of Internal Revenue alleged to have been violated, or the law under which such regulations were made, or that any such regulations were made. It was held that not only should the Act prescribing the penalty be set forth with reasonable certainty, but also the Act authorizing said commissioner to make regulations and the fact that they were made by him thereunder, as well as the specific regulation or regulations thus authorized and made, which were violated.

**Credit for proceeds of sale.**—Where the government made an assessment against a distiller of the tax on spirits made from material used and not reported, and a portion of such spirits were found, seized, and sold, and the tax on such part paid from the proceeds, it was held that the surety on the distiller's bond, when charged with liability for the assessment, is entitled to credit for the part of the tax so paid, but not for the remainder of the proceeds of the sale. *U. S. v. National Surety Co.*, (1907) 157 Fed. 174, 84 C. C. A. 622.

## Vol. III, p. 647, sec. 3271.

**Possession.**—The joint custody and control of a bonded warehouse by the federal storekeeper and the warehouse proprietor, as provided by sections 3271-3275, does not constitute such change of possession of the liquor

stored therein as to destroy the presumption of ownership thereof by the distiller. *Hannis Distilling Co. v. Berkeley County Ct.*, (1907) 62 W. Va. 442, 59 S. E. 1051.

## Vol. III, p. 651, sec. 3281.

Burden of proof. — See under this title, vol. 3, p. 634, sec. 3257.

## Vol. III, p. 656, sec. 3287.

**Branding of spirits — legality of regulations.** — Circular No. 33, issued by the Commissioner of Internal Revenue May 10, 1910, instructing subordinates in his department that "all forms of distilled spirits from which the substances congeneric with ethyl alcohol have been removed for practical purposes altogether, and which have been heretofore marked as 'pure neutral, or cologne spirits,' will be marked 'alcohol,'" under which the marking of any distilled product as "spirits" has been discontinued, is in violation of this section, which provides that "all distilled spirits shall be drawn from the receiving cisterns into casks or packages, . . . and the particular name of such distilled spirits as known to the trade, that is to say, high wines, alcohol, or spirits, as the case may be, shall be marked or branded on the head of such cask or package;" it being shown that one distinct product of alcohol in distillation is known

to the trade as "spirits," while another product is known as "alcohol," the distinction being so well known and established that their being so marked does not constitute a misbranding, and therefore the provision therefor is not by implication repealed by Food and Drugs Act June 30, 1906, ch. 3915, 34 Stat. L. 768, 1909 Supp. Fed. Stat. Annot. 137. *Union Distilling Co. v. Bettman*, (1908) 181 Fed. 419.

**Casks.** — The term "cask" is generally understood to be a receptacle for liquids, either larger or smaller than the usual barrel, and, as employed in the statute respecting the manufacture and sale of spirituous liquors, pertaining to wholesale dealers, has a well-recognized import as a vessel containing not less than twenty, ten, or five gallons, wine measure. *Williams v. U. S.*, (C. C. A. 1907) 158 Fed. 30.

## Vol. III, p. 658, sec. 3289.

**Each mark and stamp required therefor by law.** — R. S. sec. 3323, as amended by Act Cong. July 16, 1892, ch. 196, 27 Stat. L. 200, 3 Fed. Stat. Annot. 638, declares that every package of distilled spirits containing five wine gallons or more, filled on the premises of a local dealer, shall be marked, branded, and stamped by such wholesale liquor dealer in such manner and under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, etc., and declares that every rectifier or wholesale dealer who refuses or wilfully neglects so to mark, brand, or stamp his liquors shall be fined, etc. It has been held that such Act only authorizes

the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to designate the kind and character of the mark and stamp to be affixed to the packages, and hence that the marks and stamps so prescribed are marks and stamps "required by law," within section 3289. *U. S. v. Seven Barrels Whisky*, (1904) 131 Fed. 806.

**Information.** — In *U. S. v. Three Packages Distilled Spirits*, (1907) 152 Fed. 580, an information for a forfeiture of distilled spirits for violation of this section was held to be bad on demurrer, as not sufficiently definite to disclose to the court or claimant the precise nature of the act charged to be a violation of the statute.

## Vol. III, p. 659, sec. 3291.

**Regulations as evidence.** — See under this title, vol. 3, p. 556, sec. 321.

## Vol. III, p. 671, sec. 3296.

**Conspiracy.** — An indictment will lie under R. S. sec. 5440, 2 Fed. Stat. Annot. 247, for conspiracy to remove distilled spirits on which the tax had not been paid, in violation of

this section, although it is charged that the purpose of the conspiracy was accomplished. *Scott v. U. S.*, (C. C. A. 1908) 165 Fed. 172.

## Vol. III, p. 672, sec. 3297.

The term "alcohol," as used in this section, embraces the various grades of alcohol as reclassified in Internal Revenue Circular No.

723, and referred to therein as pure, neutral, or cologne spirits, and as commercial alcohol. (1909) 27 Op. Atty-Gen. 226.

## Vol. III, p. 678, sec. 3309.

**Evidence.** — Where, in a suit to recover an assessment on unreported spirits alleged to have been distilled from 2,774 gallons of

fruit, the defendant stipulated that he had received such amount of fruit, but wholly failed to account either for the destruction

of the fruit or of the spirits alleged to have been distilled therefrom, it was held that a finding in favor of the government was justified. *U. S. v. Cole*, (1904) 134 Fed. 697.

**Assessment prima facie evidence.**—In a suit based on an internal revenue assessment made under this section, providing that if

the commissioner finds that a distiller has not accounted for all spirits produced by him, he shall make an assessment for the difference at the rate of ninety cents per every proof gallon, the assessment is *prima facie* evidence of its validity. *U. S. v. Cole*, (1904) 134 Fed. 697.

### Vol. III, p. 680, sec. 6.

**Assessment of distiller for deficiency of production.**—Under this section which requires a distiller to pay internal revenue tax on spirits to the amount of at least eighty per cent. of the capacity of his distillery as estimated according to law, he cannot be relieved from the payment of any part of such tax because the materials used by him are of such inferior quality nor condition that they will not produce such percentage; but where

he is a fruit distiller within the proviso to this section an assessment for the deficiency cannot be made against him unless the notice of such deficiency thereby required shall have been given him by the commissioner within six months after receipt of his monthly report, and an assessment made without such notice is void. *U. S. v. Ball*, (C. C. A. 1908) 163 Fed. 504.

### Vol. III, p. 685, sec. 3318.

**Indictment.**—R. S. sec. 3244, 3 Fed. Stat. Annot. 615, defines a *wholesale liquor dealer* to be a person who sells or offers for sale foreign or domestic distilled spirits or wines in quantities not less than five wine gallons at a time. It has been held that where an indictment charged a defendant as a wholesale liquor dealer with sending out two casks of distilled spirits without making the required entries in his record book, required to be kept by section 3318, the indictment sufficiently charged that the casks contained each not less than five wine gallons. *Williams v. U. S.*, (C. C. A. 1907) 158 Fed. 30.

In charging an offense under this section it is not necessary to allege in the indictment that the defendant is both a rectifier and a wholesale liquor dealer, nor is it necessary, in such a prosecution, to charge or prove to whom the spirits were sold and the place where sent. *Williams v. U. S.*, (1906) 17 Okla. 28, 87 Pac. 647.

**Instructions on trial.**—In *Williams v. U. S.*, (C. C. A. 1907) 158 Fed. 30, it appeared that the accused was indicted for wilfully and unlawfully refusing and neglecting to make in his record book, kept as a wholesale liquor dealer, any entry or entries concerning two particular casks of spirits at the time they were sent out. The court charged that if defendant failed or neglected to provide a book in such form as prescribed by the Commissioner of Internal Revenue, and sold as a wholesale liquor dealer any kind of distilled spirits, and failed at the time of sending out

his stock and before the same was removed from his premises, to enter in such book the date when and the name and place of business of the person or firm to whom such spirits were to be sent, with the kind and quantity of such spirits, he was guilty as charged. In another paragraph the court stated that if the defendant in good faith went to the deputy revenue collector for the district and requested instruction as to the keeping of his records, and was instructed to keep them on a sheet of paper until he could procure the prescribed form book, and he in good faith relied on such instruction and so kept his record, he was not guilty. It was held that the accused by the latter instruction received the full benefit of his claim of good faith, and could not complain of any contradiction in such instructions.

**Burden of proof.**—Since a plea of not guilty puts in issue every fact essential to constitute the offense charged, and the benefit of reasonable doubt in favor of accused extends to every matter offered in evidence for as well as against him, an instruction in a prosecution of a wholesale liquor dealer for violating the internal revenue law in failing to make proper records of sales, that it was incumbent on defendant to show that he made the entries in a book prescribed by the internal revenue department, or that he made them on a sheet of paper, etc., was erroneous. *Williams v. U. S.*, (C. C. A. 1907) 158 Fed. 30.

### Vol. III, p. 688, sec. 3323.

**Penalty not exclusive.**—The penalty imposed by this section is not exclusive and does not prevent the United States from enforcing a forfeiture of the goods under R. S. sec. 3289, as amended by Act of July 16, 1892,

ch. 196, 27 Stat. L. 200, 3 Fed. Stat. Annot. 658. *U. S. v. Seven Barrels Whisky*, (1904) 131 Fed. 806.

**Casks.**—See under this title, vol. 3, p. 656, sec. 3287.

## Vol. III, p. 689, sec. 3324.

**Intent.**—A conviction may be had, under this section, making it a felony to empty a cask of distilled spirits without then and there effacing and obliterating the stamps, marks, and brands thereon, though the defendant's act was inadvertent and negligent, and did not involve actual felonious intent. *U. S. v. Gallant*, (1910) 177 Fed. 281.

**Failure of employee to destroy stamp as ordered.**—The conviction of a defendant of a violation of this section by failing to remove the stamp from a barrel which contained

distilled spirits when such barrel was emptied, which constitutes a felony, and requires the imprisonment of the defendant in the penitentiary for a term of not less than one year, will not be sustained on evidence that, on the sale of a single barrel by defendant, he expressly directed an employee to empty it of the liquor remaining therein and to destroy the stamp before delivering the barrel to the purchaser and that the failure of the employee to obey such order was unknown to him. *U. S. v. Rogers*, (1908) 164 Fed. 520.

## Vol. III, p. 701, sec. 3334.

**Forfeiture of stamps.**—Where stamped liquors were forfeited for a violation of the internal revenue law, the forfeiture included the stamps as well as the property. *Harkins v. Williard*, (1906) 146 Fed. 703, 77 C. C. A. 129.

**Application of proceeds.**—The proceeds of a sale of spirits forfeited to the United States for violation of the internal revenue law belong exclusively to the government, and cannot be applied to the payment of the tax thereon. *Harkins v. Williard*, (1906) 146 Fed. 703, 77 C. C. A. 129.

## Vol. III, p. 704, sec. 6.

**Intent.**—The criminality involved in the re-use of a bottle containing whiskey bottled in bond, without removing and destroying the stamps, does not depend on its being knowingly and wilfully done, the offense being complete if the bottle is re-used without destroying the stamps. *U. S. v. Guthrie*, (1909) 171 Fed. 528.

**Sufficiency of evidence.**—Where accused was one of three persons, each of whom held a retail liquor dealer's special tax stamp for a saloon in which government officers found a bottle which had been refilled with spirits without destroying the internal revenue stamps previously affixed thereto, in violation of this

section, but there was no evidence that the bottle was refilled by accused, or by his procurement, or by any one acting for him, it was held that he could not be convicted of violating such Act. *Duff v. U. S.*, (C. C. A. 1911) 185 Fed. 101.

**Acts of agents.**—A seller of whiskey is guilty of violating this section, prohibiting the re-use of bottles containing whiskey bottled in bond, without the removal and destruction of the stamp, though the refilling of the bottle, without destroying the stamp, is the act of the seller's bartender or agent acting within the scope of his employment. *U. S. v. Guthrie*, (1909) 171 Fed. 528.

## Vol. III, p. 714, sec. 1.

**A statement of claim in a suit against a collector to recover internal revenue taxes assessed and collected from plaintiff as a broker under War Revenue Act June 13, 1898, ch. 448, sec. 1, 30 Stat. L. 448, as amended by Act March 2, 1901, ch. 806, sec. 1, 31 Stat.**

L. 938, on the ground that plaintiff was not subject to such taxes, should set out the transactions on account of which they were assessed. *Haight, etc., Co. v. McCoach*, (1905) 135 Fed. 894.

## Vol. III, p. 730, sec. 3.

**Rules and regulations regarding rebates.**—The rules and regulations prescribed by the Commissioner of Internal Revenue on April 28, 1902, providing for claims for rebate of taxes paid on manufactured tobacco and snuff, as authorized by this section, are not objectionable for unreasonableness. *Powell v. U. S.*, (1905) 135 Fed. 881.

**Noncompliance with rules.**—A bankrupt's trustee was not entitled to recover rebates of

internal revenue on tobacco and snuff manufactured by the bankrupt, as authorized by this section, where there was evidence tending to show that the bankrupt's claim was fraudulent and there was a failure to comply with the rules and regulations prescribed therefor by the Commissioner of Internal Revenue. *Powell v. U. S.*, (1905) 135 Fed. 881.

## Vol. III, p. 730, sec. 4.

**Rules and regulations adopted in accordance with this section which made it an absolute prerequisite to the recovery of the rebate that the proofs offered the executive officers should be satisfactory to them were held to be invalid**

as applied to this case. *U. S. v. Hyams*, (C. C. A. 1906) 146 Fed. 15.

**Conditions precedent.**—A strict compliance with a clause in instructions on the back of a blank proof for tobacco rebate, requiring the

witnesses at the time of taking the inventory each to count the packages of the several denominations mentioned in the inventory, keep a separate account of the same on separate sheets of paper, make computations, etc., was held not to be a condition precedent to the claimant's right to the rebate authorized by this section. *Hyams v. U. S.*, (1905) 139 Fed. 997, *affirmed* (1906) 146 Fed. 15, 76 C. C. A. 523.

**Evidence.**—Where in a suit for tobacco rebate, as authorized by this section, claimant presented four witnesses, who testified explicitly to the amount of tobacco claimed for, and such testimony was uncontradicted, the mere fact that the government claimed that the space in the stores was obviously inade-

quate for holding the amount of tobacco testified to was held to be insufficient to show that the claim was fraudulent. *Hyams v. U. S.*, (1905) 139 Fed. 997, *affirmed* (1906) 146 Fed. 15, 76 C. C. A. 523.

**Review by Circuit Court.**—In proceedings to recover a tobacco rebate as authorized by this section, the whole claim having accrued since the passage of the Tucker Act (Act Cong. March 3, 1887, ch. 359, 24 Stat. L. 505, 2 Fed. Stat. Annot. 88), as amended by Act June 27, 1898, ch. 503, 30 Stat. L. 494, a rejection of the claim by the Commissioner of Internal Revenue is reviewable by the Circuit Court under such Act. *Hyams v. U. S.*, (1905) 139 Fed. 997, *affirmed* (1906) 146 Fed. 15, 76 C. C. A. 523.

### Vol. III, p. 746, sec. 3392.

**Cigars repacked in new boxes.**—Where cigars are repacked in other and new boxes they become liable to the same tax which was

imposed when they were first packed. *American West Indies Trading Co. v. U. S.*, (1910) 45 Ct. Cl. 488.

### Vol. III, p. 747, sec. 3394.

**Wholesale value or price.**—This section classifies cigars and cigarettes for internal revenue duty, and imposes a stamp tax of fifty-four cents per thousand on cigarettes weighing not more than three pounds to the thousand, and the wholesale value or price of which is not more than two dollars per thousand, including the tax, and, if the value exceeds such sum, then they are required to carry a tax of \$1.08 per thousand. It was held that where a person manufactured cigarettes and sold them at wholesale at his store-room in reasonable quantities to any one who

might apply, at two dollars per thousand, the fact that the larger part of the cigarettes manufactured by him were purchased by his son at two dollars per thousand and sold by him at wholesale with cigarettes of other manufacture for more than such price did not make the "wholesale price or value" of the cigarettes more than two dollars per thousand, and hence the manufacturer was not subject to an assessment prescribed by section 3371, 3 Fed. Stat. Annot. 732, for insufficient stamping. *Epremiar v. Ward*, (1909) 169 Fed. 691.

### Vol. III, p. 758, sec. 3411.

**Taxation of national bank circulation.**—A national bank whose outstanding circulating notes amount to less than five per cent. of its capital is not exempted from the payment of the half-yearly duty imposed by R. S. sec. 5214, 5 Fed. Stat. Annot. 155, upon the average amount of its notes in circulation, by the provision of section 3411, that the outstanding circulation of any bank, association, corporation, company, or person shall be free from taxation when reduced to an amount not exceeding five per cent. of its capital, although the latter section is, by section 3417,

3 Fed. Stat. Annot. 762, expressly made applicable to national banking associations, since it was so made applicable, as clearly appears from the legislation from which its provisions were drawn, in order to give national banks representing state banks the benefit of the presumption of loss or inability to retire the circulation of the state bank when ninety-five per cent. thereof had been actually retired. *Merchants' Nat. Bank v. U. S.*, (1909) 214 U. S. 33, 29 S. Ct. 593, 53 U. S. (L. ed.) 899, *affirming* (1906) 42 Ct. Cl. 6.

### Vol. III, p. 765, sec. 38.

**Construction of statute.**—A dealer may not reassemble cards from packs that have paid the tax and offer the reassembled packs

for sale in new wrappings without restamping. *U. S. v. Neustaedter*, (1906) 149 Fed. 1010.

### Vol. III, p. 770, sec. 2.

For cases on section 2, see *Leather Manufacturers' Nat. Bank v. Treat*, (1904) 128 Fed. 262, 62 C. C. A. 644; *Central Trust Co. v. Treat*, (1909) 171 Fed. 301.

## Vol. III, p. 770, sec. 6.

For a case on section 6, see *U. S. v. Chamberlin*, (1911) 219 U. S. 250, 31 S. Ct. 155, 55 U. S. (L. ed.) 204, reversing (1907) 156 Fed. 881, 84 C. C. A. 461, 13 Ann. Cas. 720.

## Vol. III, p. 770, sec. 7.

**Payee affixing stamp of the execution of paper.**—Where a note was executed in Massachusetts, and apparently payable there, the affixing of an internal revenue stamp to it by the payee after its execution was held to be not a material alteration, under the holding of the Massachusetts courts that these sections, prohibiting the admission in evidence of such documents when not stamped, applied only in the federal courts. *Rowe v. Bowman*, (1903) 183 Mass. 488, 67 N. E. 636.

**Not applicable to state courts.**—*Rowe v. Bowman*, (1903) 183 Mass. 488, 67 N. E. 636; *Davis v. Evans*, (1903) 133 N. C. 320, 45 S. E. 643.

**Liability of telegraph company for failure to transmit unstamped message.**—A telegraph company agreeing to transmit a telegraph message to which the sender had not attached the revenue stamp required by this section, notwithstanding that the Act prohibited under penalty a company from transmitting a message without an adhesive stamp being affixed, was not liable for the negligent

or intentional failure to transmit and deliver the same. *Western Union Tel. Co. v. Young*, 1902) 138 Ala. 240, 36 So. 374.

The subsequent repeal of sections 7 and 18, prohibiting a telegraph company from transmitting a message without the required adhesive stamp being affixed, did not validate a contract whereby a company agreed to transmit a message to which no stamp had been affixed by the sender. *Western Union Tel. Co. v. Young*, (1902) 138 Ala. 240, 36 So. 374.

**Proof of written contract.**—Under the provisions of sections 7 and 14 of this Act, which required charter parties to be stamped, and made unstamped instruments which were within its provisions incompetent as evidence, an action could be maintained for breach of an unstamped charter party which was executed while such provisions were in force, and which was subject to tax thereunder, for want of competent evidence of the contract. *Wheaton v. Weston*, (1903) 128 Fed. 161.

## Vol. III, p. 772, sec. 13.

**Intent.**—The provision of this section making notes, etc., invalid if not stamped, did not render such an instrument invalid unless the stamp was omitted with fraudulent intent. *Rowe v. Bowman*, (1903) 183 Mass. 488, 67 N. E. 636.

**A notary's certificate of acknowledgment attached to a declaration of homestead was held to be subject to a stamp tax under this section.** *Sackett v. McCaffrey*, (C. C. A. 1904) 131 Fed. 219.

**Validating unstamped conveyance.**—The satisfaction of a judgment for the recovery of the stamp tax which, under the War Revenue

Act of June 13, 1898, is to be levied, collected, and paid upon the execution of a conveyance, must be deemed the equivalent of the payment of the price of the stamps under section 13 of that Act, as amended by the Act of March 2, 1901, validating unstamped instruments on making the prescribed payment in view of R. S. sec. 3216, 3 Fed. Stat. Annot. 595, providing that all judgments and moneys recovered for taxes, costs, forfeitures, and penalties shall be paid to collectors as internal taxes are required to be paid. *U. S. v. Chamberlin*, (1911) 219 U. S. 250, 31 S. Ct. 155, 55 U. S. (L. ed.) 204.

## Vol. III, p. 773, sec. 14.

**Repeal.**—The repeal of the Act requiring certificates to be stamped did not authorize the subsequent admission in evidence of an instrument containing an unstamped certificate of acknowledgment which was subject to the tax when made. *Sackett v. McCaffrey*, (C. C. A. 1904) 131 Fed. 219. *Contra*, *Ohio River Junction R. Co. v. Pennsylvania Co.*, (1909) 222 Pa. St. 573, 72 Atl. 271.

**Decisions of state courts.**—Decisions of state courts that instruments, though unstamped, as required by section 14, were admissible in evidence, were held to have no application to federal courts. *Sackett v. McCaffrey*, (C. C. A. 1904) 131 Fed. 219.

**Intent in omitting stamp.**—It was only where a stamp had been omitted from an instrument with intent to evade this Act that it was rendered inadmissible in evidence, and

the burden of proving such fraudulent intent was on the party objecting to the admission of the instruments. *Ohio River Junction R. Co. v. Pennsylvania Co.*, (1909) 222 Pa. St. 573, 72 Atl. 271.

**State functions.**—Since stamps required to be affixed to a notary's certificate of acknowledgment to a declaration of homestead, under this section, were required to be furnished by the person for whose benefit the instrument was furnished, such tax was not objectionable on the ground that the notary, in taking the acknowledgment and indorsing his certificate, was exercising a function of the state government not subject to federal taxation. *Sackett v. McCaffrey*, (C. C. A. 1904) 131 Fed. 219.

**Use of unstamped instrument not prejudiced where sufficient other evidence.**—*Armstrong v. Mayer*, (Neb. 1901) 95 N. W. 493.

Not applicable to state courts.—Frank v. Bauer, (1904) 19 Colo. App. 445, 75 Pac. 930; Dillingham v. Parks, (1902) 30 Ind. App. 61, 65 N. E. 301; Tomlin v. Woods,

(1904) 125 Ia. 367, 101 N. W. 135; Rowe v. Bowman, (1903) 183 Mass. 488, 67 N. E. 636; Wheaton v. Liverpool, etc., Ins. Co., (1905) 20 S. D. 62, 104 N. W. 850.

### Vol. III, p. 774, sec. 16.

**Presumptions.**—Where a contract or conveyance is offered in evidence, executed during the period when revenue stamps were required, and such instrument has the required stamp, it is entitled to go in evidence, and,

in the absence of direct proof to the contrary, the presumption will prevail that it was stamped at the proper time, by the proper person, and in the proper sum. Glaser v. Glaser, (1903) 13 Okla. 389, 74 Pac. 944.

### Vol. III, p. 775, sec. 20.

For a case on section 20, see Johnson v. Herold, (1907) 161 Fed. 593.

### Vol. III, p. 775, sec. 25.

For a case on section 25, see New York Telephone Co. v. Treat, (C. C. A. 1904) 130 Fed. 340.

### Vol. III, p. 775, Schedule A.

For cases on schedule A, see Thomas v. U. S. (1904) 192 U. S. 363, 24 S. Ct. 305, 48 U. S. (L. ed.) 481, *affirming* (1902) 115 Fed. 207; Simpson v. Treat, (1904) 126 Fed. 1003; Wheaton v. Weston, (1903) 128 Fed. 151; Wright v. Michigan Cent. R. Co., (C. C. A. 1904) 130 Fed. 843; Municipal Tel., etc., Co.

v. Ward, (1904) 133 Fed. 70, *affirmed* (C. C. A. 1905) 138 Fed. 1006; U. S. v. Chamberlin, (1907) 156 Fed. 881, 84 C. C. A. 461, 13 Ann. Cas. 720; Eldridge v. Ward, (1909) 174 Fed. 402, 98 C. C. A. 619, *affirming* (1907) 155 Fed. 253.

### Vol. III, p. 775, Schedule B.

For cases on schedule B, see Taylor v. Treat, (1907) 153 Fed. 656, *affirmed* (C. C. A. 1908) 166 Fed. 1021; Johnson v. Herold, (1907) 161 Fed. 593.

### Vol. III, p. 776, sec. 27.

For cases on section 27, see Spreckels Sugar Refining Co. v. McClain, (1904) 192 U. S. 397, 24 S. Ct. 376, 48 U. S. (L. ed.) 496, *reversing* (1902) 113 Fed. 244, 51 C. C. A. 201; U. S. v. Northwestern Ohio Natural Gas Co.,

(1905) 141 Fed. 198; U. S. v. Consumers' Gas Trust Co., (1906) 142 Fed. 134, 73 C. C. A. 352; Union Trust Co. v. Lynch, (1906) 148 Fed. 49, *affirmed* (C. C. A. 1908) 164 Fed. 161.

### Vol. III, p. 776, sec. 29.

For cases on section 29, see Vanderbilt v. Eidman, (1905) 196 U. S. 480, 25 S. Ct. 331, 49 U. S. (L. ed.) 563; Hertz v. Woodman, (1910) 218 U. S. 205, 30 S. Ct. 621, 54 U. S. (L. ed.) 1001; King v. Eidman, (1903) 128 Fed. 815; Heberton v. McClain, (1905) 135 Fed. 226; Philadelphia Trust, etc., Co. v. McCoach, (1905) 135 Fed. 866, *affirmed* (1905) 142 Fed. 120, 73 C. C. A. 610, *affirmed* (1907) 205 U. S. 539, 27 S. Ct. 793; 51 U. S. (L. ed.) 921; Eidman v. Tilghman, (1905) 136 Fed. 141, 69 C. C. A. 139, *affirming* (1904) 131 Fed. 651, *affirmed* (1906) 203 U. S. 580, 27 S. Ct. 779, 51 U. S. (L. ed.) 326; Peck v. Kinney, (C. C. A. 1905) 143 Fed. 76, *reversing* (1904) 128 Fed. 313; U. S. v. Marion Trust Co., (C. C. A. 1906) 143 Fed. 301, *affirmed* (1907) 205 U. S. 539, 27 S. Ct. 794, 51 U. S. (L. ed.) 1191; Herold v. Shanley, (C. C. A. 1906) 146

Fed. 20, *affirming* (1905) 141 Fed. 423; Diss-ton v. McClain, (C. C. A. 1906) 147 Fed. 114, *reversing* 143 Fed. 191; Blair v. Herold, (1907) 150 Fed. 199, *affirmed* (C. C. A. 1908) 158 Fed. 804; Kerr v. Goldsborough, (C. C. A. 1906) 150 Fed. 289; McCoy v. Gill, (1907) 156 Fed. 985; Herold v. Blair, (1908) 158 Fed. 804, 86 C. C. A. 64, *affirming* (1907) 150 Fed. 199; Herold v. Kahn, (1908) 159 Fed. 608, 86 C. C. A. 598, *modified* 163 Fed. 947, 90 C. C. A. 307; McCoach v. Bamberger, (C. C. A. 1908) 161 Fed. 90; U. S. v. Robertson, (C. C. A. 1910) 183 Fed. 711; Title Guarantee, etc., Co. v. Ward, (C. C. A. 1911) 184 Fed. 447, *affirming* (1908) 164 Fed. 459; Ward v. Sage, (C. C. A. 1911) 185 Fed. 7; Matter of Hoyt, (1904) 44 Misc. 76, 89 N. Y. S. 741.



## Vol. III, p. 776, sec. 31.

**Collection of stamp tax.**—Express statutory authority for an action by the United States to recover the stamp tax which, under section 6 of this Act, was to be levied, collected, and paid upon the execution of a conveyance, was given by section 31 of that Act, making applicable all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes not heretofore specifically repealed, which must

comprehend the authority conferred by R. S. sec. 3213, 3 Fed. Stat. Annot. 594, to sue for and recover taxes in the name of the United States in any proper form of action, before any federal Circuit or District Court for the district within which the liability is incurred, or where the party from whom such tax is due resides. *U. S. v. Chamberlin*, (1911) 219 U. S. 250, 31 S. Ct. 155, 55 U. S. (L. ed.) 204.

## Vol. III, p. 784, sec. 30.

**Distribution under compromise.**—Where a writing offered as the will of a decedent was not admitted to probate, but contested proceedings therefor were compromised, as authorized by the statutes of Massachusetts, and the estate was distributed in accordance with the compromise decree, such compromise was held to be deemed the will under which the property passed, for the purposes of this section. *McCoy v. Gill*, (1907) 156 Fed. 985.

The term "clear value," as used in this section, was held to convey the idea of definite or certain value, something in no sense speculative. *Lynch v. Union Trust Co.*, (C. C. A. 1908) 164 Fed. 161, affirming (1906) 148 Fed. 49.

**Use of life tables.**—Where, at the time certain internal revenue inheritance taxes were assessed on the value of a life estate, such estate had been already terminated by the death of the life tenant, it was held to be improper to use life tables to determine the value of such life estate. *Kahn v. Herold*, (1906) 147 Fed. 575.

## Vol. III, p. 787, sec. 3.

**Vested.**—The right given to a beneficiary by a will to receive a stated share of the net income from the entire residuary estate of the testator, left in trust until the time fixed for its distribution, is not a "legacy" or "distributive share," within the meaning of such terms as used in War Revenue Act June 13, 1898, ch. 448, sec. 29, 30 Stat. L. 464, 3 Fed. Stat. Annot. 784; and under section 3, which provides that no tax shall be assessed under said section 29 in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to July 1, 1902, the only interest of the legatee in such income which was subject to taxation was the amount thereof actually received by him prior to said July 1, 1902, provided such amount was ten thousand dollars, or more. *Lynch v. Union Trust Co.*, (C. C. A. 1908) 164 Fed. 161, affirming (1906) 148 Fed. 49.

In *Title Guarantee, etc., Co. v. Ward*, (1908) 164 Fed. 459, it appeared that a testator who died in March, 1901, devised and bequeathed his residuary estate to trustees, to hold and manage the same during the lives of the two surviving children of the testator who should be the youngest at the time of his death, and for so much longer as permissible

**Voluntary payment.**—Where, at the time certain executors paid an internal revenue inheritance tax on a life estate under protest, they had no knowledge that the life tenant had died and that the life estate had therefore terminated, the payment was not voluntary so as to preclude a recovery thereof. *Kahn v. Herold*, (1906) 147 Fed. 575.

**Interest not vested in possession or enjoyment.**—The interest of a residuary legatee, conditioned on his attaining a certain age, could be deemed taxable under this Act before the happening of the contingency, in view of the express provisions of sections 29 and 30 as to "possession or enjoyment" and "beneficial interest" and "clear value," and of the absence of any express language exhibiting an intention to tax a mere technically vested interest in a case where the right to possession or enjoyment is subordinated to an uncertain contingency. *Vanderbilt v. Eidman*, (1905) 196 U. S. 480, 25 S. Ct. 331, 49 U. S. (L. ed.) 563.

under the laws of the state. The trustees were directed to set apart a sufficient sum to produce a certain amount of income to be paid to the widow during her life, and to pay the income from the remainder in equal parts to the four children of the testator or to their issue or devisees in case of their death, subject as to a part thereof to certain charges to pay off liens on the property. At the termination of the trust the corpus of the estate was to be divided equally between the four children or the devisees, legatees, assigns, or legal heirs, of any deceased. It was held that each of the four children took at once a vested estate in one-fourth part of the testator's residuary estate, having the immediate right to dispose of the same by deed or will, and to enjoy a part of the income, subject to no contingency, possession of the corpus alone being deferred, that such gifts took effect at once "in possession or enjoyment," and became subject to the legacy tax imposed by War Revenue Act June 13, 1898, ch. 448, sec. 29, 30 Stat. L. 464, 3 Fed. Stat. Annot. 783 note, and that the taxes paid thereon were not recoverable under Act June 27, 1902, ch. 1160, sec. 3, as having been assessed on contingent interests which had become vested prior to July 1, 1902.

For other cases see *Fidelity Trust Co. v. U. S.*, (1910) 45 Ct. Cl. 362; *Union Trust Co. v. Lynch*, (1906) 148 Fed. 49; *Westhus v. Union Trust Co.*, (C. C. A. 1908) 164 Fed. 795; *Chouteau v. Allen*, (C. C. A. 1909) 170 Fed. 412.

**Vested in enjoyment but not in possession.**

— Where legatees had full and absolute control of the disposition of their share of the residue, and each was entitled to all the income accruing therefrom after the testator's death, the legacies were vested in "enjoyment," though not in possession. *Ward v. Sage*, (C. C. A. 1911) 185 Fed. 7.

**Contingent interest.**— Where the interest of certain legatees in the *corpus* of the estate was contingent only, terminable by death before reaching thirty-five years of age, with no power to designate a successor, the shares of the *corpus* of legatees who had not reached the required age at testator's death on June 23, 1902, were not subject to internal revenue tax imposed by War Revenue Act June 13, 1898, ch. 448, secs. 29, 30, under the rule that any interests vested in possession or enjoyment were saved from the repeal of the Act by Act Cong. April 12, 1902, ch. 500, secs. 7, 8, 32 Stat. L. 97. *Ward v. Sage*, (C. C. A. 1911) 185 Fed. 7.

In *Land Title, etc., Co. v. McCoach*, (1904) 129 Fed. 901, 64 C. C. A. 333, reversing 127 Fed. 381, it appeared that a testator who died in March, 1901, by his will bequeathed his residuary estate in trust, the income to be paid to his wife during her life, with remainder to his children living at the time of her death, and the lawful issue of any deceased child or children; such issue taking only the share their parent would have taken if living. It was held that the remainder so created was not vested, not being limited to "persons *in esse* and ascertained" but was contingent, being limited to persons who could not be ascertained until the death of the wife, and that such bequests were not subject to the legacy tax imposed by section 29 of the War Revenue Act of June 13, 1898, ch. 448, since repealed, the wife being still living at the time of the taking effect of the amendment, by section 3 of this Act, exempting from the tax "any contingent beneficial interest not absolutely vested in possession or enjoyment" prior to July 1, 1902.

The interest of an heir in personal prop-

erty left by an intestate is wholly contingent until the estate becomes distributable under the laws of the state by the expiration of the time for the proving and payment of claims, and where such time did not expire until after July 1, 1902, the share of an heir was not subject to legacy tax provided for by War Revenue Act June 13, 1898, ch. 448, sec. 29, imposed on any contingent beneficial interest which should not become absolutely vested in possession or enjoyment prior to said July 1, 1902. *Farrell v. U. S.*, (1909) 167 Fed. 639.

The interest of a daughter in her father's estate, which, by the terms of his will, she was not to take unless she survived her mother, was contingent, and not vested, and did not become subject to legacy tax, under section 29 of the War Revenue Act of June 13, 1898, ch. 448, where her mother was living July 1, 1902, after which time contingent beneficial interests vested in possession or enjoyment were exempted from the tax by this section. *Philadelphia Trust, etc., Co. v. McCoach*, (C. C. A. 1904) 129 Fed. 906, reversing 127 Fed. 386.

**"Imposed."**— A legacy tax under War Revenue Act June 13, 1898, ch. 448, sec. 29, was not "imposed" within the meaning of the saving clause of the repealing Act of April 12, 1902, ch. 500, sec. 8, 32 Stat. L. 97, until its assessment, and there remained no power to make a valid assessment after July 1, 1902, when the repealing act took effect. *Farrell v. U. S.*, (1909) 167 Fed. 639.

**Limitation of action.**— R. S. sec. 3228. 3 Fed. Stat. Annot. 603, limiting the time for presenting claims for the refunding of internal revenue taxes illegally collected, has no application to a claim for the refunding of legacy taxes paid on contingent interests, which did not become vested prior to July 1, 1902, which are required to be refunded by this section, irrespective of their legality or whether they were voluntarily paid or not; and a failure to present the claim within the time limited by such section will not bar an action thereon. *Thacher v. U. S.*, (1906) 149 Fed. 902. See also (1907) 26 Op. Atty. Gen. 194.

The jurisdiction of the Secretary of the Treasury, under this Act, is not exclusive. *Fidelity Trust Co. v. U. S.*, (1910) 45 Ct. Cl. 363.

## Vol. III, p. 793, sec. 1.

The necessity of protest or notice to sustain the recovery of a stamp tax illegally collected on manifests of cargoes on vessels bound to foreign ports is not removed by the provisions of this section authorizing the Commissioner of Internal Revenue to redeem or make allowance for internal revenue stamps in any manner "wrongfully collected." *U. S. v. New York, etc., Mail Steamship Co.*, (1906) 200 U. S. 488, 26 S. Ct. 327, 50 U. S. (L. ed.) 569.

**Stamps destroyed because sale enjoined by state court.**— Where the manufacturer destroyed the stamps on boxes of cigars in his own warehouse because he was enjoined from

selling the same in those boxes by a state court for infringement of trademark, his case does not come within the statute. *American West Indies Trading Co. v. U. S.*, (1910) 45 Ct. Cl. 488.

**Finality of decision of commissioner.**— Where there is no disputed question of fact, and a decision of the Commissioner of Internal Revenue rests entirely upon his construction of the statute, it is not final; and if adverse to the claimant, the court has jurisdiction of a case seeking a refund for internal revenue stamps destroyed. *American West Indies Trading Co. v. U. S.*, (1910) 45 Ct. Cl. 488.

## Vol. III, p. 795, sec. 3449.

**Construction of statute.**—This section is highly penal in character and should be strictly construed. *U. S. v. Twenty Boxes Corn Whisky*, (1904) 133 Fed. 910, 67 C. C. A. 214, *affirming* (1902) 123 Fed. 135.

**Intent.**—In a prosecution for the violation of this section no question of fraud or fraudulent intent is involved. *U. S. v. Liquor Dealers' Supply Co.*, (1907) 156 Fed. 219.

**False designation.**—When spirituous liquors contained in bottles are packed in barrels and shipped and the barrels are marked "groceries," such shipment is a violation of section 3449. *U. S. v. Liquor Dealers' Supply Co.*, (1907) 156 Fed. 219.

**Concealing name or brand.**—This section applies solely to shipments of liquors under other than the proper name or brand known to the trade, as designating the kind and quality of the liquor, and not to a shipment concealing the name or brands required by the regulations of the Internal Revenue Department to be put upon all vessels containing liquors. *U. S. v. Sandefuhr*, (1906) 145 Fed. 49.

**The remedy given by this section is not exclusive.**—*Blacklock v. U. S.*, (1908) 208 U. S. 75, 28 S. Ct. 228, 52 U. S. (L. ed.) 396.

## Vol. III, p. 795, sec. 3450.

**Repeal as to oleomargarine.**—This section and section 3453 were repealed, so far as concerns the tax on oleomargarine, by Act Aug. 2, 1886, ch. 840, sec. 17, 24 Stat. L. 209, 3 Fed. Stat. Annot. 126, providing a more limited forfeiture for attempts to defraud the government of the oleomargarine tax. *U. S. v. One Bay Horse*, (1904) 128 Fed. 207.

**Time of forfeiture.**—Under the provision of this section declaring that animals used for the removal of spirits with intent to de-

**Acquittal of criminal offense as bar.**—Where a defendant was acquitted in a criminal prosecution for causing to be transported certain casks containing bottled beer falsely marked as containing bottled soda water, such acquittal was held to be a bar to the subsequent maintenance of an action by the United States to forfeit the property and recover a penalty imposed for the same act imposed by R. S. sec. 3449. *U. S. v. Seattle Brewing, etc., Co.*, (1905) 135 Fed. 597.

**Marks by government officers.**—This section has no application to marks or brands placed on packages by government officers. *Woolner v. Rennick*, (1908) 170 Fed. 662.

**This statute does not apply to all persons.**—*U. S. v. Twenty Boxes Corn Whisky*, (1904) 133 Fed. 910, 67 C. C. A. 214, *affirming* (1902) 123 Fed. 135, set out in the original note.

**Shipments of unmarked packages.**—*U. S. v. Twenty Boxes Corn Whisky*, (1904) 133 Fed. 910, 67 C. C. A. 214, *affirming* (1902) 123 Fed. 135, set out in the original note.

**"Glass; this side up with care."**—*U. S. v. Twenty Boxes Corn Whisky*, (1904) 133 Fed. 910, 67 C. C. A. 214, *affirming* (1902) 123 Fed. 135, set out in the original note.

fraud the government shall be forfeited, etc., forfeiture takes place immediately upon commission of the act, though the title of the United States is not perfected until judicial condemnation, but upon such condemnation the completed title of the United States relates back to the time of the commission of the prohibited act, and avoids all intermediate sales, even to purchasers in good faith. *Pileher v. Faircloth*, (1903) 135 Ala. 311, 33 So. 545.

## Vol. III, p. 799, sec. 3455.

**Addition of nontaxable articles.**—Substances which are not in themselves taxable under the laws of the United States are not embraced in the words "anything else," as used in this section, providing for a seizure, forfeiture, and penalty for selling packages which contain, at the time of sale, anything else than the contents when the same were lawfully stamped by a revenue officer, even where there is no intent to defraud, and for a much heavier penalty where there is such fraudulent intent. Thus the sale of a barrel of whiskey to which has been added, after such barrel has been properly stamped by a revenue officer, burnt sugar or caramel, as coloring matter, does not authorize its seizure and forfeiture to the United States. *U. S. v. A. Graf Distilling Co.*, (1908) 208 U. S. 198, 28 S. Ct. 264, 52 U. S. (L. ed.) 452.

**Evidence of changing contents after stamping.**—Where, on an information to forfeit certain liquors on the ground that distilled spirits of a different quality had been put into the barrels after they were originally stamped

and branded, in violation of this section, it was conceded that the claimant was entitled to reduce the proof by the addition of water, and the uncontradicted evidence showed that the spirits contained in the packages had been reduced in proof between twelve and fourteen degrees, after they had been gauged and stamped, by the addition of water, in conformity with the law and in the presence of a government gauger, it was held that the discrepancy in the percentage of the alcohol contained in the liquor was insufficient to form a basis for an inference that the change was occasioned by the addition of "other spirits of a different quality." *Three Packages Distilled Spirits v. U. S.*, (1904) 129 Fed. 329, 63 C. C. A. 263, *reversing* (1903) 125 Fed. 52.

**Product made under similar conditions as evidence.**—In a proceeding by the United States under this section for the forfeiture of whiskey contained in the distiller's original barrels, but alleged to be other than that contained in such barrels when they were branded and marked by the gauger, it was

competent for the government to introduce in evidence tabulated analyses of samples of the whiskey in such barrels showing the per cent. of its congeneric properties and for comparison similar analyses of whiskey taken from a large number of barrels produced by the same distillery under the same process, out of material in the same proportions, and of substantially the same grade, placed in barrels of the same character of wood, treated in the same manner, and stored in the same warehouse under practically the same conditions as to moisture and temperature, much of such whiskey having been made in the same year, some in different years, and a portion on the same day as some of the seized whiskey, and the testimony being given by expert chemists who made the analyses. *Corbin v. U. S.*, (C. C. A. 1910) 181 Fed. 296.

**Burden of proof.**—In a proceeding by the United States under this section for the forfeiture of whiskey contained in the original distiller's barrels, but in which it is alleged that the whiskey is other than that contained in the barrels when they were branded and marked by the gauger, and that the claimants in whose possession the barrels were found received the same in such substituted condition with intent to defraud, the burden rests on the government to prove that they were

in that condition when so received, and such fact cannot be inferred from the fact that they were in such condition when seized. *Corbin v. U. S.*, (C. C. A. 1910) 181 Fed. 296.

**Information.**—An information for a forfeiture of distilled spirits for violation of this section was held to be bad on demurrer, as not sufficiently definite to disclose to the court or claimant the precise nature of the act charged to be a violation of the statute. *U. S. v. Three Packages Distilled Spirits*, (1907) 152 Fed. 580.

**Variance.**—Where an information for the forfeiture of certain packages of liquors alleged that, after the barrels had been inspected, gauged, and stamped, something else than the contents which were therein when said barrels and packages were so lawfully stamped, branded, and marked, to wit, distilled spirits of a different quality, had been placed therein in violation of this section, it was held that evidence that at the time the proof of the liquors was reduced by the addition of water, after the packages had been stamped, some caramel matter had been put into the packages to deepen the color, was not within the information, and therefore inadmissible. *Three Packages Distilled Spirits v. U. S.*, (1904) 129 Fed. 329, 63 C. C. A. 263, reversing (1903) 125 Fed. 52.

### Vol. III, p. 802, sec. 3459.

**Notice.**—Where goods, seized by a collector for violation of R. S. sec. 3453, 3 Fed. Stat. Annot. 797, are attached while in his hands by the marshal on process issued in proceedings for their forfeiture, and a bond for their release is thereafter given by the claimant under this section, the proviso to the section requiring notice of the pendency of the proceedings in court to be given to the parties executing the bond, is inapplicable,

such notice being intended to take the place of an actual seizure by the marshal where the goods have been returned to the claimant under the bond before such seizure has been made, and unnecessary where the attachment has been made, and the proceeding *in rem* is pending when the bond is given. *U. S. v. 59,650 Cigars*, (1906) 146 Fed. 130, 76 C. C. A. 556, affirming (1905) 138 Fed. 166.

### Vol. III, p. 803, sec. 3460.

**Mules used to remove spirits.**—Under the provision in this section that in all cases of seizure of any goods, wares, or merchandise subject to forfeiture under the internal revenue laws, the collector shall proceed to have such goods, wares, and merchandise listed and appraised, and sell the same at auction, etc.,

the phrase "goods, wares, and merchandise" is sufficiently broad to include a team of mules used for the removal of spirits with intent to defraud the government, in violation of section 3450, 3 Fed. Stat. Annot. 795. *Pilcher v. Faircloth*, (1903) 135 Ala. 311, 33 So. 545.

### Vol. III, p. 804, sec. 3462.

**All the requirements for search warrants.**—This section, authorizing federal circuit and district judges and commissioners of the Circuit Courts to issue search warrants, does not express all the requisites of an affidavit for such warrant. An affidavit merely alleging that the officer had good reason to believe, and did believe, that the accused was unlaw-

fully engaged in manufacturing oleomargarine on the premises described, and praying the issuance of a warrant, is fatally defective for failure to state facts from which the officer issuing the warrant might determine the existence of probable cause. *Ripper v. U. S.*, (C. C. A. 1910) 178 Fed. 24.

### Vol. III, p. 805, sec. 3464.

**Spirits purchased for the National Soldiers' Home at Washington, D. C.** are purchased "for the use of the United States," within the meaning of this section, and may be with-

drawn from bonded warehouses without payment of internal revenue tax. (1905) 25 Op. Atty.-Gen. 449.

## 1909 Supp., p. 248, sec. 1.

The term "alcohol," as used in this section, embraces the various grades of alcohol as reclassified in Internal Revenue Circular No.

723, and referred to therein as pure, neutral, or cologne spirits, and as commercial alcohol. (1909) 27 Op. Atty-Gen. 226.

## 1909 Supp. Appendix, p. 829, sec. 38.

**Due process of law.**—Property is not taken without due process of law by the imposition, under this section, of an excise, measured by the net corporate income, upon the doing or the carrying on of business in a corporate or quasi-corporate capacity. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

**Excise or direct tax.**—An excise upon the carrying on or the doing of business in a corporate or quasi-corporate capacity is what was imposed by this section. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

**Inequality of application**, owing to different local conditions, does not invalidate the excise imposed by this section upon the doing or carrying on of business in a corporate or quasi-corporate capacity. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

**Discrimination.**—There is such a substantial difference between the carrying on of business by corporations and the conducting of the same business by a private firm or individual as would justify—even were the principles of the Fourteenth Amendment to the Federal Constitution applicable—the excise imposed by this section. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

**Uniformity.**—Taxing a business when carried on by a corporation, and exempting a similar business when carried on by a partnership or by a private individual, as is done by this section, does not invalidate the tax, since the only limitation upon the power of Congress is uniformity in laying the tax, and this is a geographical uniformity, which does not require the equal application of the tax to all persons or corporations who may come within its operation. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

**Apportionment.**—The tax imposed by this section being an excise, and not a direct tax, is not invalid because not apportioned among the several states according to population. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 342, 55 U. S. (L. ed.) 389.

**Possible effect on powers of state.**—The possibility that the rights of the several states to create corporations may practically be destroyed by the exercise of the power assumed by Congress in this section furnishes no ground for judicial interference with the tax. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

**Federal taxation of state agencies.**—The excise imposed by this section upon the carrying on or the doing of business in a corporate or quasi-corporate capacity is not invalid be-

cause the business taxed is done in pursuance of the authority granted by a state, in the creation of private corporations. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

**"Doing business."**—Corporations organized for and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this section. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

**Taxicab corporation.**—A corporation owning and leasing taxicabs and collecting rents therefrom is engaged in business within the meaning of this section. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

**Corporation owning and renting office building.**—A corporation organized for the purpose of owning and renting an office building, but which has wholly parted with the control and management of the property, and by the terms of a reorganization has disqualified itself from any activity in respect to it, its sole authority being to hold the title subject to a lease for 130 years, and to receive and distribute the rentals which may accrue under the terms of the lease, or the proceeds of any sale of the land, if it shall be sold, is not doing business within the meaning of this section. *Zonne v. Minneapolis Syndicate*, (1911) 220 U. S. 187, 31 S. Ct. 361, 55 U. S. (L. ed.) 428.

**Real estate trusts** created by deed for the purchasing, improving, holding, or selling lands and buildings for the benefit of the shareholders, which do not derive any benefit from, and are not organized under, any statute of the state, and which, by their terms, end with lives in being and twenty years thereafter, are not subject to the excise imposed by this section. *Eliot v. Freeman*, (1911) 220 U. S. 178, 31 S. Ct. 360, 55 U. S. (L. ed.) 424.

**Exemptions.**—Exempting corporations whose net annual incomes are under five thousand dollars from the excise imposed by this section does not invalidate the tax. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

Labor, agricultural, and horticultural organizations, fraternal and benevolent societies, and organizations for religious, charitable, or educational purposes, could be excepted from the operation of the excise imposed by this section without invalidating the tax. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

Public service corporations, such as street railway companies created under state laws, may constitutionally be subjected to the excise imposed by this section. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

Corporations acting as trustees, guardians, etc., under the authority of the law or courts of a state, are not agents of the state exempt from the imposition, under this section, of an excise measured by net income upon the doing or the carrying on of business in a

corporate or quasi-corporate capacity. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

**Insolvent corporation in hands of receiver.**—The federal excise tax imposed on the net income of certain corporations by this section was not intended to include insolvent corporations with no net income, whose properties are being administered by a court. *Pennsylvania Steel Co. v. New York City R. Co.*, (1910) 176 Fed. 471.

## 1909 Supp. Appendix, p. 829, sec. 38, cl. second.

**Measure of tax.**—Measuring the excise imposed by this section upon the carrying on or the doing of business in a corporate or quasi-corporate capacity by the entire net income from all sources does not invalidate the tax, although a part of such income may be derived from property in itself not taxable. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

The measurement by the net corporate income from all sources of the excise imposed by this section upon the doing or carrying on of business in a corporate or quasi-corporate capacity is not so arbitrary and baseless as to fall outside of the authority of the taxing

power. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 342, 55 U. S. (L. ed.) 389.

**Validity of deductions.**—The excise measured by net annual income, imposed by this section, is not invalid because a deduction of interest payments is permitted only in case of interest paid by banks and trust companies on deposits, and interest actually paid within the year on bonded or other indebtedness to an amount not exceeding the paid-up capital stock. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

## 1909 Supp. Appendix, p. 833, sec. 38, cl. sixth.

**Making tax returns public.**—Making the returns for the assessments of the excise imposed by the Act of Aug. 5, 1909, sec. 38, on the doing or the carrying on of business in a corporate or quasi-corporate capacity, public documents and open to inspection as such, under certain restrictions, as is done

by the 6th clause of that Act, as amended by the Act of June 17, 1910 (Stat. L., 2d Sess. 61st Cong. 494, ch. 297), does not do violence to the constitutional protection against unreasonable searches and seizures. *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

# INTERSTATE COMMERCE.

## Vol. III, p. 809, sec. 1.

**Amendment.**—This section was amended by the Act of June 29, 1906, ch. 3591, sec. 1, 34 Stat. L. 584, 1909 Supp. Fed. Stat. Annot. 255.

The principal objects of the Interstate Commerce Act.—To the same effect as the original note see *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, affirmed (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

**Construction of Act.**—The constitutional power of Congress to regulate commerce among the several states includes the power to regulate freight rates by requiring that they shall be uniform to all shippers, and in construing statutes enacted to that end freight rates should be construed to mean the net cost to the shipper of the transportation of his property, and such regulations may lawfully apply, not to common carriers,

but to all persons and corporations occupying such relation to transportation that the conduct of their business may operate to impair uniformity of rates. *Interstate Commerce Commission v. Reichmann*, (1906) 145 Fed. 235.

The construction of this Act and the scope of its operation is a federal question, and as to such question the state courts will follow and are bound by the decisions of the federal courts. But contracts for reduced rates not being affected by the Act, no federal question arises and no federal right is involved, and hence the state courts are free to apply their own rules to its construction. *McElvain v. St. Louis, etc., R. Co.*, (Mo. 1910) 131 S. W. 736.

**Carriers subject to Act.**—Where the line of a railway is wholly within a single state, but it is engaged in the transportation of

property moving wholly by railroad from one state to another, it is as much subject to this Act as it would be if it owned and operated a railway connecting points in different states. *U. S. v. Illinois Terminal R. Co.*, (1909) 168 Fed. 546.

**Effect of published schedule rate.**—There is no presumption of law that a freight rate upon a particular commodity is reasonably low because such rate has been duly published and filed by the carrier with the Interstate Commerce Commission. *Illinois Cent. R. Co. v. Interstate Commerce Commission*, (1907) 206 U. S. 441, 27 S. Ct. 700, 51 U. S. (L. ed.) 1128.

**Expenditures for permanent improvements and equipments** should not be charged to the current or operating expenses of a single year for the purpose of testing the reasonableness of an increased freight rate. *Illinois Cent. R. Co. v. Interstate Commerce Commission*, (1907) 206 U. S. 441, 27 S. Ct. 700, 51 U. S. (L. ed.) 1128.

A concerted advance by interstate carriers in the freight rate upon a particular commodity may be held unreasonable and unjust by the Interstate Commerce Commission and by a federal Circuit Court in the subsequent proceedings to enforce the order of the Commission, although such rate may be but a mere division of a through rate. *Illinois Cent. R. Co. v. Interstate Commerce Commission*, (1907) 206 U. S. 441, 27 S. Ct. 700, 51 U. S. (L. ed.) 1128.

**Demurrage.**—The provisions of this section, requiring rates for the transportation and for the "receiving, delivering, storage, or handling" of property by an interstate carrier to be reasonable, and prohibiting discrimination, are sufficiently broad to cover demurrage charges. *Michie v. New York, etc., R. Co.*, (1907) 151 Fed. 694.

**Reconsignment charges.**—The remedies afforded by this Act extend to the regulation of charges imposed by railroad companies for the transportation of consignments from the part of a city to which they were originally delivered to some other part at the consignee's order, and exclude the review of such question by quo warranto in the state courts. *State v. Atchison, etc., R. Co.*, (1903) 178 Mo. 687, 75 S. W. 778.

**Effect on state statutes.**—To the same effect as the original note, see *Spratlin v. St. Louis Southwestern R. Co.*, (1905) 76 Ark. 82, 88 S. W. 836.

The Texas statute (Sayles' Annot. Civ. St. Supp. 1897-1904, Act 4502 *o, d, e*) providing for penalties against railroads for each day freight is held after payment or tender of freight charges, or holding freight for collection of excess of freight thereon, is in conflict with this Act and as to interstate shipments of freight is void. *Trinity, etc., R. Co. v. Geppert*, (1911), 135 S. W. 164.

**Contracts limiting liability—enforcement by state courts.**—The right of a state to refuse to enforce a special live stock shipping contract limiting the liability of a carrier, made in a foreign state, is not affected by the Interstate Commerce Act. *Louisville, etc., R.*

*Co. v. Smith*, (1910) 123 Tenn. 678, 134 S. W. 866.

**Common-law rights.**—An interstate carrier can exercise all its rights under the common law to the full extent unless made unlawful by the Interstate Commerce Act. *McElvain v. St. Louis, etc., R. Co.*, (Mo. 1910) 131 S. W. 736.

**Jurisdiction of court.**—A court has not the power, in the first instance, to inquire into the reasonableness of a rate regularly established by a carrier and filed with the Interstate Commerce Commission and published, but whether or not a rate is reasonable is, in the first instance, for the commission. *Great Northern R. Co. v. Loonan Lumber Co.*, (1910) 25 S. D. 155, 125 N. W. 645.

**Ferry rates.**—This Act did not strip a state of any power to fix rates of ferriage which it theretofore possessed. *New York Cent., etc., R. Co. v. Chosen Freeholders*, (1909) 80 N. J. L. 305, 74 Atl. 954.

**Shipments made under "common arrangement."**—Under the provision of this Act that "the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property . . . under a common control, management, or arrangement for a continuous carriage or shipment from one state . . . to any other state," as a general rule a "common arrangement" is established by proof of a shipment under a through bill of lading and a continuous interstate carriage thereunder, coupled with proof of concerted action among the connecting carriers with regard to the payment of the charges and the receipt and movement of the traffic, even if an agreed division of a single through rate is not shown. *Standard Oil Co. v. U. S.*, (1910) 179 Fed. 614, 103 C. C. A. 172.

**Comparison of rates.**—A carrier's rates on through business do not prove that a local rate is unreasonable, nor can the local rate throw light on the justice or injustice of discriminations between nonlocal shipments of the same origin and destination. *Southern R. Co. v. St. Louis Hay, etc., Co.*, (C. C. A. 1907) 153 Fed. 729.

A finding that the rates charged by railroads for shipment to a particular point are unreasonable in themselves, and in violation of section 1 of the Interstate Commerce Act, cannot properly be based on evidence which only tends to show that they are too high as compared with the rates charged between the initial points and one or two other points. *Interstate Commerce Commission v. Nashville, etc., R. Co.*, (C. C. A. 1903) 120 Fed. 934.

**Factors to be considered in fixing reasonable rates—Cost of service to the carrier.**—The cost of service to the carrier would be an ideal theory for rate making; but it is not practical. Such cost can be reached approximately, but not accurately enough to make this factor controlling. It is, however, worthy of consideration and is a very important factor. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, affirmed (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

*Value of service to shipper.* — There are a great many factors and circumstances to be considered in fixing rates, and among other things is the value of the service to the shipper, which includes the value of the goods and the profits which the shipper can make by having them transported from one point to another. The evidence and authorities in the cases show that this method of rate making is not only ideal, but practical, when not interfered with by competition; and it is based on an idea similar to taxation. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, *affirmed* (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

*Amount of the product or commodity offered for transportation.* — The fact that there is a large amount of a product or commodity in the hands of a few persons under almost one control, which is offered for shipment at stated intervals, in fixed and continuous quantities, may be considered in rate making, thus recognizing the principle of selling cheaper at wholesale than at retail. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, *affirmed* (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

*Weight, bulk, and convenience of transportation.* — The weight and bulk of the article to be transported, and the convenience or inconvenience to the carrier in transporting it, may be considered in rate making. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, *affirmed* (1908)

209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

*General public good.* — The general public good may be considered in rate making. This includes the welfare and advantage of the great body of the citizens of the United States, who constitute the producers, shippers, and consumers; and it also includes the welfare and advantage of the various localities and of the common carriers. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, *affirmed* (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

*Competition.* — Competition may be considered in rate making. The authorities, as well as the experts in these cases, recognize that competition may be a controlling factor. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, *affirmed* (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

*No one factor controlling.* — None of the above factors alone are considered as necessarily controlling. Neither are all of them controlling as a matter of law. It is a question of fact, to be decided by the proper tribunal in each case, as to what is controlling. In every case the Supreme Court has held that competition may be controlling. In only one has it, as a matter of fact, been held not to be a defense. *Interstate Commerce v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, *affirmed* (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

## Vol. III, p. 813, sec. 2.

### CONSTRUCTION AND OPERATION IN GENERAL.

*Construction of English act followed.* — The settled construction of the equality clause of the English Railway Clauses Consolidation Act of 1845, as forbidding the charging of a higher rate for the carriage of goods for an intercepting or forwarding agent than for others, applies in construing the provisions of this section, which were substantially taken from the English statute. *Interstate Commerce Commission v. Delaware, etc., R. Co.*, (1911) 220 U. S. 235, 31 S. Ct. 392, 55 U. S. (L. ed.) 448.

*Not a defense to action for damages for delay.* — If a contract for the shipment of stock was void as discriminating in favor of the shipper by giving him a rate which was too low, so that the carrier would be entitled to collect the correct rate, it would not prevent the shipper from recovering damages for delay in shipment where he had no actual knowledge that the rate was unlawful. *Kirby v. Chicago, etc., R. Co.*, (1909) 242 Ill. 418, 90 N. E. 252.

*Liability of lessor railroad.* — Where a railroad company owning a part of the through route over which oil was transported under an alleged discriminating rate leased its line to another company, and the lessee, by virtue of the lease or otherwise, was not a partner, agent, or representative of the lessor company during the time the former was operat-

ing such portion of the through route, the lessor was not personally liable for violation of the Interstate Commerce Act by the lessee's participation in such discriminating rate during the continuance of the lease. *Western New York, etc., R. Co. v. Penn Refining Co.*, (1905) 137 Fed. 343, 70 C. C. A. 23, *affirmed* (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456.

*"Contemporaneous service."* — Under this section services rendered to a complaining and a favored shipper are "contemporaneous" as long as the discriminating rates remain in force, and for the purpose of comparison they need not be rendered on the same day, nor during the same week or month. *Mitchell Coal, etc., Co. v. Pennsylvania R. Co.*, (1910) 181 Fed. 403.

*Rebates.* — In *Mitchell Coal, etc., Co. v. Pennsylvania R. Co.*, (1910) 181 Fed. 403, it was held that a shipper was not entitled to recover damages from a railroad company for discrimination in rates because of rebates paid to a shipper from another district; the rate from such district with the rebates deducted being higher than that paid by plaintiff.

*Action by person who has received rebates.* — In *Pennsylvania R. Co. v. International Coal Min. Co.*, (1909) 173 Fed. 1, 97 C. C. A. 383, it was held that a coal shipper, which, with others, was given rebates by a



railroad company in violation of law, could not maintain an action against the company to recover damages for discrimination because others were granted larger rebates.

**Right of United States to party rate for transportation of soldiers.**—The government of the United States, in buying transportation on a railroad for its soldiers in lots of ten or more, is not entitled to the benefit of a reduced ten-party rate given by the railroad company's schedule to "theatrical, operatic, or concert companies, hunting and fishing parties, glee clubs, brass or string bands, boat, baseball, polo, or tennis clubs, football teams, and other parties of like character." Nor does the refusal to give it the same rates constitute an unjust discrimination against it, or subject it to undue prejudice or disadvantage, in violation of the Interstate Commerce Act, where it is shown that the purpose and effect of the party rate given by the schedule is to increase the company's business, and that tickets sold thereunder are closely limited in time, and are paid for in cash in advance, while those furnished to the government are not so limited, are furnished on a requisition, and are only paid for after indefinite delay, in the auditing and allowance of the claims by the War and Treasury Departments. In such case the conditions and circumstances under which the service is rendered are essentially different, and justify the making of different rates. *U. S. v. Chicago, etc., R. Co.*, (1905) 127 Fed. 785, 62 C. C. A. 465.

**Aggregation of shipments of various owners for carload rates.**—A carrier may not forbid the aggregation of the shipments of various owners for the purpose of carload rating in official classification territory, or the combination of such shipments by forwarding agents for that purpose, where preferences and discriminations forbidden by this section will result from the carrier's action. *Interstate Commerce Commission v. Delaware, etc., R. Co.*, (1911) 220 U. S. 235, 31 S. Ct. 392, 55 U. S. (L. ed.) 448.

A forwarding agent is a person within the meaning of this section. *Interstate Commerce Commission v. Delaware, etc., R. Co.*, (1911) 220 U. S. 235, 31 S. Ct. 392, 55 U. S. (L. ed.) 448.

**"Dissimilar conditions."**—The ownership or nonownership by the shipper of the goods tendered for carriage is not a dissimilar circumstance and condition, within the meaning of this section, prohibiting inequality and discrimination in rates. *Interstate Commerce Commission v. Delaware, etc., R. Co.*, (1911) 220 U. S. 235, 31 S. Ct. 392, 55 U. S. (L. ed.) 448.

**Relates to service rendered.**—The provisions of sections 2 and 8, prohibiting unjust discriminations and undue and unreasonable preferences, have reference to the service rendered, and not to the person of the sender or consignee. *U. S. v. Wells-Fargo Express Co.*, (1908) 161 Fed. 606, *affirmed* (1909) 212 U. S. 522, 29 S. Ct. 315, 53 U. S. (L. ed.) 636.

**Injunction.**—Prior to the enactment by Congress of the Elkins Act (Act Feb. 19,

1903, ch. 708, 32 Stat. L. 847, 10 Fed. Stat. Annot. 172, a United States Circuit Court had no jurisdiction in equity over a suit instituted by direction of the Attorney-General of the United States to enjoin a railroad company from granting rebates under the interstate commerce law, especially where no order had hitherto been made by the Interstate Commerce Commission on the railroad company to discontinue the forbidden act. *U. S. v. Atchison, etc., R. Co.*, (1905) 142 Fed. 176.

#### WHAT CONSTITUTES UNJUST DISCRIMINATION UNDER SECTION 2.

**Only unjust and unreasonable discriminations illegal.**—All discriminations are not forbidden, but only discrimination against some person, locality, or corporation, made for the advantage of the carrier, or by receiving greater or less compensation from one class of persons than from another for similar services; and hence a contract by a railroad to maintain rates from a factory not exceeding, to competitive points, the rates from two other places, is not, on its face, void for discrimination. *Laurel Cotton Mills v. Gulf, etc., R. Co.*, (1904) 84 Miss. 339, 37 So. 134.

**Reconsignment charges.**—An additional charge by a carrier of two cents per hundred-weight for the privilege of reconsigning hay at East St. Louis, originating in northwestern territory and shipped into southeastern territory, was held to be excessive, within section 1, prohibiting excessive rates, and thereby produced an unjust discrimination, in violation of sections 2 and 3. *Southern R. Co. v. St. Louis Hay, etc., Co.*, (C. C. A. 1907) 153 Fed. 728.

**Allowance for trackage of shipper.**—The allowance by a railroad company to certain coal companies shipping over its line of a stated sum per ton, ostensibly for the use of trackage owned by such companies and the service of their own locomotives in hauling cars thereon, from the rate charged plaintiff, which was also a shipper in the same district under similar circumstances, was held to be an unlawful discrimination. *Mitchell Coal, etc., Co. v. Pennsylvania R. Co.*, (1910) 181 Fed. 403.

The phrase "substantially similar circumstances and conditions" relates to the circumstances and conditions of carriage only, and does not include matters affecting individual shippers; and a railway company is not authorized to charge one shipper of coal a lower rate than is charged another shipper between the same terminals, because the former is shipping under contracts extending over a term of years, based on lower rates which were in force when such contracts were made, while the other shipper has no such contracts. *Pennsylvania R. Co. v. International Coal Min. Co.*, (1909) 173 Fed. 1, 97 C. C. A. 383.

**Discrimination between oil shipments in barrels and tank cars.**—In *Penn Refining Co. v. Western New York, etc., R. Co.*, (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456, *affirming* (1905) 137 Fed. 343, 70 C. C.

A. 23, it was held that railroads could not be charged with discriminating against shippers of oil in barrels from the Pennsylvania oil fields to Perth Amboy, New Jersey, because they charge for the barrel package without making a corresponding charge upon shipments in tank cars owned by those shippers who can afford to build and furnish them, the carriers having none of their own, where the transportation by tank cars is more remunerative to the carriers than the transportation by barrels, and the barrel shippers have made no demand for tank cars, and cannot use them economically for shipments to Perth Amboy, on account of the lack of facilities for unloading at that point.

**Acceptance of advertising in payment of transportation.**—The acceptance of advertising by a carrier in lieu of money in payment of interstate transportation furnished to the publisher, his employees, and the immediate members of his and their families, violates the provisions of this Act, and the Acts amendatory thereof, prohibiting the furnishing of interstate transportation for a compensation less than or different from that specified in the carrier's published rates. *Chicago, etc., R. Co. v. U. S.*, (1911) 219 U. S. 486, 31 S. Ct. 272, 55 U. S. (L. ed.) 305.

A state statute authorizing a railway company incorporated under the laws of the state to issue transportation in payment for printing and advertising must give way, so far as interstate transportation is concerned, before the provisions of this Act, and the Acts amendatory thereof, under which a carrier can accept nothing but money in exchange for interstate transportation. *Chicago, etc., R. Co. v. U. S.*, (1911) 219 U. S. 486, 31 S. Ct. 272, 55 U. S. (L. ed.) 305.

**"Milling in transit" agreement.**—An agreement by which the railroad contracts to credit on the freight charges on manufactured goods any freight on raw material shipped to the factory is not violative of this section. *Laurel Cotton Mills v. Gulf, etc., R. Co.*, (1904) 84 Miss. 339, 37 So. 134.

**Sale and delivery of goods by carrier.**—An interstate carrier, not empowered by its charter or by any legislation existing at the time of the adoption of this Act to mine and market coal, violates the mandate of the Act respecting the maintenance of published rates, and its prohibitions against undue preferences and discriminations, by stipulating to sell and transport coal at an agreed price, insufficient to yield its published freight rates after deducting the cost of purchase and delivery. *New York, etc., R. Co. v. Interstate Commerce Commission*, (1906) 200 U. S. 361, 26 S. Ct. 272, 50 U. S. (L. ed.) 515, wherein the court said: "That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view

of the positive command of the second section of the Act that no departure from the published rate shall be made 'directly or indirectly,' how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all. Now if, by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy, and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may, by becoming a dealer, buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as, by the departure from the tariff rates, the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person, so selected by the carrier, would have a monopoly in the market to which the goods were transported."

## Vol. III, p. 816, sec. 3.

## UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE.

## IN GENERAL.

The object of this section was to prevent undue preference or advantage to any person, company, firm, corporation, or locality, or any particular description of traffic. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1004, *affirmed* (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705; *De Rochemont v. New York Cent., etc., R. Co.*, (1909) 75 N. H. 158, 71 Atl. 868.

**Validity of statute.**—This section is valid and enforceable in a civil action for failure to comply with its provisions. *Gulf, etc., R. Co. v. Moore*, (Tex. 1904) 80 S. W. 428.

**State statutes.**—This section is not in conflict with a state statute permitting the attachment of freight cars when not in actual use. *De Rochemont v. New York Cent., etc., R. Co.*, (1909) 75 N. H. 158, 71 Atl. 868.

## WHAT CONSTITUTES UNDUE PREFERENCE OR ADVANTAGE.

**Definition.**—The statute does not define the phrase "undue or unreasonable preference or advantage." Whether a preference or advantage is "undue" or "unreasonable" must be determined by the circumstances of each case. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, *affirmed* (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

**Preference or advantage not necessarily unlawful.**—To the same effect as the second paragraph of the original note, see *Gamble-Robinson Commission Co. v. Chicago, etc., R. Co.*, (C. C. A. 1909) 168 Fed. 161, 16 Ann. Cas. 613; *Union Pac. R. Co. v. Updike Grain Co.*, (C. C. A. 1910) 178 Fed. 223.

**More inequality of charge does not constitute undue or unreasonable preference or advantage.** Railroads are only bound to give the same terms to all persons alike, under the same conditions and circumstances; and any fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, *affirmed* (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

**Substantially similar circumstances and conditions must exist in order to render a preference or advantage illegal.** *U. S. v. Oregon R., etc., Co.*, (1908) 159 Fed. 975.

The similarity of circumstances and conditions under which a service of carriage is rendered, which, under the Interstate Commerce Act, requires an equality of rate, relates to the circumstances and conditions which affect the service only, and where different coal-mining localities are grouped into a district for rate-making purposes, a carrier is not justified in making a different rate for the same or substantially similar service from a particular locality in such district, or on the product of a particular

mine or vein, from that charged others because the difference in the product from such locality mine or vein and that from other mines in the district is such that it can pay a higher rate and still compete in the market. *Philadelphia, etc., R. Co. v. Interstate Commerce Commission*, (1909) 174 Fed. 687.

**Preference between localities.**—The same evidence which warrants a finding that dissimilar circumstances and conditions exist which justify a lower rate for a longer haul to one point than for a shorter haul to another also establishes that the charging of such rates does not give one point an undue preference and advantage over the other, in violation of section 3 of the Interstate Commerce Act. *Interstate Commerce Commission v. Nashville, etc., R. Co.*, (C. C. A. 1903) 120 Fed. 934.

In *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, (1903) 124 Fed. 624, it appeared that the conditions are such at Norfolk and Richmond, Va., by reason of the large number of carrying lines, both rail and water, which enter such places, and the fact that they are in what is known as the "trunk line territory," as to create a very active competition on shipments from the west, and to justify the making of low rates on such shipments; and the fact that such low rates are made on through shipments from Chicago, St. Louis, and East St. Louis by a material reduction from local tariff rates by the connecting lines west of the Ohio river, while substantially the local rates are charged on the same lines on through shipments from the same points to Wilmington, N. C., which is not within the trunk line territory, but in the southern territory, and has fewer lines of transportation and less active competition, resulting in higher through rates to the latter place, although the length of haul is substantially the same, does not operate to give Norfolk and Richmond an undue or unreasonable preference or advantage, or subject Wilmington to an undue or unreasonable prejudice or disadvantage, in violation of section 3.

**Classification.**—The classification of railway cross-ties in a different class from "lumber," imposing on them a higher rate, constitutes unjust discrimination. *American Tie, etc., Co. v. Kansas City Southern R. Co.*, (C. C. A. 1909) 175 Fed. 28.

The disturbance in the relations between freight rates for soap in carload and less than carload lots, created by advancing the former from class 6 to class 5, and the latter from class 4 to class 3 in a new classification adopted to govern in official classification territory, was not cured by classifying soap in less than carload lots at twenty per cent. less than third class, but not less than fourth class, where the result of applying this modified percentage classification to the varying rates is to leave soap in less than carload lots in the fourth class in portions of the territory and in a higher class in other portions. Cin-

cinnati, etc., R. Co. v. Interstate Commerce Commission, (1907) 206 U. S. 142, 27 S. Ct. 648, 51 U. S. (L. ed.) 995.

**Special service.**—A contract by a railroad company with a shipper to ship his horses to another state on a special through stock train was not an agreement to perform a special service in violation of the Interstate Commerce Act, every shipper being entitled to the same privilege upon request. *Kirby v. Chicago, etc., R. Co.*, (1909) 242 Ill. 418, 90 N. E. 252.

**Motive.**—The fact that a carrier, for the purpose of injuring the business of a consignee, or harassing it, subjects it to a prejudice or disadvantage which is neither undue nor unreasonable, does not change the nature of the prejudice or disadvantage or create any cause of action therefor. Thus, in *Gamble-Robinson Commission Co. v. Chicago, etc., R. Co.*, (C. C. A. 1909) 168 Fed. 161, it appeared that the plaintiff was a corporation engaged in buying, selling, and dealing for commissions in fruit, vegetables, and dairy products at Minneapolis, and had offices at St. Paul, Rochester, and Mankato in Minnesota, and Aberdeen in South Dakota. The defendant was a common carrier. It had railroad stations at those towns, and lines of railroad through those states and adjoining states. It was the custom and usage of such carriers, and of the defendant, for the terminal carrier to advance the charges of connecting lines upon freight and deliver it to the consignees, also to receive freight at its stations and to transport and deliver it to the consignees, to hold the bills until the questions regarding the correctness of the charges on its lines and on the connecting lines have been adjusted, and then to collect the bills of the consignees. From a bad motive the defendant, after notice, refused to advance charges to connecting lines, to receive and transport freight consigned to the plaintiff, unless the charges upon it for transportation were prepaid, while it continued to give credit to other consignees similarly situated according to the usage and custom. It was held that these acts did not subject the plaintiff to undue or unreasonable prejudice or disadvantage within the meaning of the Interstate Commerce Act.

**Stations for special accommodation of particular customers.**—A railroad company may establish a station for the special accommodation of a particular customer, and refuse to establish a like station elsewhere for the accommodation of others, and may also grant to one person the right to erect a warehouse or elevator on its right of way, and refuse to grant the same privilege to another, in the exercise of its right to private property. *U. S. v. Oregon R., etc., Co.*, (1908) 159 Fed. 975.

**Loading facilities.**—A lumber company, which was a shipper of railroad ties, made a contract with a railroad company in 1899 by which it agreed to build a tie hoist for loading ties at a station, and the railroad company agreed to haul its ties to a designated point for \$8.50 per car, and to return to the lumber company ten per cent. of the freights

so received to apply on the cost of the hoist until entirely paid for, when it was to become the property of the railroad company. In the meantime, however, it could be used only by the lumber company. The rate given was materially less than the published rate, which was charged other shippers. It was held that such contract was one designed to give the lumber company an undue preference or advantage over other shippers, in violation of this Act, and was illegal and not enforceable in any part. *Chesapeake, etc., R. Co. v. Standard Lumber Co.*, (C. C. A. 1909) 174 Fed. 107.

**Discriminating differences between state and interstate rates.**—The nation has the power to forbid, and by this Act it has prohibited, undue discriminations between localities in different states wrought by unreasonable differences between intrastate and legal interstate rates caused by the reduction of the former by the acts and orders of the officers of a state. Thus, in *Shepard v. Northern Pac. R. Co.*, (1911) 184 Fed. 765, the facts were considered and it was held that the unavoidable effect of the general and sweeping reductions of intrastate fares and rates in Minnesota, made by the acts and orders considered, was and is substantially to burden, directly to regulate, and to discriminate against the interstate commerce of the defendant companies, and to create undue and unjust discriminations between localities in Minnesota and those in other states, in violation of the commerce clause of the Constitution.

**Competition between rival carriers.**—See *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, *affirmed* (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

**Different rates for live stock and dressed meats.**—A reduction of freight rates for dressed meats and packing-house products from Missouri river points and other points similarly situated to Chicago, which makes such rates lower than those charged for live stock, does not work an undue and unreasonable preference, where the higher rate on live stock has not materially affected any of the markets, prices, or shipments, being reasonably fair to Chicago and the shippers, and the shipments of live stock from the West to Chicago are as great in proportion to the bulk of the business as before the change of rates, and where the lower rate given to the packers was the result of competition, and does not directly influence or injure shippers of live stock. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705, *affirming* (1905) 141 Fed. 1003.

**Distinction between "real" and "possible" competition.**—The fact that defendants might if they chose to do so bring about a severe competition in live stock, as in its products, is immaterial. It is sufficient that real and substantial competition is not as severe in live stock as in its products; and it is useless to inquire whether it might be possible to make competition as severe in the one case as in the other. *Interstate Commerce Commis-*

sion *r. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, *affirmed* (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

**Contracts with shippers.**—Railway companies may contract with shippers for a single transportation or for successive transportations, subject to a change of rates in the manner provided in the Interstate Commerce Act. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705, *affirming* (1905) 141 Fed. 1003.

**Transportation of intoxicating liquors.**—Where an express company doing interstate business refused shipment of intoxicating liquors offered by shippers in Arkansas for transportation to purchasers in that portion of Oklahoma formerly called the Indian Territory, it was held that the shippers were entitled to mandamus to compel the express company to transport and deliver such liquor into that part of Oklahoma to which it was consigned. *U. S. v. U. S. Express Co.*, (1910) 180 Fed. 1006.

**Refusal to make switch connections.**—This section does subject a railroad company to indictment under section 10 for its failure or refusal to furnish switch connections to a shipper tendering interstate traffic for transportation, although such connections are furnished to other shippers, where the indictment does not charge that those demanded are reasonably practicable and could be put in with safety and would furnish sufficient business to justify the expense of their construction and maintenance, nor that the person or company asking for the same offered to pay such portion of their cost as is usual and reasonable. *U. S. v. Baltimore, etc., R. Co.*, (1907) 153 Fed. 997.

**Routing by initial carrier.**—A discrimination forbidden by this section is not made by the adoption by common carriers, as part of an agreement for a through rate from California to the East, for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper, where such rule has served, as was intended, to break up rebating by the connecting lines, and in its practical operation the actual routing is generally conceded to the shipper, and his requests to divert shipments *en route* are usually allowed. *Southern Pac. Co. v. Interstate Commerce Commission*, (1906) 200 U. S. 536, 26 S. Ct. 330, 50 U. S. (L. ed.) 585.

**Discrimination based upon ownership.**—A carrier may not, under the Interstate Commerce Act, make the ownership of goods tendered to it for carriage the criterion by which its charge for such carriage is to be measured. *Interstate Commerce Commission v. Delaware, etc., R. Co.*, (1911) 220 U. S. 235, 31 S. Ct. 292, 52 U. S. (L. ed.) 448.

**Discrimination against passengers from different points by stopping trains at certain stations for some and refusing privilege to others.**—In *Gulf, etc., R. Co. v. Moore*, (Tex. 1904) 80 S. W. 426, it was held that the refusal by a railroad company to stop its train

to let off a passenger who purchased a ticket at a point on its own road, outside the state, at a station at which it stopped its trains to let off passengers who purchased tickets over other roads at points outside the state, was a violation of this section.

**Refusal to furnish cars.**—In *American Tie, etc., Co. v. Kansas City Southern R. Co.*, (C. C. A. 1909) 175 Fed. 28, it was held that the refusal of an interstate carrier to furnish cars for the shipment of the complainant's cross-ties, while furnishing cars to others for interstate shipment of other freight, constitutes an unjust discrimination in violation of this section, for which plaintiff was entitled to recover full damages with an attorney's fee and costs as authorized by section 8.

**Distribution of cars.**—A railroad having permitted the erection of grain warehouses along its right of way in which grain was stored for producers and owners for hire, as well as grain purchased and owned by the warehousemen, promulgated a rule requiring all orders for cars for the shipment of grain from such warehouses to be made by the warehousemen. The rule operated to the prejudice of private storers of grain through the use of cars ordered by the warehousemen for the shipment of their own grain before cars could be obtained for the shipment of grain in the warehouse owned by storers, and by the appropriation of cars intended for storers by the warehousemen. It was held that the railroad company, under its duty to see that no discrimination was practiced, was bound either to change the rule, or to see that it was not permitted to operate in favor of one shipper and against another. *U. S. v. Oregon R., etc., Co.*, (1908) 159 Fed. 975.

**Pro rata allotment of cars.**—A railroad rule providing that, in the distribution of the cars of a railroad company available for the transportation of coal, cars for the railroad's fuel supply, foreign railroad cars specially consigned for the fuel supply of the consigning railroads, and individual cars owned by shippers and assigned to specified mines for loading, should be charged against the capacity of the mines at which they were placed, and that the difference between the rated capacity of the mine and the capacity of such assigned cars should be the rate on which all the other cars of the railroad company would be prorated, which rule operated slightly to the advantage of the owners of individual cars, was held not to be objectionable as a discrimination against them. *Logan Coal Co. v. Pennsylvania R. Co.*, (1907) 154 Fed. 497.

To the same effect as the original note, see *U. S. v. West Virginia Northern R. Co.*, (1903) 125 Fed. 252, *affirmed* (1904) 134 Fed. 198, 67 C. C. A. 220.

**Agreement with shippers.**—An arrangement between an interstate railroad company and coal shippers in a certain field, fixing a basis which should be considered equitable for the distribution of cars between such shippers, does not operate to relieve the railroad company from the obligations imposed on it by section 3 to treat shippers without dis-

crimination. *U. S. v. Norfolk, etc., R. Co.*, (1906) 143 Fed. 266, 74 C. C. A. 404.

**Cars owned by individual operators.** — Where some of the operators of coal mines along a line of interstate railroad own cars individually which are moved by the railroad company, they are entitled to the exclusive use of such cars, but in times when the total supply of coal cars, including such individual cars and those owned by the railroad company, is insufficient to meet the demand, in the distribution by the railroad company of cars between the different mine operators on a percentage basis, calculated on the production of the several mines, each operator is entitled to its percentage of all of the available cars, whether owned by the company or individually, in so far as it will not interfere with such right of the individual owners to the exclusive use of their own cars; and the action of the railroad company in deducting such individual cars before making the distribution, and allowing their owners in addition thereto their full quota of its own cars, subjects other operators who own no cars to an undue and unreasonable prejudice and disadvantage in violation of section 3. In such a distribution the allotment of an arbitrary number of cars for development to new mines which have had no opportunity to establish a percentage within reasonable limits is lawful. *U. S. v. Baltimore, etc., R. Co.*, (1907) 154 Fed. 108; *Majestic Coal, etc., Co. v. Illinois Cent. R. Co.*, (1908) 162 Fed. 810.

**Cars owned by other railroads buying coal of particular operator.** — The practice of a railroad company in distributing coal cars for use between mine operators on its line in times of shortage of cars not to charge against a mine as a part of its quota cars of other railroad companies who had bought coal for fuel from such mine and sent the cars there to receive delivery of the same, when

the coal so sold is not taken into consideration in computing such mine's percentage, does not subject other mine operators to an undue or unreasonable prejudice or disadvantage. The same considerations apply to coal purchased by any buyer for its own use to be delivered into its own cars at the mine, and which does not become a subject of interstate commerce. *U. S. v. Baltimore, etc., R. Co.*, (1907) 154 Fed. 108.

**Extra percentage for prompt return of cars.** — The statute is not violated by the allowance by a railroad company of an extra percentage of cars to an operator who during the preceding month has unloaded and returned its cars within a certain average time; such practice having been adopted instead of the imposition of a demurrage charge to encourage prompt return of cars, and enlarge the available supply for use, and being open to all alike. *U. S. v. Baltimore, etc., R. Co.*, (1907) 154 Fed. 108.

**Demurrage.** — A demurrage or "car service" charge, made by an interstate railroad company for the time during which cars loaded with hay are left standing on its tracks at a suburban station in Boston after the expiration of the time given for unloading, is not discriminative within the meaning of section 3 because at South Boston, which is the terminal of the road in the city, a hay shed is provided into which hay is unloaded at the request of a consignee to the extent of its capacity, and where it is stored at a somewhat less rate, the charge being the same at the two places where hay is left in the car. *Michie v. New York, etc., R. Co.*, (1907) 151 Fed. 694.

**Requiring prepayment of charges.** — To the same effect as the original note, see *Gamble-Robinson Commission Co. v. Chicago, etc., R. Co.*, (C. C. A. 1909) 168 Fed. 161, 16 Ann. Cas. 613.

#### FACILITIES FOR INTERCHANGE OF TRAFFIC.

**Construction of second paragraph.** — The provision of this paragraph that the requirement that all railroads shall provide reasonable facilities for the interchange of traffic shall not require one carrier to give the use of its track or terminal facilities to another engaged in like commerce, is not a substantive enactment, but a mere interpretation clause designed to restrain, if necessary, the generality of the language preceding it. *Pittsburgh, etc., R. Co. v. Hunt*, (1908) 171 Ind. 189, 86 N. E. 328.

**Use of tracks and terminal facilities.** — A railroad commission's order, requiring construction of a connection between a plaintiff's railroad and that of another company at a junction point, did not give such other com-

pany the use of complainant's track or terminal facilities, within this section. *Pittsburgh, etc., R. Co. v. Hunt*, (1908) 171 Ind. 189, 86 N. E. 328.

**Duty to transfer shipments consigned to substantially same points of delivery.** — A railway maintaining a live stock depot as a point of delivery for cattle having a municipality as their general destination cannot be compelled to receive live stock billed to a similar depot at substantially the same point on another railway, and to deliver the same to that railway, at a point of physical connection between the two roads for ultimate delivery there. *Central Stock Yards Co. v. Louisville, etc., R. Co.*, (1904) 192 U. S. 569, 24 S. Ct. 339, 48 U. S. (L. ed.) 565.

#### Vol. III, p. 823, sec. 4.

**Circumstances justifying different charge.** — In an action by a carrier to recover a greater rate for a shorter than for a longer haul, an answer alleging that there existed

no reason, by way of the peculiar geographical position, competition, or trade or other conditions, why a greater charge should be made for the shorter haul, stated facts show-



ing that the rate was illegal and not recoverable. *Great Northern R. Co. v. Looman Lumber Co.*, (1910) 25 S. D. 155, 125 N. W. 645.

The possibility of competition arising at a particular point does not render freight rates to that point, though higher than those for a longer haul to a point where competition prevails, obnoxious to the prohibition of the Interstate Commerce Act against a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions. *Interstate Commerce Commission v. Louisville, etc., R. Co.*, (1902) 190 U. S. 279, 23 S. Ct. 687, 47 U. S. (L. ed.) 1054.

Competition between rival carriers. — In *Interstate Commerce Commission v. Louisville, etc., R. Co.*, (1902) 190 U. S. 279, 23 S. Ct. 687, 47 U. S. (L. ed.) 1054, it was

held that freight rates from New Orleans, Louisiana, to La Grange, Georgia, arrived at by charging the through rate to Atlanta, Georgia, fixed as the result of competition at that point, and adding thereto the local rate back over the same line from Atlanta to La Grange, are not obnoxious to the prohibition of the Interstate Commerce Act against undue discrimination and a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions, because stations between La Grange and Atlanta to which the same rule is applied receive lower rates from New Orleans than La Grange, where the La Grange rates, if based on the nearest competitive point south with the local rate from such point added, would be still higher.

### Vol. III, p. 827, sec. 5.

Routing by initial carrier. — The pooling of freights of competing railroads, forbidden by this section, is not accomplished by the adoption of common carriers, as part of an agreement for a through rate from California to the East, for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is, reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper, even though the initial carrier promises fair treat-

ment to the connecting lines, and carries out such promise, where such rule has served, as was intended, to break up rebating by the connecting lines, and in its practical operation the actual routing is generally conceded to the shipper, and his requests to divert shipments *en route* are usually allowed. *Southern Pac. Co. v. Interstate Commerce Commission*, (1906) 200 U. S. 536, 26 S. Ct. 330, 50 U. S. (L. ed.) 585. See also under this title, vol. 3, p. 816, sec. 3.

### Vol. III, p. 827, sec. 6.

Amendment. — This section was amended by Act of June 29, 1906, ch. 3591, sec. 2, 34 Stat. L. 586, 1909 Supp. Fed. Stat. Annot. 280.

Construction of classification sheets. — In construing classification sheets, the intention of the framers thereof as to the meaning of words used, when such intention can be ascertained, should be given effect regardless of the intention of the shipper, or of local usages and customs relating to the meaning of terms contained therein. *Smith v. Great Northern R. Co.*, (1906) 15 N. D. 195, 107 N. W. 56.

Rates in force to which this section applies are not limited to rates under which transportation has actually taken place, but are those which the carrier has established as its present charges for transportation, as distinguished from those which are obsolete, tentative, or perhaps only to take effect in the future. They are rates open to public inspection and on which shipments may be made, if offered. *New York Cent., etc., R. Co. v. U. S.*, (1908) 166 Fed. 267, 92 C. C. A. 331.

Designation of route. — A tariff rate between two points on different railroads, filed and published by one company and concurred in by the other, which does not designate any particular route, must be held as a matter of law to apply to the natural and direct route over the lines of the two companies between the designated points, and to constitute the lawful rate over such route. *Standard Oil Co. v. U. S.*, (1910) 179 Fed. 614, 103 C. C. A. 172.

Different route. — This section provides, among other things, that it shall be unlawful for any common carrier, party to any joint tariff, to charge or receive a greater or less compensation for the transportation of persons or property, or for any service in connection therewith, between any points as to which a joint rate is named thereon than specified in the schedule filed by the commission in force at the time. It has been held that the words "between two points" do not limit such section to points on the established route, but that the section prohibited the transportation of property between terminals in different states at a greater or less rate than the established rate, without reference to routes. *U. S. v. Pennsylvania R. Co.*, (1907) 153 Fed. 625.

Reservation by initial carrier of right to route freight. — Nothing in the provisions of this section requiring joint traffic rates, when agreed upon, to be filed with the Interstate Commerce Commission, and made public when required, and empowering the commission to prescribe forms of schedules of such rates, forbids the adoption by common carriers, as part of an agreement for a through rate from California to the East, for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper, where such rule has served, as was intended, to break up rebating by the connecting lines, and in its practical operation the actual routing is generally conceded

to the shipper, and his requests to divert shipments *en route* are usually allowed. *Southern Pac. Co. v. Interstate Commerce Commission*, (1906) 200 U. S. 536, 26 S. Ct. 330, 50 U. S. (L. ed.) 585.

**Right to receive freight.**—It has been held that it is only the "business" of a common carrier which cannot be exercised without filing rates, and that a railroad company is not prohibited from receiving freight for transportation to another state by the fact that no through route and joint rates had been established between the points of shipment and delivery. *Reid v. Southern R. Co.*, (1910) 153 N. C. 490, 89 S. E. 618.

**Through rates under joint schedules.**—In *U. S. v. Wood*, (1906) 145 Fed. 405, it appeared that through shipments of iron pipe were made from points in New Jersey and Pennsylvania to Winnipeg, Can., part over the Baltimore and Ohio railroad and part over the Philadelphia and Reading to the Great Lakes; thence by the Mutual Transit Company, a water carrier, to Duluth; and thence by the Great Northern railway and its connections. There was no through joint rate filed or published, but there was a joint rate of 24½ cents per one hundred pounds between the initial points and Duluth published and filed by participating carriers, and one of twenty-five cents per one hundred between Duluth and Winnipeg filed by the Great Northern Railway Company. It was held that the lawful rate for the through carriage was the sum of such two rates, or 49½ cents per hundred, and that under the interstate commerce law neither line over which the shipments passed could lawfully charge a greater or less sum than was specified in the filed and published schedule of rates to which it was a party.

**Demand equal to collection.**—Under the provision that no carrier shall charge, demand, collect, or receive a greater or less compensation for service than the rates, fares, and charges specified in the tariff filed and in effect at the time, a wilful demand of more than the tariff rates by a carrier is of equal criminality with an actual collection thereof. *U. S. v. Texas, etc., R. Co.*, (1911) 185 Fed. 820.

**A rate on lumber** was held to cover cross-ties. *American Tie, etc., Co. v. Kansas City Southern R. Co.*, (C. C. A. 1909) 175 Fed. 28.

**Departure from published rate.**—Where a tariff has been established on a commodity for a through interstate shipment, as provided by this section, there can be no departure therefrom unless made according to law. *U. S. v. Pennsylvania R. Co.*, (1907) 153 Fed. 625.

**Separate rates for icing cars.**—It seems that a railroad company engaged in interstate commerce in its schedules of rates and classifications filed with the Interstate Commerce Commission may state separately its rate for the carriage of ordinary commodities of a particular class and its charge for icing cars when commodities of the same class are of a character requiring to be shipped under refrigeration, and that its collection of both charges when refrigeration is used is lawful,

provided they are each reasonable and do not cover double compensation for the same service. *Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co.*, (C. C. A. 1906) 148 Fed. 968.

**Storage charges.**—Where a carrier gave notice of the arrival of freight before it had so placed the cars that the freight could be delivered to the consignees, and thereafter attempted to charge storage while the cars remained in its possession as the carrier, in addition to the freight rates it was authorized to charge under its published tariffs, it was held that there was a wilful violation of the provisions of the Interstate Commerce Act, providing that no carrier shall charge, demand, or collect different compensation for service than the rates specified in the tariff filed. *U. S. v. Texas, etc., R. Co.*, (1911) 185 Fed. 820.

**Applicability of through rates to other carriers.**—Where a railroad accepts freight for shipment to a point not on its route, another road passing through the same place, and to the destination of the shipment, is not justified in refusing to accept the shipment at its regular published rate from the first road, by the fact that there is no agreement between the two companies for a joint through rate, notwithstanding this section relating to publication of joint tariffs. *Texas, etc., R. Co. v. Texas Short Line R. Co.*, (1904) 35 Tex. Civ. App. 387, 80 S. W. 567.

**Acceptance at through rates when no through rates published.**—Where a railroad accepts freight for shipment to a point not on its route, though it has published no through rate, where there is a railroad passing through the same place and to the destination, the road accepting the shipment may charge the rate published by the other, and need not charge a combination of local rates. *Texas, etc., R. Co. v. Texas Short Line R. Co.*, (1904) 35 Tex. Civ. App. 387, 80 S. W. 567.

**Printing, filing, and posting schedule of rates.**—Where a carrier makes its schedule of rates and files them with the Interstate Commerce Commission, which approves and promulgates them as required by the Interstate Commerce Act, the carrier and shipper must observe them, and any known departure therefrom will subject them to a fine. *Illinois Cent. R. Co. v. Henderson Elevator Co.*, (Ky. 1910) 127 S. W. 779.

In an indictment charging a shipper with having received from a railroad company a rebate or concession in violation of this Act, whereby oil was transported for it in interstate commerce at a less rate than that named in the tariffs published and filed by the railroad company, an averment that such company established, published, and filed a rate on oil between Chicago and St. Louis of nineteen and one-half cents per hundred pounds is not sustained by proof that its schedules named only the rate over its own line from Chicago to East St. Louis at eighteen cents, and that the tariff on connecting lines between East St. Louis and St. Louis was one and one-half cents. *U. S. v. Standard Oil Co.*, (1909) 170 Fed. 988.



**Necessity for posting.**—Under this section, requiring carriers to file freight rate schedules with the Interstate Commerce Commission and to post them in railway stations, and providing that changes in rates shall not take effect until after thirty days' notice to the commission and to the public in the same way, a rate filed with the commission is put in force, though not so posted, as affecting the Circuit Court's jurisdiction to enjoin it. *Wickwire Steel Co. v. New York Cent., etc., R. Co.*, (C. C. A. 1910) 181 Fed. 316.

Interstate freight rates are established when a schedule thereof is filed by a carrier with the Interstate Commerce Commission and copies are furnished by the railway company to its freight offices, although such rates may not be "posted" as required by this section, which is not made a condition precedent to the establishment and putting in force of the tariff of rates, but is a provision based upon the existence of an established rate, which has for its object the affording of special facilities to the public for ascertaining the rates actually in force. *Texas, etc., R. Co. v. Cisco Oil Mill*, (1907) 204 U. S. 450, 27 S. Ct. 358, 51 U. S. (L. ed.) 562. Compare *Wabash R. Co. v. Sloop*, (1906) 200 Mo. 198, 98 S. W. 607; *Chicago, etc., R. Co. v. Gardner*, (Tex. 1905) 86 S. W. 793.

**Necessity for filing at station.**—Under this section it is not sufficient that the rates are filed with the Interstate Commerce Commission, but they must be on file at the station or with the agent of the common carrier, in order to justify a rate of such carrier. *Pecos River R. Co. v. Reynolds Cattle Co.*, (Tex. 1911) 135 S. W. 162.

**Effect of schedule on contracts for transportation.**—To the same effect as the first paragraph of the original note, see *Baltimore, etc., R. Co. v. New Albany Box, etc., Co.*, (Ind. 1911) 94 N. E. 906; *Melody v. Great Northern R. Co.*, (N. D. 1910) 127 N. W. 543. See also under this title, 1909 Supp., p. 260, sec. 2.

Common carriers of freight, having adopted classification sheets fixing transportation charges, and having filed the same with the Interstate Commerce Commission, are, as well

as the shippers, bound thereby; and contracts between such carriers and shippers are presumed to be governed by the classification sheet in force at the date of shipment. *Smith v. Great Northern R. Co.*, (1906) 15 N. D. 195, 107 N. W. 56.

In September, 1901, it was not unlawful for a connecting railroad line to make a joint rate with a shipper for the transportation of grain from one state to another, and a contract of this character was valid and binding upon the parties thereto if there was no established rate under the provisions of this section in force which applied to such traffic. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, (1908) 79 Kan. 59, 99 Pac. 820.

Where a railroad, in compliance with the Interstate Commerce Act, filed with the Interstate Commerce Commission a printed schedule of tariffs showing rates of freight then in force, but in a contract of shipment no rate was fixed verbally or in writing, and no allusion made to a reduced rate, the bill of lading being silent as to the rate, it was held that no presumption obtained that the shipper knew a reduced rate was charged because the printed receipt contained a clause limiting the road's liability, so as to exonerate it from liability for loss of the freight through negligence. *Phoenix Powder Mfg. Co. v. Wabash R. Co.*, (1906) 196 Mo. 663, 94 S. W. 235. See also *Phoenix Powder Mfg. Co. v. Wabash R. Co.*, (1906) 120 Mo. App. 566, 97 S. W. 256.

**Failure to publish rate.**—Under this section it has been held that a contract by a railroad company to charge no greater rate from a certain factory to competitive points than was charged from certain other places, and to maintain a "milling in transit" agreement, was not illegal on its face, in the absence of any showing that the rates fixed by the contract were different from those approved by the commissions, or that rates had been submitted to the commissions at all before the contract was made. *Laurel Cotton Mills v. Gulf, etc., R. Co.*, (1904) 84 Miss. 339, 37 So. 134.

## Vol. III, p. 832, sec. 7.

**Limitation of liability in interstate carriage.**—The refusal of a state court to limit the liability of a common carrier for its negligence in the execution of a contract for interstate carriage to the valuation agreed upon does not contravene the various provisions of this Act, making it obligatory to provide

proper facilities for interstate carriage of freight, and preventing carriers from obstructing continuous shipments on interstate lines. *Pennsylvania R. Co. v. Hughes*, (1903) 191 U. S. 477, 24 S. Ct. 132, 48 U. S. (L. ed.) 268.

## Vol. III, p. 833, sec. 8.

**Necessity for payment under protest.**—To entitle a shipper to maintain an action against a railroad company to recover damages for being unjustly discriminated against in rates, it is not necessary that he should have paid the freight charged under protest. *Pennsylvania R. Co. v. International Coal Min. Co.*, (1909) 173 Fed. 1, 97 C. C. A. 383;

*Mitchell Coal, etc., Co. v. Pennsylvania R. Co.*, (1910) 181 Fed. 403.

**Action against initial carrier for damage by connecting carrier.**—Sections 8 and 9 do not apply to the liability of an initial carrier under section 20 of this Act, as amended by the Hepburn Act (Act June 29, 1906, ch. 3591, sec. 7, 34 Stat. L. 595, 1909 Supp. Fed.

Stat. Annot. 271), for injuries to property while in the possession of a connecting carrier, notwithstanding any provision in the contract of carriage to the contrary. *St. Louis, etc., R. Co. v. Heyser*, (1910) 95 Ark. 412, 130 S. W. 562.

**Damages.**—In an action against a railroad company under this section to recover damages for discrimination in rates charged on coal from the mines in violation of section 2 of this Act, it was held that the plaintiff was entitled only to recover for such discrimination as gave his competitor an unfair advantage in the same market. *Mitchell Coal, etc., Co. v. Pennsylvania R. Co.*, (1910) 181 Fed. 403.

Where a statement of claim alleges damages in certain sums per ton on shipments from different mines, recovery is limited to such sums. *Mitchell Coal, etc., Co. v. Pennsylvania R. Co.*, (1910) 181 Fed. 403.

In an action by a coal mining company against a railroad company to recover damages because of discrimination in rates made in favor of other shippers between the same terminals, the measure of damages recoverable is the difference between the amount paid by plaintiff and the amount it would have paid at the lowest rate charged on any other shipments carried under substantially the same circumstances and conditions during the same time, and not the difference between the rates paid by it and the average rate paid by any other shipper. *Pennsylvania R. Co. v. International Coal Min. Co.*, (1909) 173 Fed. 1, 97 C. C. A. 383.

**Ground of recovery.**—To support an action by a shipper against a carrier under this section he must show either that there has been some unreasonable or excessive charge imposed or some unlawful discrimination

practiced against him by which he has been pecuniarily damaged, and he cannot recover, on a merely technical construction of the law, because, in addition to the ordinary schedule rate, an extra charge for icing service, also shown by the schedules, but separately, has been collected from him, where such charge is not shown to be unreasonable and has not been so held by the Interstate Commerce Commission. *Knudsen-Ferguson Fruit Co. v. Michigan Cent. R. Co.*, (C. C. A. 1906) 148 Fed. 968.

**Connecting carriers.**—A connecting carrier which takes the cars as they are delivered to it by the initial carrier is not liable for a discrimination in favor of shippers of oil in tank cars and against shippers of oil in barrels which may be practiced by the initial carrier, merely because such connecting carrier has participated in the adoption of a joint through rate for barrel shipments, which is in itself reasonable, although by this section a carrier which "shall do, cause to be done, or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful," shall be liable to the full amount of the damages sustained by one injured thereby. *Penn Refining Co. v. Western New York, etc., R. Co.*, (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456, *affirming* (C. C. A. 1905) 137 Fed. 343.

**Limitation of actions.**—The Mississippi statute (Annot. Code 1892, sec. 2741) providing that actions to recover a forfeiture or penalty on a penal statute shall be brought within one year has no application to an action in the federal court against a common carrier to recover damages for discrimination in violation of this Act. *Carter v. New Orleans, etc., R. Co.*, (C. C. A. 1906) 143 Fed. 99.

## Vol. III, p. 833, sec. 9.

**Jurisdiction of federal courts.**—The federal courts have exclusive jurisdiction of all suits arising under this section. *Northern Pac. R. Co. v. Pacific Coast Lumber Manufacturers' Assoc.*, (1908) 165 Fed. 1, 91 C. C. A. 39; *Union Pac. R. Co. v. Oregon, etc., Lumber Manufacturers' Assoc.*, (1908) 165 Fed. 13, 91 C. C. A. 51.

**Jurisdiction of state courts.**—To the same effect as the original note, *Gulf, etc., R. Co. v. Moore*, (1904) 98 Tex. 302, 83 S. W. 362. *Compare St. Louis, etc., R. Co. v. Heyser*, (1910) 95 Ark. 412, 130 S. W. 562.

The Interstate Commerce Act is a part of the law of the state and enforceable in its courts when rights under it arise as incidents of a trial. *McElvain v. St. Louis, etc., R. Co.*, (1910) 151 Mo. App. 126, 131 S. W. 736.

While the federal courts have exclusive jurisdiction of all actions based on specific remedies given by this Act under sections 8 and 9 thereof, nevertheless, after adjudication by the Interstate Commerce Commission, a state court has jurisdiction of a suit at common law brought against the carrier to recover the excess of freights paid on inter-

state shipments; such right of action being preserved to the shipper by section 22 of said Act. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, (1908) 79 Kan. 59, 99 Pac. 819; *Robinson v. Baltimore, etc., R. Co.*, (1908) 64 W. Va. 406, 63 S. E. 323.

In *Banner v. Wabash R. Co.*, (1906) 131 Ia. 405, 108 N. W. 759, it appeared that the plaintiff shipped from one state to another certain goods and sixteen head of stock in an emigrant car, the railroad's rules fixing the rate for such cars, limiting the number of head of stock to be shipped in one car to ten, and providing that the freight charged for animals in excess of said number should be at a certain rate, establishing an arbitrary weight in which the computation should be made. Six of the cattle were calves weighing about three hundred pounds each, and before plaintiff was permitted to remove his property from the car he was compelled to pay the car load price of a car of stock between the points of carriage in addition to the charge for an emigrant car. There was nothing in the schedules or classification shown authorizing a charge for such arbitrary weight. It was held that the state court had jurisdiction

of an action to recover the amount so paid by plaintiff, the suit not being one to recover an overcharge under the Interstate Commerce Act but to recover back a wholly unjust and unauthorized exaction demanded and collected not only in violation of the Act itself, but in violation of the contract made with plaintiff.

**Overcharges, jurisdiction of actions to recover** which is given to federal tribunals by this section, are such as grow out of a charge in excess of a carrier's rates as fixed by schedules, filed, published, and posted, as required by section 6; so that where no such schedules have been posted, and the overcharge is merely one in excess of the rate agreed on with the shipper, action therefor may be maintained in the state courts. *Wabash R. Co. v. Sloop*, (1906) 200 Mo. 198, 98 S. W. 607.

A state court has jurisdiction of an action based upon a carrier's common-law duties to furnish facilities for shipping, although the damage was caused by the act of a carrier engaged in interstate business, where the action was not brought under the Interstate Commerce Act. *Pittsburgh, etc., R. Co. v. Wood*, (1908) 45 Ind. App. 1, 84 N. E. 1009.

The question of jurisdiction between the state and federal courts is to be determined by the averments of the petition, and not by the federal questions presented defensively by the answer. *St. Louis, etc., R. Co. v. Roff Oil, etc., Co.*, (Tex. 1910) 128 S. W. 1194.

**Election of remedies.**—Where the plaintiff elected to proceed by a complaint to the commission, it was held that he was thereafter confined to the remedy provided by this section. *Western New York, etc., R. Co. v. Penn Refining Co.*, (1905) 137 Fed. 343, 70 C. C. A. 23, *affirmed* (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456.

**Parties.**—Where there has been a preliminary inquiry and finding by the Interstate Commerce Commission on the question of unlawful discrimination, a suit against the carrier may be maintained by the government. *U. S. v. Michigan Cent. R. Co.*, (1903) 122 Fed. 544.

**Receivers.**—Since execution cannot issue against the property of a railroad company in the hands of a receiver appointed by a federal court to enforce a judgment for damages sustained by the charge of discriminating freight rates in violation of the Interstate Commerce Act, the receiver as such should not be joined with other railroad companies constituting a through route, against which the judgment would constitute a personal liability, to be enforced by execution at law. *Western New York, etc., R. Co. v. Penn Refining Co.*, (1905) 137 Fed. 343, 70 C. C. A. 23, *affirmed* (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456.

**Lessee.**—Where a lessee railroad company operated a part of a through route over which oil was transported under an alleged discriminating rate, but was not a party to a proceeding before the Interstate Commerce Commission to recover reparation, an order in favor of petitioners including discriminating freight charges by such lessee company

was neither conclusive nor effective as to it. *Western New York, etc., R. Co. v. Penn Refining Co.*, (1905) 137 Fed. 343, 70 C. C. A. 23, *affirmed* (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456.

**Pleading.**—Where a count in a complaint against an interstate carrier alleged a discrimination in rates against the plaintiff, in that the defendant charged plaintiff the full tariff rates and permitted plaintiff's competitors by a device to transport their similar products at a lower rate, it was held to state a cause of action for violating section 2 of this Act, and was therefore not demurrable, though it also insufficiently attempted to allege a combination or conspiracy, on defendant's part, with certain other railroads to restrain trade, and to recover treble damages under the Sherman Anti-trust Act (Act July 2, 1890, ch. 647, 26 Stat. L. 209, 7 Fed. Stat. Annot. 336). *American Union Coal Co. v. Pennsylvania R. Co.*, (1908) 159 Fed. 278.

**Limitation of actions.**—Two methods of procedure are prescribed for the recovery of damages for violation of the interstate commerce law: One by this section, by an action at law; and the other by complaint to the Interstate Commerce Commission under sections 14, 15, 16, as amended by Act June 29, 1906, ch. 3591, secs. 3, 4, 5, 34 Stat. L. 589, 590, 1909 Supp. Fed. Stat. Annot. 264, 265, 268, and the provision of section 16 as so amended, that "all complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues," is merely a limitation as to time upon the second method, and does not deprive a party injured of the right to sue at law. *Lyne v. Delaware, etc., R. Co.*, (1908) 170 Fed. 847.

**Burden of proof.**—In a suit against a railroad for breach of a contract to transport freight at a certain rate, the burden is not on plaintiff to show that the contract rate had been filed with the Interstate Commerce Commission, as required by section 6. *Laurel Cotton Mills v. Gulf, etc., R. Co.*, (1904) 84 Miss. 339, 37 So. 134.

**Action for damages for preference to other shippers.**—A shipper may maintain an action at law under this section to recover damages from an interstate railroad company because of the giving of a preference or advantage to another shipper by permitting him to keep cars on its terminal tracks without payment of the charges fixed by its schedules while denying the same right to plaintiff. *Lyne v. Delaware, etc., R. Co.*, (1908) 170 Fed. 847.

**Production of corporate books.**—A corporation cannot refuse to produce its books in an action against it to recover damages for a violation of Interstate Commerce Act on the ground the evidence therein may incriminate it. *International Coal Min. Co. v. Pennsylvania R. Co.*, (1907) 152 Fed. 557.

**Action by commission as condition precedent to recovery of unreasonable rate.**—In *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, (1907) 204 U. S. 426, 27 S. Ct. 350, 51 U. S. (L. ed.) 553, a leading case, it was held that a shipper cannot maintain an action against a common carrier to obtain relief

from an alleged unreasonable freight rate exacted from him for an interstate shipment, without reference to any previous action by the Interstate Commerce Commission, where such rate has been filed with that commission and promulgated as provided by this Act, and is the rate which it is the duty of the carrier, under the Act, to enforce against shippers until changed in accordance with the provisions of that statute, since the independent right of an individual originally to maintain actions to obtain pecuniary redress for violations of the Act, conferred by section 9, must be confined to such wrong as can, consistently with the context of the Act, be redressed without previous action by the commission, and the provision of section 22, that nothing therein "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies," cannot be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the statute. In the course of the opinion Mr. Justice White said: "If, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would

destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the Act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the Act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the commission in the premises. This must be, because, if the power existed in both courts and the commission to originally hear complaints on this subject, there might be a divergence between the action of the commission and the decision of a court. In other words, the established schedule might be found reasonable by the commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the Act impossible." See also *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (1910) 183 Fed. 929, 106 C. C. A. 269; *Sandusky-Portland Cement Co. v. Baltimore, etc., R. Co.* (C. C. A. 1911) 187 Fed. 583; *Robinson v. Baltimore, etc., R. Co.*, (1908) 64 W. Va. 406, 63 S. E. 323.

**Appeal.**—The law allows no appeal from or writ of error to review a decision of the Interstate Commerce Commission denying or awarding reparation for an alleged violation of this Act. *Western New York, etc., R. Co. v. Penn. Refining Co.*, (C. C. A. 1905) 137 Fed. 343, *affirmed* (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456.

**Actions against initial carrier for damage by connecting carrier.**—See under this title, vol. 3, p. 833, sec. 8.

## Vol. III, p. 835, sec. 10.

**State laws.**—A state statute which is practically identical with the third paragraph of this section, except that the punishment prescribed by it is less severe than that imposed by the federal law, is not unconstitutional as in conflict with the federal law. *Adams Express Co. v. Charlottesville Woolen Mills*, (1908) 109 Va. 1, 63 S. E. 8.

**Venue.**—The offense of failing to file a rate schedule with a commission is committed in Washington, where the commission has its office, and hence must be prosecuted there. *New York Cent., etc., R. Co. v. U. S.*, (1908) 166 Fed. 267, 92 C. C. A. 331.

**Wilfulness.**—A violation of this section, providing that if a carrier wilfully violates any provisions of this Act it shall be liable for penalty, is not made out by proof of an overcharge due to accident or mistake, but is

only established by evidence of a wilful act or omission. *U. S. v. Texas, etc., R. Co.*, (1911) 185 Fed. 820.

**False billing, classification, weighing, etc.**—In *Montpelier, etc., R. Co. v. U. S.*, (C. C. A. 1911) 187 Fed. 271, it appeared that the defendant operated a line of railroad from Montpelier to Wells River, in Vermont, a distance of thirty-nine miles. By a joint tariff, to which it was a party, the rate on coal from a point in Pennsylvania to Montpelier was fixed at \$3.55 per ton, and to all other points on its line at \$3.80, of which it received 75 cents as its share. The published rules also provided that, where the point of destination of a shipment was between any two points named in the schedules, the rate should be the same as to the next more distant point named. It was held that the

tariff rate to Montpelier should be construed as applying to the station in that city, and that where the defendant received coal for its own use, which it received at such station and hauled over its own line to a chute between that and the next station, although within the limits of the city, the fact that it had the coal billed at the \$3.80 rate and took its divisional share thereof did not render it subject to prosecution for receiving a rebate, in violation of Interstate Commerce Act.

**Refusal to disclose value of package — effect on right of recovery.** — Where a shipper was asked, and wilfully refused, to give the value of packages, the value of each of which exceeded fifty dollars, offered for interstate express shipment, knowing that, if the value was disclosed, the shipments could be transported only at an increased rate proportionate to the value of the goods, and by such refusal obtained a lower rate than he could otherwise have obtained, it was held that such conduct constituted a violation of the Interstate Commerce Act, which rendered the contract unenforceable, so that, on the destruction of the goods in the hands of the carrier, the courts would not aid the shipper to recover therefor. *Ellison v. Adams Express Co.*, (1910) 245 Ill. 410, 92 N. E. 279.

**Burden of proof.** — In a prosecution of an interstate carrier for charging a less rate for the transportation of petroleum between two special termini in different states than that scheduled in a filed joint tariff, in violation of section 6 of this Act, the burden is on the government to show a common arrangement for a continuous carriage between the points mentioned in the filed joint tariff. *U. S. v. Pennsylvania R. Co.*, (1907) 153 Fed. 625.

**Indictment — For failure to furnish cars.** — An indictment against a railroad company based upon section 3 of this Act which charges generally that the defendant did knowingly and unlawfully grant, give, and practice an unreasonable and unjust discrimination in respect of the transportation of property in interstate commerce, by failing and refusing to grant, give, and furnish to a particular coal company its proper and rightful share and quota of cars and motive power, which it was justly and of right entitled to receive from said defendant, and by granting, giving, and furnishing to certain other coal companies and other persons, firms, and corporations more than their respective shares and quota of cars and motive power, to the undue and unreasonable prejudice and disadvantage of the first-named company, does not allege a violation of that part of the section relating to the giving of an undue or unreasonable preference or advantage to any particular person, company, or locality, or to any particular description of traffic, nor does it sufficiently charge that defendant subjected any particular company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage, where it alleges no facts showing the rightful share or quota of cars and motive power to which the coal company charged to have been so prejudiced was entitled, or that such com-

pany at the time charged was prepared to make shipments and tendered the same and made demand for cars and motive power for their transportation in interstate commerce. *U. S. v. Baltimore, etc., R. Co.*, (1907) 153 Fed. 997.

**For unjust discrimination under section 2.** — An indictment against an interstate carrier for discrimination, alleging that, under a common arrangement between the connecting carriers, the commodity which was contained in tank cars was transported without stoppage or interruption and was accompanied by written shipping order, waybills, and transfer slips indicating a through transportation, the rate and place of destination was held to sufficiently allege *prima facie* a common arrangement between the carriers for a through shipment. *U. S. v. Pennsylvania R. Co.*, (1907) 153 Fed. 625.

**For charging less than schedule rates under section 6.** — An indictment charging shippers with receiving a concession, in that they accepted transportation of certain freight at a less rate than that filed with the Interstate Commerce Commission, but which failed to charge that the higher rate so filed had been and was posted as required, was held to be fatally defective. *U. S. v. Miller*, (1911) 187 Fed. 375.

**For charging less than schedule rates under section 6.** — Where in a prosecution against a carrier for discrimination in violation of the interstate commerce law, the indictment alleged that a common arrangement existed between defendant and three other connecting carriers named for a continuous forwarding of property, in interstate commerce, between two specified points, and that defendant kept open for public inspection its printed tariff of rates, and filed the same as required by law, with the allegation that the shipment in question was accompanied by written shipping order, waybills, and transfer slips showing a continuous shipment between such points, it was held that it sufficiently charged the establishment of a joint tariff of rates for the commodity in question, without alleging that all the connecting carriers concurred in such joint rate, or that it was filed with the Interstate Commerce Commission by their joint action. *U. S. v. Pennsylvania R. Co.*, (1907) 153 Fed. 625.

**Penalty for failure to publish rates.** — The penalty for failure on the part of any carrier to publish and file its rates is as severe as the penalty for failure to strictly observe such rates after filing. *U. S. v. Illinois Terminal R. Co.*, (1909) 168 Fed. 546.

**Offenses by shipper.** — Under Act Cong. June 29, 1906, ch. 3591, sec. 2, 34 Stat. L. 587, 1909 Supp. Fed. Stat. Annot. 260, requiring interstate carriers to publish a schedule of freight rates and make their charges accordingly, and this section, making it a fraud for a shipper to obtain a preference in freight rates by knowingly making a shipment under a false billing, etc., a contention that a shipper, innocent at the time, and ignorant of any classification or difference in rate, who shipped a race horse and paid the freight charged by the agent without being

informed of the valuation made, is guilty of an offense under the statute, because he sues for injuries to the horse and seeks to recover the true value of the horse regardless of the rating, is self-refutatory. Nor under such fact can a contention be sustained that re-

covery is forbidden by the statute of 1906, because indirectly giving a preference in rating forbidden by the law. *Kissenger v. Fitzgerald*, (1910) 152 N. C. 247, 67 S. E. 588.

### Vol. III, p. 837, sec. 11.

**Term of commissioners.**—A member of the Interstate Commerce Commission whose term of office, as fixed by law, has expired, cannot

thereafter lawfully continue to act as such commissioner and perform the duties of that office. (1905) 25 Op. Atty-Gen. 332.

### Vol. III, p. 838, sec. 12.

**Powers and duties of commission**—*Commission not a court.*—To the same effect as the original note, see *Louisville, etc., R. Co. v. Scott*, (1909) 133 Ky. 724, 118 S. W. 900.

*No power to fix rates.*—*Interstate Commerce Commission v. Lake Shore, etc., R. Co.*, (1905) 134 Fed. 942, affirmed (1906) 202 U. S. 613, 26 S. Ct. 766, 50 U. S. (L. ed.) 1171.

*Extent of inquiry.*—The Interstate Commerce Commission, in making an investigation of a complaint as to the freight rate promulgated in a classification adopted to govern in official classification territory, had the power, in the public interest, unembarrassed by any supposed admissions contained in the complaint, to consider the whole subject, and the operation of the classification in the entire territory, and also how far its going into effect would be just and reasonable, would create preferences, or would engender discrimination. *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, (1907) 206 U. S. 142, 27 S. Ct. 648, 51 U. S. (L. ed.) 995.

*Power to forbid classification.*—The Interstate Commerce Commission is acting within its powers, under the Act to regulate commerce, in ordering carriers to desist from further enforcing a classification by percentage on common soap in less than carload lots, operating throughout official classification territory, which it finds has brought about a general disturbance in relations previously existing in that territory, and has created discriminations and preferences among manufacturers and shippers of the commodity, and between localities in such territory. *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, (1907) 206 U. S. 142, 27 S. Ct. 648, 51 U. S. (L. ed.) 995.

*Regulation of distribution of coal cars.*—Authority to regulate the distribution of a railway company's fuel cars in times of car shortage to the bituminous coal mines was delegated to the Interstate Commerce Commission as a means of prohibiting the unjust preferences or undue discriminations forbidden by section 3 of this Act. *Interstate Commerce Commission v. Illinois Cent. R. Co.*, (1910) 215 U. S. 452, 30 S. Ct. 155, 54 U. S. (L. ed.) 280, reversing (1908) 173 Fed. 930.

*Restricting allowance for elevator charges.*—Confining the allowance by a carrier to the owner of an elevator for elevating grain in transit, in which he has an interest, to such

grain as shall be reshipped within ten days, is within the power of the Interstate Commerce Commission. *Interstate Commerce Commission v. Dittenbach*, (1911) 223 U. S. 42, 32 S. Ct. 22, modifying and affirming 176 Fed. 409.

*Evidence.*—*Contracts of railroad companies or coal companies owned by the railroads*, which are otherwise relevant and competent, are not inadmissible in evidence in a proceeding before the Interstate Commerce Commission on a complaint charging such companies with violations of the Act because they are made with third persons not parties to the proceeding. *Interstate Commerce Commission v. Baird*, (1904) 194 U. S. 25, 24 S. Ct. 563, 48 U. S. (L. ed.) 860.

*Compulsory production of documentary evidence.*—In *Interstate Commerce Commission v. Baird*, (1904) 194 U. S. 25, 24 S. Ct. 563, 48 U. S. (L. ed.) 860, it was held that the production of contracts under which railroad companies engaged in interstate carriage of anthracite coal, who had acquired certain collieries whose proprietors were about to build a competing line, guaranteed the stock and bonds issued on payment therefor by a corporation whose charter they had purchased for that purpose, might be compelled in a proceeding before the Interstate Commerce Commission on a complaint charging such railroad companies with violations of this Act by the pooling of freights and the charging of unreasonable rates in carrying anthracite coal.

*Attendance and testimony of witnesses.*—Witnesses cannot be required to testify before the Interstate Commerce Commission except in connection with complaints for violation of the Interstate Commerce Act or with the investigation by the commission of subjects that might have been made the object of complaint, these being the only matters contemplated by the provision of section 12, giving the commissioner power to require testimony "for the purposes of this Act," which power cannot be exercised by the commission in performing its duty under that section to keep itself informed as to the manner and method in which the business of common carriers is conducted, nor in connection with the enforcement of the requirement of section 20 respecting reports by carriers, nor to aid the commission in recommending, pursuant to section 21, additional legislation to Congress,

*Harriman v. Interstate Commerce Commission*, (1908) 211 U. S. 407, 29 S. Ct. 118, 53 U. S. (L. ed.) 253, *affirming* 157 Fed. 432.

**Jurisdiction to compel reports.**—Jurisdiction, in a federal Circuit Court, of an original proceeding by mandamus to compel an interstate carrier to make the report which the Interstate Commerce Commission is authorized by the Act to require, cannot be in-

ferred from the grant of authority to the commission to enforce that Act, or from the direction to district attorneys of the United States or the attorney-general to institute all necessary proceedings for the enforcement of its provisions. *Knapp v. Lake Shore, etc., R. Co.*, (1905) 197 U. S. 536, 25 S. Ct. 538, 49 U. S. (L. ed.) 870.

### Vol. III, p. 842, sec. 13.

**Cumulative remedies.**—See under this title, vol. 3, p. 852, sec. 10.

### Vol. III, p. 843, sec. 14.

**Amendment.**—This section was amended by Act of June 29, 1906, ch. 3591, sec. 3, 34 Stat. L. 589, 1909 Supp. Fed. Stat. Annot. 364.

**Inclusion of opinion in report.**—Where a proceeding to enforce the commission's findings was tried to a federal court without a

jury, it was not error for the court to receive the commission's report in evidence without excluding matters of opinion stated therein, as distinguished from the commission's findings of fact. *Southern R. Co. v. St. Louis Hay, etc., Co.*, (C. C. A. 1907) 153 Fed. 729.

### Vol. III, p. 843, sec. 15.

**Amendment.**—This section was amended by Act of June 29, 1906, ch. 3591, sec. 4, 34 Stat. L. 589, 1909 Supp. Fed. Stat. Annot. 265.

### Vol. III, p. 844, sec. 16.

**Amendment.**—This section was amended by Act of June 29, 1906, ch. 3591, sec. 5, 34 Stat. L. 590, 1909 Supp. Fed. Stat. Annot. 268.

**Jurisdiction of federal courts.**—The courts have the power to investigate any rate or rates fixed by legislative authority and to determine whether they are such as would be confiscatory of the property of the carrier, and if they are judicially found to be confiscatory in their effects, to restrain their enforcement. Any law which attempts to deprive the courts of this power is unconstitutional. (1905) 25 Op. Atty-Gen. 422.

**Courts cannot make rates.**—The rate-making power is not a judicial function and cannot be conferred constitutionally upon the courts of the United States, either by way of original or appellate jurisdiction. (1905) 25 Op. Atty-Gen. 422.

**The lawfulness of an order of reparation issued by the Interstate Commerce Commission does not necessarily depend on a sufficiency of evidence adduced before the commission, but on the existence of facts, whether disclosed or not before that body, warranting the reparation ordered; and in an action to enforce such reparation it is sufficient that such facts be established by proper evidence.** *Western New York, etc., R. Co. v. Penn Refining Co.*, (1905) 137 Fed. 343, 70 C. C. A. 23, *affirmed* (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456.

**Enforcement of order.**—No lawful orders of the Interstate Commerce Commission are self-executing. *Western New York, etc., R. Co. v. Penn Refining Co.*, (1905) 137 Fed. 343, 70 C. C. A. 23, *affirmed* (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456.

The enforcement of an order of the Interstate Commerce Commission directing the common carriers to desist from maintaining or enforcing a rule adopted by them may be decreed by a federal Circuit Court if it finds such rule is, for any reason, in violation of this Act, although such reason may not have been the one relied upon by the commission itself to invalidate the rule. *Southern Pac. Co. v. Interstate Commerce Commission*, (1906) 200 U. S. 551, 28 S. Ct. 330, 50 U. S. (L. ed.) 585. See also under this title, vol. 3, p. 816, sec. 3.

Any supposed admissions in a complaint filed with the Interstate Commerce Commission as to the freight rate promulgated in a classification adopted to govern in official classification territory are ineffectual to deprive a federal Circuit Court, in a proceeding to enforce an order of the commission, of the power to test the validity of such order by the scope of this Act. *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, (1907) 206 U. S. 142, 27 S. Ct. 648, 51 U. S. (L. ed.) 995.

**Jury trial.**—In an action to enforce an interstate commerce reparation order based on a discriminating freight rate, whether such rate was just and reasonable or unreasonable and excessive is a question for the jury. *Western New York, etc., R. Co. v. Penn Refining Co.*, (1905) 137 Fed. 343, 70 C. C. A. 23, *affirmed* (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456.

**Necessity for action by commission.**—The rule that an action at law to recover excessive interstate freight charges cannot be maintained in advance of action by the Interstate Commerce Commission will not prevent

a federal Circuit Court which has suspended proceedings on a bill seeking relief from an advance in freight rates, pending action by the commission, from granting relief in the exercise of its powers under section 16, as a court of equity, on a petition filed after the commission has acted, stating the substance of the findings of the commission, and containing a copy of its report and opinion, where defendants have stipulated in open court that, in case complainants prevailed, decree of restitution might be made. *Southern R. Co. v. Tift*, (1907) 206 U. S. 428, 27 S. Ct. 709, 51 U. S. (L. ed.) 1124.

**Stipulation.**—Parties, after action by the Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may make a valid stipulation, in the subsequent proceedings had in the federal court under this section, that such court may adjudge the amount of the reparation. *Southern R. Co. v. Tift*, (1907) 206 U. S. 428, 27 S. Ct. 709, 51 U. S. (L. ed.) 1124.

**Reference for ascertainment of damages.**—The final decree of a federal Circuit Court in the proceedings prosecuted under this section, after action by the Interstate Commerce Commission declaring an increased freight rate to be unreasonable, may direct an order of reference to the standing master of the pleadings and evidence in the cause, with instructions to ascertain the sum of the increase in rates paid since the rate went into effect, where defendants stipulated in open court that, in case complainants prevailed, a decree of restitution might be made. *Southern R. Co. v. Tift*, (1907) 206 U. S. 428, 27 S. Ct. 709, 51 U. S. (L. ed.) 1124.

**Evidence — Findings of fact.**—The provision of this section that the findings of fact of the Interstate Commerce Commission shall be *prima facie* evidence of the facts found in a subsequent proceeding to enforce the commission's order, contemplated that the findings of fact should be so prepared and arranged in the commission's report that they could be offered in evidence unaccompanied by extraneous or incompetent legal arguments, opinions, or other conclusions. *Western New York, etc., R. Co. v. Penn Refining Co.*, (1905) 137 Fed. 343, 70 C. C. A. 23, *affirmed* (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456.

A finding by the Interstate Commerce Commission that a just and reasonable charge for the privilege of reconsigning hay at East St. Louis was one cent per hundred weight was held to be *prima facie* evidence of its own truth. *Southern R. Co. v. St. Louis Hay, etc., Co.*, (C. C. A. 1907) 153 Fed. 728.

**Opinions of commission.**—The mere opinions of the Interstate Commerce Commission are inadmissible in an action brought for the enforcement of an order of pecuniary repara-

tion. *Western New York, etc., R. Co. v. Penn Refining Co.*, (1905) 137 Fed. 343, 70 C. C. A. 23, *affirmed* (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456.

**No power to modify order or substitute new one.**—In a proceeding in a Circuit Court under this section of the Interstate Commerce Act, to enforce an order of the Interstate Commerce Commission, the court has no power to amend or modify such order, or to sever from the remainder a part which is illegal, but must enforce the same, if at all, in its entirety as made by the commission. *Interstate Commerce Commission v. Lake Shore, etc., R. Co.*, (1905) 134 Fed. 942, *affirmed* (1906) 202 U. S. 613, 26 S. Ct. 766, 50 U. S. (L. ed.) 1171.

**Hearing and determination de novo.**—Though an action to recover pecuniary reparation ordered by the Interstate Commerce Commission is triable *de novo*, the cause of action must have been included in the order of reparation, and have constituted the whole or part of the basis of such order, whether the proceeding to enforce the same is in equity or at law. *Western New York, etc., R. Co. v. Penn Refining Co.*, (1905) 137 Fed. 343, 70 C. C. A. 23, *affirmed* (1908) 208 U. S. 208, 28 S. Ct. 268, 52 U. S. (L. ed.) 456.

**Review of facts.**—Findings of fact found by the Interstate Commerce Commission, when concurred in by a federal Circuit Court, will not be disturbed unless the record establishes that clear and unmistakable error has been committed. *Cincinnati, etc., R. Co. v. Interstate Commerce Commission*, (1906) 206 U. S. 142, 27 S. Ct. 648, 51 U. S. (L. ed.) 995; *Illinois Cent. R. Co. v. Interstate Commerce Commission*, (1907) 206 U. S. 441, 27 S. Ct. 700, 51 U. S. (L. ed.) 1128; *Interstate Commerce Commission v. Delaware, etc., R. Co.*, (1911) 220 U. S. 235, 31 S. Ct. 392, 55 U. S. (L. ed.) 448.

**Supersedeas.**—To the same effect as the second paragraph of the original note, and following the case there cited, *Interstate Commerce Commission v. Southern Pac. Co.*, (1904) 137 Fed. 606.

A Circuit Court will not supersede a decree enjoining railroad companies from violating an order of the Interstate Commerce Commission affecting rates, entered in a suit brought by the commission pursuant to this section, pending an appeal from such decree, where it does not appear that the damage to defendants from the enforcement of the decree will be greater than that which would result to shippers from its suspension. *Interstate Commerce Commission v. Southern Pac. Co.*, (1904) 137 Fed. 606.

**New section added.**—See Act of June 29, 1906, ch. 3591, sec. 6, 34 Stat. L. 592, 1909 Supp. Fed. Stat. Annot. 271.

## Vol. III, p. 849, sec. 18.

**Telegrams sent by commission.**—Substantial compliance with the requirements of the Comptroller of the Treasury that the original telegrams relating to the business of the Interstate Commerce Commission, or copies

thereof, or certificates that such telegrams are of a confidential nature, shall accompany telegraph vouchers for which credit is asked, is made by an order of the commission, filed by the secretary with his accounts, which directs



him to disregard such requirements as to copies of telegrams, and declares that such messages are so far confidential as to justify the refusal to disclose their contents, and

that the requirement for their production is unreasonable and against public interest. *U. S. v. Moseley*, (1902) 187 U. S. 322, 23 S. Ct. 90, 47 U. S. (L. ed.) 198.

### Vol. III, p. 850, sec. 20.

**Amendment.**—This section was amended by Act of June 29, 1906, ch. 3591, sec. 7, 34 Stat. L. 593, 1909 Supp. Fed. Stat. Annot. 271.

### Vol. III, p. 851, sec. 22.

**Jurisdiction.**—The common-law right of a shipper to recover in excess of charges paid to a carrier for an interstate shipment is not within the exclusive jurisdiction of the federal courts, but may be enforced in a state court. *H. L. Halliday Milling Co. v. Louisiana, etc.*, R. Co., (1906) 80 Ark. 536, 98 S. W. 374; *Chicago, etc., R. Co. v. Lena Lumber Co.*, (Ark. 1911) 137 S. W. 562; *Missouri, etc., R. Co. v. New Era Milling Co.*, (1909) 79 Kan. 435, 100 Pac. 273; *Illinois Cent. R. Co. v. Henderson Elevator Co.*, (1910) 138 Ky. 220, 127 S. W. 779; *N. H. Blitch Co. v. Atlantic Coast Line R. Co.*, (1910) 87 S. C. 107, 69 S. E. 16; *Chas. H. Lilly Co. v. Northern Pac. R. Co.*, (Wash. 1911) 117 Pac. 401. See also under this title, vol. 3, p. 833, sec. 9.

**Effect of reservation of existing remedies.**—The clause in this section reserving existing common-law or statutory remedies cannot be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of this Act. In other words, the Act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the Act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the Act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the Act. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, (1907) 204 U. S. 426, 27 S. Ct. 350, 51 U. S. (L. ed.) 553.

**Equity jurisdiction.**—The provision of section 1 of the federal judiciary acts of 1887 and 1888 (Act March 3, 1887, ch. 373, 24 Stat. L. 552, and Act Aug. 13, 1888, ch. 866, 25 Stat. L. 433), relating to the Circuit and District Courts, that "no suit shall be brought in either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," does not apply to suits of which such courts are given exclusive jurisdiction; and a suit to enjoin railroad companies from establishing and enforcing unreasonable rates in violation of the Interstate Commerce Act is of such character and may be maintained in any district in which the defendants can be found. *Northern Pac. R. Co. v. Pacific Coast Lumber Manufacturers' Assoc.*, (C. C. A. 1908) 165 Fed. 1; *Union Pac.*

**Attendance and testimony of witnesses.**—See under this title, vol. 3, p. 838, sec. 12.

For a case under this section, see *People v. Chicago, etc., R. Co.*, (1906) 223 Ill. 581, 79 N. E. 144.

*R. Co. v. Oregon, etc., Lumber Manufacturers' Assoc.*, (C. C. A. 1908) 165 Fed. 13.

Under this section a Circuit Court of the United States has jurisdiction of a suit to enjoin railroad companies from filing or enforcing a proposed new schedule of rates alleged to be unjust and unreasonable by the Interstate Commerce Commission, where it is shown that their enforcement would result in irreparable injury to the complainants. *Northern Pac. R. Co. v. Pacific Coast Lumber Manufacturers' Assoc.*, (1908) 165 Fed. 1, 91 C. C. A. 39; *Union Pac. R. Co. v. Oregon, etc., Lumber Manufacturers' Assoc.*, (1908) 165 Fed. 13, 91 C. C. A. 51.

As to the right to enjoin an established rate as unreasonable, see *infra*, this title, p. 1204, 1909 Supp., p. 265, sec. 4, *Effect upon power of courts to pass upon reasonableness of rates.*

A complaint for the recovery of an excess over reasonable charges paid to a carrier for an interstate shipment, which is good as stating a common-law cause of action, is not rendered bad by the Interstate Commerce Act, dealing with the subject of reasonable and just rates, in view of the provision in this section that nothing therein contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the Act are in addition to such remedies. *H. L. Halliday Milling Co. v. Louisiana, etc., R. Co.*, (1906) 80 Ark. 536, 98 S. W. 374.

**Compelling carrier to receive and transport goods.**—A suit to compel an interstate carrier to receive and transport property tendered for shipment is one to enforce performance of a duty imposed by general law, and within the jurisdiction of the courts, and the complainant is not required to resort in the first instance to the Interstate Commerce Commission. *Louisville, etc., R. Co. v. F. W. Cook Brewing Co.*, (C. C. A. 1909) 172 Fed. 117.

**Express franks.**—The issuing of franks by an express company to officers, agents, attorneys, or employees of itself or other express companies or railroad companies, or to the families of such persons, upon which property is transported from one state to another free of charge, relates to interstate commerce, which it is within the constitutional power of Congress to regulate, and is within the prohibitions of the Interstate Commerce Act and its amendments against discrimination, undue preference, and departure from the pub-

lished schedule of rates, and is unlawful. Such gratuitous carriage is not within the exceptions made in section 22, which by their terms are restricted to certain classes of passengers carried by railroads and property carried for certain classes of shippers and for stated purposes. *U. S. v. Wells-Fargo Express Co.*, (1908) 161 Fed. 607, *affirmed* (1909) 212 U. S. 522, 29 S. Ct. 315, 53 U. S. (L. ed.) 635.

**Reduction of freight on machinery used in making irrigation ditches.**—This Act is not violated by a reduction in freight rates, authorized by section 22, on material and machinery used by the United States, or by parties contracting with them, for work upon

irrigation systems under construction in the arid regions of the West, provided the government receives the whole benefit of the reduced rate or concession; but it is violated if the contractor receives any portion of such benefit. (1905) 25 Op. Atty-Gen. 408.

**Reclamation service employees.**—There is no provision in the Act to regulate commerce or in its various amendments, which justifies the granting of reduced rates by railroads to employees of the Reclamation Service and dependent members of their families and servants accompanying them, and laborers destined for work in that service. (1906) 26 Op. Atty-Gen. 47.

### Vol. III, p. 852, sec. 24.

**New section added.**—See Act of June 29, 1906, ch. 3591, sec. 8, 34 Stat. L. 595, 1909 Supp. Fed. Stat. Annot. 275.

### Vol. III, p. 852, sec. 10.

**Necessity for previous determination by commission.**—The courts cannot, under the guise of exerting judicial power, usurp merely administrative functions by setting aside an order of the Interstate Commerce Commission within the scope of the power delegated to such commission, upon the ground that such power was unwisely or inexpediently exercised. *Interstate Commerce Commission v. Illinois Cent. R. Co.*, (1910) 215 U. S. 452, 30 S. Ct. 155, 54 U. S. (L. ed.) 280.

**Cumulative remedies.**—An action in a federal court for a mandamus, under this section, does not preclude the relator or others from proceedings in respect to the same matter by petition to the Interstate Commerce Commission under section 13 of the original Act, and the court in the mandamus suit is without power on an ancillary bill to enjoin such proceeding. *Merchants' Coal Co. v.*

*Fairmont Coal Co.*, (C. C. A. 1909) 160 Fed. 769.

**Effect of judgment as bar to subsequent proceedings.**—The judgment of a federal court in a mandamus suit brought by a coal company operating mines on the lines of a railroad against the railroad company to compel a fair distribution of cars, upon an allegation of discrimination in violation of the interstate commerce law, does not inure to the benefit of any other operator not a party to the suit nor bar an independent suit or proceeding by such operator on its own behalf in court or before the Interstate Commerce Commission to secure similar relief; nor is it estopped to maintain such independent suit or proceeding by the fact that it aided the relator in the prior suit or contributed to the expense thereof. *Merchants' Coal Co. v. Fairmont Coal Co.*, (C. C. A. 1908) 160 Fed. 769.

### Vol. III, p. 853. [*Intoxicating liquors shipped in original packages subject to state laws.*]

**Object of statute.**—This Act removed all limitations upon the powers of the states to regulate or prohibit all sales, contracts, and other acts and transactions relating to intoxicating liquors, occurring wholly within their territorial jurisdictions. *State v. Spence*, (1910) 127 La. 336, 53 So. 596; *State v. Miller*, (1909) 66 W. Va. 436, 66 S. E. 522.

**Prohibition of advertising of intoxicating liquors.**—Since the passage of this Act a state may lawfully prohibit the advertising within the state of intoxicating liquors sold or kept for sale without the state. *State v. J. P. Bass Pub. Co.*, (1908) 104 Me 288, 71 Atl. 895; *State v. State Capital Co.*, (1909) 24 Okla. 252, 103 Pac. 1021.

**No new powers conferred on states.**—This Act does not authorize the enactment by a state of a law restricting the right of an interstate carrier to deliver the imported pack-

age to its consignee. *Crescent Liquor Co. v. Platt*, (1906) 148 Fed. 894.

**Municipal license law.**—A city ordinance imposing a license tax on dealers in beer was held to be one enacted in the exercise of the police power conferred on the city by its charter, and by virtue of this Act was not invalid as in violation of the interstate commerce clause of the Federal Constitution as applied to the sale of beer in the bottles in which it was brought from other states. *Meyer v. Mobile*, (1906) 147 Fed. 843.

**Importer can sell only on terms prescribed by local statute.**—*New Iberia v. Erath*, (1907) 118 La. 305, 42 So. 845.

**State laws.**—Under the provisions of this Act a statute which, in aid of a police regulation prohibiting the sale of intoxicating liquors within a state, or any portion thereof, prohibits the solicitation of orders, is not, for the reason that such statute conflicts with

the power of Congress to regulate and control interstate commerce, void as to orders solicited in said state, although the seller and the liquor to be sold may both be in another state, because such regulation in no wise encroaches upon the power of Congress to control interstate commerce. The exercise of such state regulation, so far from being in conflict with the power of Congress to regulate interstate commerce, is expressly allowed by this Act. *Rose v. State*, (1908) 4 Ga. App. 588, 62 S. E. 117.

A license tax imposed under municipal ordinance upon those engaged in selling beer in the city by the barrel, half barrel, or quarter barrel, must be regarded, even when applied to interstate transactions in the original packages, as an exercise of the police power permitted by the Wilson Act, subjecting intoxicating liquors arriving in a state to the laws of such state enacted in the exercise of its police power, although the city may derive more or less revenue from the ordinance in question. *Phillips v. Mobile*, (1908) 208 U. S. 472, 28 S. Ct. 370, 52 U. S. (L. ed.) 578.

A state statute prohibiting a carrier from carrying intoxicating liquors into any county or district therein where the sale of such liquors is prohibited by law, as applied to shipments from other states, is void as an attempted regulation of interstate commerce, and affords no justification for the refusal of a railroad company, although a corporation of such state, to receive and carry such shipments. *Louisville, etc., R. Co. v. F. W. Cook Brewing Co.*, (C. C. A. 1909) 172 Fed. 117, affirmed 222 U. S.

When state law becomes operative. — The federal Supreme Court in its decision in *Heyman v. Southern R. Co.*, 203 U. S. 270, 27 S. Ct. 104, 51 U. S. (L. ed.) 178, announced Dec. 3, 1906, has authoritatively settled the following doctrines: (a) Prior to the Wilson Act, in case of interstate shipment of intoxicating liquors, delivery and sale in the original package was necessary to terminate interstate commerce, so far as the police regulations of the states were concerned. (b) The Wilson Act did not delegate to the states the right to forbid the transportation of merchandise from one state to another, but "it merely provided in the case of intoxicating liquors that such merchandise, when transported from one state to another, should lose its character as interstate commerce upon completion of delivery under the contract of interstate shipment, and before sale in the original package." (c) The state statute must permit the delivery of the liquors to the party to whom they were consigned within the state, but after such delivery the state has power to prevent the sale of the liquors, even in the original package. (d) The question of whether the liability of the carrier, as such, has ceased, under the state laws, and has become that of a warehouseman, is immaterial. (e) But the court reserved its opinion upon the question whether, if the consignee, after notice and full opportunity to receive the liquors, designedly leaves them in the hands of the carrier

for an unreasonable time, they should not be held to have come under the provisions of the Wilson Act, because constructively delivered.

Under the authority of the decision of the federal Supreme Court in the *Heyman* case, *supra*, the Supreme Judicial Court of Maine overruled its decision in *State v. Intoxicating Liquors*, (1901) 95 Me. 140, 49 Atl. 670, cited in the original note, and held that intoxicating liquors transported from another state to Maine by a common carrier are not subject to seizure by virtue of the provisions of the prohibitory liquor statute of that state until there has been a delivery to the consignee. *State v. Intoxicating Liquors*, (1907) 102 Me. 385, 67 Atl. 312. See also *American Express Co. v. Iowa*, (1905) 196 U. S. 133, 25 S. Ct. 182, 49 U. S. (L. ed.) 417; *Daneiger v. Stone*, (1909) 187 Fed. 853; *Crigler v. Com.*, (1905) 120 Ky. 512, 87 S. W. 276; *State v. Eighteen Casks Beer*, (1909) 24 Okla. 786, 104 Pac. 1093.

But where a person went outside the state and purchased intoxicating liquors and brought them into the state himself, it was held that the state law did not operate until he had reached his destination. *Hudson v. State*, (1909) 2 Okla. Crim. 176, 101 Pac. 275. And in *High v. State*, (1909) 2 Okla. Crim. 161, 101 Pac. 115, it was held that carrying or conveying intoxicating liquors from the railroad station to the home of the consignee is a part of the interstate commerce transportation, when they were shipped from another state, and is not a violation of a constitutional clause making the conveyance of such liquors from one place within a state to another place therein an offense.

The agreement of the local agent of an express company to hold for a few days a C. O. D. interstate shipment of intoxicating liquors, to suit the convenience of the consignee in paying for such liquor and taking it away, does not destroy the character of the transaction as interstate commerce, so as to render the express company amenable to prosecution for violating a state local option law. *Adams Express Co. v. Kentucky*, (1907) 206 U. S. 129, 27 S. Ct. 606, 51 U. S. (L. ed.) 987.

Sales made outside a state by mail. — This Act does not affect the question of a sale in one state, completed by delivery in that state of the liquor to a common carrier to transport to another state to the person who ordered it from there by mail, being within the protection of the interstate commerce clause of the Constitution, as against the law of the state in which the sale was made, making it an offense to sell intoxicating liquor. *State v. Kelly*, (1911) 123 Tenn. 556, 133 S. W. 1011.

Sales of traveling salesmen. — To the same effect as the original note, see *Moog v. State*, (1906) 145 Ala. 75, 41 So. 166.

But in *Delamater v. South Dakota*, (1907) 205 U. S. 97, 27 S. Ct. 447, 51 U. S. (L. ed.) 724, it was held that the annual license charge imposed by a state law upon the business of selling or offering for sale intoxicating liquors within the state by any traveling salesman who solicits orders in quantities of less

than five gallons cannot be regarded, when applied to interstate transactions, as repugnant to the commerce clause of the Federal Constitution, in view of the provisions of the Wilson Act that intoxicating liquors coming into the state shall be as completely under its control as if manufactured therein.

**Inspection laws.**—Interstate commerce in intoxicating liquors is not unlawfully burdened by an inspection law enacted by a state "in the exercise of its police powers," because the statute does not provide for an adequate inspection, and imposes a burden beyond the cost of inspection. *Pabst Brewing Co. v. Crenshaw*, (1905) 198 U. S. 17, 25 S. Ct. 552, 49 U. S. (L. ed.) 925.

Neither is such an inspection law void because it operates to deter shipments into the state. *Pabst Brewing Co. v. Crenshaw*, (1905) 198 U. S. 17, 25 S. Ct. 552, 49 U. S. (L. ed.) 925.

A state statute imposing an inspection fee upon beer or other malt liquor shipped from other states into that state, and held there for sale and consumption therein, must, although producing a revenue, and not providing for an adequate inspection, be deemed enacted by the state "in the exercise of its

police powers," within the meaning of the Wilson Act, where the highest state court has upheld as a valid police regulation so much of the statute as imposes the same fee on beer of domestic manufacture over the objection that it is a revenue measure, and not an inspection law. *Pabst Brewing Co. v. Crenshaw*, (1905) 198 U. S. 17, 25 S. Ct. 552, 49 U. S. (L. ed.) 925. See also *Delamater v. South Dakota*, (1907) 205 U. S. 93, 27 S. Ct. 447, 51 U. S. (L. ed.) 724.

**Taxation on bar of vessel.**—In *Harrell v. Speed*, (1904) 113 Tenn. 224, 81 S. W. 840, *affirmed* (1905) 199 U. S. 517, 26 S. Ct. 138, 50 U. S. (L. ed.) 288, it appeared that a Tennessee statute (Act Tenn. 1903, p. 615, ch. 357, sec. 4) provided that persons selling any quantity of liquor on any vessel should pay a specified tax. It was held that one running a bar on a vessel belonging to a corporation of Arkansas and plying between a port in Arkansas and one in Tennessee—the one running the bar acting under a lease from the corporation—was subject to the license tax imposed by the statute for running the bar while the vessel was at its landing within the jurisdiction of Tennessee.

### Vol. III, p. 855. [*Self-incriminating disclosures by witnesses in proceedings, etc.*]

**Constitutionality.**—The immunity extended by this Act from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law satisfies the guaranty of the Fifth Amendment of the Federal Constitution against compelling witnesses to furnish evidence against themselves. *Interstate Commerce Commission v. Baird*, (1904) 194 U. S. 25, 24 S. Ct. 563, 48 U. S. (L. ed.) 860; *U. S. v. Swift*, (1911) 186 Fed. 1002.

**Offenses committed after testimony given.**—This Act is not intended to be, and cannot be made, a shield against prosecution for offenses committed after the testimony is given or the evidence furnished, since a person cannot be said to have been a witness against himself in respect to an offense which had not been committed when the testimony was given. *U. S. v. Swift*, (1911) 186 Fed. 1002.

**Compulsory production of documentary evidence.**—The compulsory production of documentary evidence in a proceeding before the Interstate Commerce Commission on a complaint alleging violations by railroad companies of the Act of Feb. 4, 1887, to regulate

commerce, does not infringe the immunity from unreasonable searches and seizures guaranteed by the Fifth Amendment to the Federal Constitution, since that Act, as amended by the Act of Feb. 11, 1893, expressly extends immunity from prosecution or forfeiture of estate because of testimony given in pursuance of the requirements of the law. *Interstate Commerce Commission v. Baird*, (1904) 194 U. S. 25, 24 S. Ct. 563, 48 U. S. (L. ed.) 860.

**Corporations.**—A corporation, whether state or federal, cannot claim immunity from prosecution for violation of the interstate commerce laws of the United States because of testimony given or evidence produced by its officers or agents before the Interstate Commerce Commission or the Commissioner of Corporations, or any proceeding, suit, or prosecution under such laws, the right to immunity on account of evidence so given in the several cases granted by this Act being limited to individuals who as witnesses give testimony or produce evidence. *U. S. v. Armour*, (1906) 142 Fed. 808.

### Vol. X, p. 170, sec. 1. [*Interstate commerce regulations — corporation common carriers liable for violating.*]

**Amendment.**—This Act was amended by Act of June 29, 1906, ch. 3591, sec. 2, 34 Stat. L. 587, 1909 Supp. Fed. Stat. Annot. 262.

**Due process of law** is not denied by the provisions of this Act, under which the commission by corporate officers, acting within the scope of their employment, of criminal

violations of the prohibitions of the Act against giving rebates, is imputed to the corporation, and the corporation is subjected to criminal prosecution therefor. *New York Cent., etc., R. Co. v. U. S.*, (1909) 212 U. S. 481, 29 S. Ct. 304, 53 U. S. (L. ed.) 613.

**Possible invalidity in part.**—The possible invalidity as to individual carriers of the

provisions of this Act, imputing to the carrier the acts, omissions, or failures of the officers and agents of such carrier, acting within the scope of their employment, does not affect the validity of so much of that Act as imputes to corporate carriers the commission by officers and agents of such car-

riers, acting within the scope of their employment, of criminal violations of the prohibitions of that Act against giving rebates. *New York Cent., etc., R. Co. v. U. S.*, (1909) 212 U. S. 481, 29 S. Ct. 304, 53 U. S. (L. ed.) 613.

*[Penalty for failing to file tariffs, etc. — giving rebates, etc.]*

**Constitutionality.** — This Act is not unconstitutional as in violation of the Fifth Amendment because it subjects a shipper to criminal prosecution for accepting a concession from a rate published and filed without permitting him as a defense to show that the established rate was extortionate and unreasonable, and that the rate paid was reasonable. *U. S. v. Vacuum Oil Co.*, (1908) 158 Fed. 536.

**The mere incidental effect upon exports** which may be produced by applying to a shipment from an interior point of the United States to a foreign port the provisions of this Act making it an offense against the United States to obtain the transportation of property in interstate or foreign commerce at less than the carrier's published rates, does not render such provisions repugnant to U. S. Const., art. 1, sec. 9, par. 5, forbidding the levying of export taxes or duties. *Armour Packing Co. v. U. S.*, (1908) 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 680.

**Due process of law.** — This Act was not unconstitutional as depriving shippers or carriers of property rights without due process of law. *U. S. v. Great Northern R. Co.*, (1907) 157 Fed. 288.

**Preference is not given to the ports of one state** over those of another by applying to articles intended for foreign export, the provisions of this Act making it an offense against the United States to accept transportation of goods in interstate or foreign commerce at less than the carrier's published rates. *Armour Packing Co. v. U. S.*, (1908) 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 680.

**Effect of repeal.** — This Act has been held to be in full force as to offenses created thereby committed prior to the time it was superseded by the Hepburn Act (Act June 29, 1906, ch. 3591, 34 Stat. L. 584). *U. S. v. Great Northern R. Co.*, (1907) 157 Fed. 288.

**Purpose of Act.** — The purpose of Congress in the enactment of this Act was to secure uniform freight rates to all shippers, and its provisions are violated by the giving or receiving of any rebate or concession whereby any property shall be transported at a less rate, by any interstate carrier, than that named in the tariffs published and filed by such carrier, whether by direct agreement between shipper and carrier, or indirectly by "any device whatever;" and where a railroad company has published shipments to points beyond its own line, said section applies to such rates equally with those between points on its own road. *U. S. v. Standard Oil Co.*, (1907) 148 Fed. 719.

**Scope of statute.** — This Act is not restricted in its provisions to departures from

an established tariff rate, but is violated if any other advantage is given to a shipper whereby a discrimination is practiced. *U. S. v. Vacuum Oil Co.*, (1907) 153 Fed. 598.

**Construction of statute.** — This section describes three separate and distinct correlative offenses on the part each of carrier and shipper, to wit: The offering or soliciting of a rebate, concession, or discrimination; the granting or accepting of a rebate, concession, or discrimination; and the giving or receiving of a rebate, concession, or discrimination. *U. S. v. Bunch*, (1908) 165 Fed. 736.

In considering the sufficiency of an indictment for receiving an unjust discrimination in rates from a carrier on an interstate shipment of property, in violation of Interstate Commerce Act Feb. 4, 1887, ch. 104, 24 Stat. L. 379, 3 Fed. Stat. Annot. 809, as supplemented by this Act, any doubts as to the correct construction of the statute should be resolved in favor of the evident intention of Congress that equality among shippers should be maintained, and unjust discrimination and favoritism of all kinds condemned, leaving the question whether the existing conditions justified the difference in rates charged to be determined as one of fact on the trial. *U. S. v. Vacuum Oil Co.*, (1907) 153 Fed. 598.

**Size of shipment.** — The gist of the offense under this Act was the receipt of a concession, irrespective of whether the property involved was train loads, carloads, or pounds, and consisted of the "transaction," which was not completed until the shipper received a rate different from the established rate, without reference to the size of the shipment. *Standard Oil Co. v. U. S.*, (1908) 164 Fed. 376, 90 C. C. A. 364.

**Intent.** — In a prosecution of an interstate carrier for giving a rebate on an interstate shipment of lime, constituting a departure from the established published rate, the intent of the carrier is of the essence of the offense. *Atchison, etc., R. Co. v. U. S.*, (1909) 170 Fed. 250, 95 C. C. A. 446.

**Wilfulness.** — A departure from an established and published interstate freight rate by a carrier in order to constitute a crime denounced by the Elkins Act must be wilful. *Atchison, etc., R. Co. v. U. S.*, (1909) 170 Fed. 250, 95 C. C. A. 446.

The use of the word "wilful" in this Act, to characterize offenses thereunder, conceding it to apply to the granting of rebates from the published schedule rates, does not require that there should have been an evil intent to constitute the offense, but it is sufficient if the act was done knowingly and purposely. *Chicago, etc., R. Co. v. U. S.*, (1908) 162 Fed. 835, 90 C. C. A. 211.

**Good faith.**—Intentionally accepting transportation of goods in interstate or foreign commerce at less than the carrier's published rates, which is forbidden by this Act, is sufficient to sustain a conviction under the Act, although such action may have been taken in good faith, under a claim of legal right. *Armour Packing Co. v. U. S.*, (1908) 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 680.

**Elements of offense.**—To warrant a conviction of a shipper for receiving rebates in violation of section 1, the fact of the payment of such rebate by or on behalf of the carrier, and its receipts by or on behalf of defendant, must be proved, and each payment constitutes but one offense, although it may cover more than one shipment. *U. S. v. Bunich*, (1908) 165 Fed. 736.

**When offense complete.**—The offense of giving rebates in violation of the Elkins Act is complete when the carrier, to whom the shipper has paid the full legal rate, pays over to the shipper, upon a claim presented by him, the amount of the rebate stipulated in the agreement under which the shipment was made. *New York Cent., etc., R. Co. v. U. S.*, (1909) 212 U. S. 481, 20 S. Ct. 304, 53 U. S. (L. ed.) 613.

**Foreign shipments.**—Shipments under a through bill of lading from an interior point in the United States to a foreign port are embraced in the provisions of this Act. *Armour Packing Co. v. U. S.*, (1908) 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 680.

**Necessity for secret or fraudulent device.**—A device or contrivance, secret or fraudulent in its nature, is not essential to sustain the conviction of a shipper for violating this Act. *Armour Packing Co. v. U. S.*, (1908) 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 680.

**Rebates received by consignee.**—A consignee, no less than the consignor, is chargeable with a violation of this section by receiving rebates or concessions from the published tariffs of an interstate carrier through the cancellation of terminal charges at the point of destination which form a part of the tariffs as so published. *U. S. v. Standard Oil Co.*, (1907) 148 Fed. 719.

**Rebate given by intrastate railroad.**—The fact that a concession from the published and filed through rate on an interstate shipment over the lines of a connecting carrier was given entirely by the initial carrier for transportation over its own line wholly within one state does not relieve the shipper receiving such concession from liability to prosecution therefor. *U. S. v. Vacuum Oil Co.*, (1908) 158 Fed. 536.

**Private car companies.**—A private car company which delivers its cars to railroad companies to be furnished indiscriminately for the use of shippers, receiving pay for such use from the railroad companies on a mileage basis, is within the provision of this section, and the giving by such a car company of any rebate or allowance to a shipper using its cars, whereby he secures the transportation of his property at a less rate than that named in the published tariff of the carrier for transportation of such property in its own cars,

although from its own funds and without the connivance or knowledge of the carrier, is a violation of the statute. Such a car company is therefore subject to the jurisdiction of the Interstate Commerce Commission, charged with the duty of enforcing the statute and having power to inquire into the operations of any agency of transportation which may so conduct its business as to destroy uniformity of rates. *Interstate Commerce Commission v. Reichmann*, (1906) 145 Fed. 235.

In *U. S. v. Milwaukee Refrigerator Transit Co.*, (1906) 145 Fed. 1007, it appeared that a refrigerator company was incorporated to own and operate a private car line, and to have charge of all the interstate transportation of the product of a brewing company. A majority of the brewing company's stock, however, was owned by persons who had no interest in the refrigerator company, and the stock of the latter was bought and paid for by the holders with their own money and in their own interest, none of it being held for the brewing company, though the majority of it was owned by persons who also owned brewing company stock. The brewing company paid its freights in full and received no rebates, nor was it a party to contracts between the refrigerator company and the railroad companies by which the refrigerator company received a rebate of from one-eighth to one-tenth of all freight moneys on all interstate traffic it controlled. It was held that such facts were insufficient to establish that the brewing company had received rebates.

**Necessity for knowledge of rate by shipper.**—A shipper cannot be convicted of accepting a concession from the lawfully published rate without proof of knowledge of what such rate in fact was, and hence evidence that the shipper had no knowledge of the published rate, and could only have ascertained the same by construction of several tariff sheets, the application of which was questionable, was held to be admissible. *Standard Oil Co. v. U. S.*, (1908) 164 Fed. 376, 80 C. C. A. 364.

**Retrospective operation.**—The payment of a rebate after the passage of this Act, but upon shipments of property transported prior to its enactment, is comprehended by its provisions that it shall be unlawful to offer, grant, or give, or to solicit, accept, or receive, any rebate in respect to property in interstate commerce transportation, whereby any such property shall be transported at less than the published rates. *New York Cent., etc., R. Co. v. U. S.*, (1909) 212 U. S. 500, 29 S. Ct. 309, 53 U. S. (L. ed.) 624.

**Common arrangement.**—A carrier by water which has not joined in a tariff and division sheet filed and published by connecting railroad carriers for the through carriage of interstate shipments between two points does not become a party to a "common arrangement" for the carriage of such a shipment within the meaning of the Elkins Act, by accepting and carrying the same under a through bill of lading issued by the initial railroad carrier stating the published tariff rate and the division of the charges in accordance therewith, nor by receiving its divisional part of such rate, where it has pre-

vously privately contracted with the shipper to "protect" a lower through rate, pursuant to which contract the shipment was made, and its return to the shipper of a part of its divisional share of the freight, in fulfillment of the contract, is not the "giving of a rebate" in violation of this Act. *Camden Iron Works v. U. S.*, (C. C. A. 1908) 158 Fed. 561; *Mutual Transit Co. v. U. S.*, (1910) 178 Fed. 664, 102 C. C. A. 164.

**Refund of elevator charges.**—A railroad company whose published schedule rate for the carriage of oats in interstate shipment from Minneapolis to Duluth or Superior was five cents per one hundred pounds, and which received payment from a shipper at such rate, but, on shipments intended for through transportation over the lakes, later refunded to the shipper the elevator charges for transferring the grain from its cars to vessels after the termination of its own carriage, amounting to one-half cent per bushel, was held to be guilty of granting a rebate or concession from the published schedule rate, in violation of the Elkins Act, and it was held to be no defense to a prosecution therefor that competing roads granted a like concession, and that it was compelled to do the same in order to secure its fair share of the business, or that it treated all shippers alike, or that the concession was made by its officers in good faith and in the honest belief that it was lawful. *Chicago, etc., R. Co. v. U. S.*, (1908) 162 Fed. 835, 90 C. C. A. 211.

**Receiving rebate from joint rate.**—This section makes it unlawful for a carrier to grant a rebate from a joint tariff rate which it has filed with the Interstate Commerce Commission, or published, or in which it participates when filed or published by another carrier, but it does not make it a criminal offense to receive a rebate from a joint rate unless such rate has been both filed and published. *U. S. v. Wood*, (1906) 145 Fed. 405.

**"By any device whatever."**—Under the provisions in this section prohibiting the giving or receiving of rebates in respect to the transportation of any property in interstate or foreign commerce "by any device whatever" it was unlawful for a corporation organized to control the interstate transportation of a brewing company to demand and receive as a consideration for the routing of the brewing company's products over certain lines of railroad a concession equal to one-eighth or one-tenth of the published freight rates. *U. S. v. Milwaukee Refrigerator Transit Co.*, (1906) 145 Fed. 1007.

**Liability of stockholder.**—The fact alone that a person is a stockholder in a corporation which has accepted rebates in violation of law does not render him subject to the penalty imposed by the statute therefor. *U. S. v. Wood*, (1906) 145 Fed. 405.

**Liability of shipper not receiving the benefit of the rebate.**—The fact that a shipper who contracts for and receives a rebate in violation of the statute personally receives no benefit therefrom, but turns the same over without consideration to another, does not relieve him from criminal liability. *U. S. v. Wood*, (1906) 145 Fed. 405.

**Shipments beginning and terminating in same state but passing through other states.**—A shipment from New York city to Buffalo, by way of New Jersey and Pennsylvania, is interstate commerce, and so is subject to the provisions of this Act. *U. S. v. Delaware, etc., R. Co.*, (1907) 152 Fed. 269.

**Necessity for express agreement.**—When a carrier unites with another or others in making a rate for interstate or foreign shipments, and a through bill is issued therefor, it is subject to the Interstate Commerce Act. An express agreement for the through rate is not required, but the successive receipt and forwarding in the ordinary course of business by two or more carriers under through bills, or any arrangement for a continuous carriage, constitutes assent to such common arrangement, and makes the carrier a party to the contract, within the meaning of the Act. *U. S. v. Wood*, (1906) 145 Fed. 405.

**Departure from published through rate—shipments over different route.**—An initial carrier which has become a party to a joint through rate for the transportation of property over its own and connecting lines between two points in different states, which rate has been filed and published as required by this Act, cannot lawfully transport property between such points at a less and unpublished rate over another route and with different connections. *U. S. v. Vacuum Oil Co.*, (1907) 153 Fed. 598.

**Refund for use of private tracks.**—Private tracks built by the owner of a packing plant on its own property, extending from a connection with the tracks of a belt line railroad company to and around its buildings, and used in loading cars for shipment, are not a part of the railroad system, but plant facilities, and the refunding by a railroad company, which made and published a schedule of through rates, including the belt line charge of one dollar per car to such packing company on shipments made by it and paid for at the schedule rate, on the ground that it was a payment for the use of such private tracks, thus making the rate charged one dollar per car less than that published and charged to shippers generally from the same point, was held to constitute the giving of a rebate, in violation of this section. *Chicago, etc., R. Co. v. U. S.*, (C. C. A. 1907) 156 Fed. 558.

**Carriers by water.**—Broadly speaking, this Act is not applicable to carriers by water, and such a carrier does not become subject to the Act in respect to an interstate shipment in part over its line and in part over connecting railroad lines, unless, as provided in this section, it was "under a common control, management, or arrangement" with the railroad carriers for the continuous carriage of such shipment. *Mutual Transit Co. v. U. S.*, (1910) 178 Fed. 664, 102 C. C. A. 164.

**Accepting aggregate of local rates as through rate.**—In *U. S. v. Great Northern R. Co.*, (1907) 157 Fed. 288, it was held that a carrier which accepts and carries an interstate shipment on a through bill of lading, openly charging the sum of the published local rates between the points named therein,

thereby creates a through rate and accepts the published aggregate as the lawful through charge; and that any rebate given therefrom was a violation of the Elkins Act.

**Agreements made prior to passage of statute.**—A railroad company subject to the interstate commerce laws, which paid rebates to a shipper in 1904, was subject to prosecution therefor under the Elkins Act, although the agreement therefor was made before the passage of such Act. Such agreement was unlawful and unenforceable under the original interstate commerce law, and the rebates cannot be said to have been "given" within the meaning of the Elkins Act until their actual payment; and as so construed the Act as applied to such a case is not an *ex post facto* law. *U. S. v. Great Northern R. Co.*, (1907) 157 Fed. 288.

**Joinder of defendants.**—Both the corporation and its agents may be joined in an indictment for violating the provisions of this Act. *New York Cent., etc., R. Co. v. U. S.*, (1909) 212 U. S. 481, 29 S. Ct. 304, 53 U. S. (L. ed.) 613.

**Contract fixing former rate as defense.**—A shipper is guilty of accepting transportation at less than the carrier's published rates where, after the carrier has duly established a higher rate, he secures such transportation at the rate agreed upon in a prior contract with the carrier, which was the legal, published, and filed rate when the contract was made, since the statute, being then in force, is read into such contract, and becomes a part of it. *Armour Packing Co. v. U. S.*, (1908) 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 680.

**Questions for jury.**—On the trial of indictments against a railroad company for granting concessions to a shipper in respect to interstate shipments in violation of this section and for failing to observe its published tariff rates with regard to demurrage charges, the questions whether defendant had made a settlement with the shipper as to such demurrage, and whether, if so, the cancellation of the charges was a valid settlement of a disputed claim or for the purpose of making a concession in violation of the law, were held to be questions of fact for the jury. *U. S. v. Philadelphia, etc., R. Co.*, (1910) 184 Fed. 543.

**Excessive sentence.**—In *Standard Oil Co. v. U. S.*, (1908) 164 Fed. 376, 90 C. C. A. 364, it appeared that the defendant, Standard Oil Company of Indiana, was found guilty on 1,462 counts of an indictment for receiving concessions from a railroad company on shipments of oil, in violation of this section. The defendant's capital stock was one million dollars, and there was no evidence that its assets were in excess of that sum, nor did it appear that the defendant had ever before been guilty of a similar offense. A majority of defendant's capital stock was owned by the Standard Oil Company of New Jersey, which was no party to the prosecution, whose capital stock was one hundred million dollars. This corporation was a holding company, and its net earnings for the period during which the concessions were received the court in-

vestigated before passing sentence. It was held that the assessment of the fine of \$29,240,000, which was the maximum punishment on each count, based on a finding that such amount was less than one-third of the net revenues of the Standard Oil Company of New Jersey during the period of violation, the effect of which would be to bankrupt the defendant, was excessive, and an abuse of discretion.

**Number of offenses.**—In a prosecution against a shipper for receiving concessions from the published rates of a railroad company in violation of this Act, which involves continuous shipments covering a number of years, there can be no greater number of offenses than there were payments of freight in which concessions were granted and received, such receipt being the completion of the transaction which constitutes the offense. *U. S. v. Standard Oil Co.*, (1909) 170 Fed. 988.

Under this section, which makes it unlawful for a shipper to receive "any concession" from the published and filed rate for the interstate transportation of property, where the published rates relate to transportation in carload lots and the shipments are so made, concessions received and accepted on such shipments were upon the property transported, and not upon the conceded rate, and each shipment on which a concession was given constitutes a separate offense. *U. S. v. Vacuum Oil Co.*, (1908) 158 Fed. 536.

**Indictment.**—An indictment charging a shipper with securing transportation of goods in interstate or foreign commerce at less than the carrier's published rates, in violation of this Act is sufficient where it charges each and all of the elements of the offense, with allegations of time, place, kind of goods, and name of carrier, averring the fixing of the published rate, the changing of the rate, and the new publication, the shipper's knowledge of this change, and the carriage of the goods over a described route at a concession of the difference between the two rates. *Armour Packing Co. v. U. S.*, (1908) 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 681.

An indictment against a railroad company for granting rebates in violation of the Elkins Act need not set out a particular description of the device resorted to, but is sufficient where it avers the kind of property shipped, the time and place, when and where shipped, the consignee, the existing legal tariff for such shipment, the payment thereof by the shipper, the subsequent payment of the rebate by the carrier to the shipper, and the time and amount of such payment. *Chicago, etc., R. Co. v. U. S.*, (1908) 162 Fed. 835, 90 C. C. A. 211.

An indictment of a shipper for receiving rebates or concessions in violation of the Elkins Act, which charges that defendant received a concession from such rates on a specified shipment, is sufficiently specific and need not specifically charge the actual payment of the unlawful lower rate, which is a matter of proof. *Standard Oil Co. v. U. S.*, (1910) 179 Fed. 614, 103 C. C. A. 172.



In *Atchison, etc., R. Co. v. U. S.*, (1909) 170 Fed. 250, 95 C. C. A. 446, it was held that an indictment alleging that the established and published rate per car for bulk lime between two points was seventy dollars per car of 40,000 pounds minimum, and that the defendant charged and received for a specified car the sum of \$64.75, and no more, sufficiently charged that defendant granted a "concession" prohibited by the statute, though the counts did not use the word "concession" to describe the alleged rebate.

An indictment for violation of this section for giving or receiving rebates need not allege that the carrier's published rate was a reasonable rate, nor set out its tariffs in full, it being sufficient to aver that a certain named rate was in force between designated points as shown by the published tariffs. *U. S. v. Standard Oil Co.*, (1907) 148 Fed. 719.

For other cases dealing with the sufficiency of an indictment for violation of this section, see *U. S. v. Standard Oil Co.*, (1907) 148 Fed. 719; *U. S. v. Delaware, etc., R. Co.*, (1907) 152 Fed. 269; *U. S. v. Vacuum Oil Co.*, (1907) 153 Fed. 598; *U. S. v. Vacuum Oil Co.*, (1908) 158 Fed. 536; *U. S. v. Standard Oil Co.*, (1910) 183 Fed. 223.

**Duplicity.**—Under the provision of this Act, making it an offense for an interstate carrier to "offer, grant, or give" rebates, where the transaction is completed, the substantive offense is the payment and receipt of the rebate; and an indictment therefor is not bad for duplicity because it also avers the offer or agreement pursuant to which the payment was made. *U. S. v. Great Northern R. Co.*, (1907) 157 Fed. 288.

An indictment under this section alleging that the defendant offered, granted, and gave a rebate, is not duplicitous, but charges but one offense. *U. S. v. Delaware, etc., R. Co.*, (1907) 152 Fed. 269.

**Variance.**—In an indictment charging a shipper with having received from a railroad company a rebate or concession in violation of this Act, whereby oil was transported for it in interstate commerce at a less rate than that named in the tariffs published and filed by the railroad company, an averment that such company established, published, and filed a rate on oil between Chicago and St. Louis of 19½ cents per hundred pounds was not sustained by proof that its schedules named only the rate over its own line from Chicago to East St. Louis at eighteen cents, and that the tariff on connecting lines between East St. Louis and St. Louis was 1½

cents. *U. S. v. Standard Oil Co.*, (1909) 170 Fed. 988.

A tariff sheet showing an established and published rate on bulk lime between two points of \$3.50 per ton in carload lots of not less than 40,000 pounds was held not to sustain an indictment against the carrier for granting a concession alleging that the established rate was \$70 a car of 40,000 pounds minimum. *Atchison, etc., R. Co. v. U. S.*, (1909) 170 Fed. 250, 95 C. C. A. 446.

**Evidence.**—Where, in a prosecution against a carrier for alleged rebating on shipments of bulk lime, it was shown that the regular published rate was \$3.50 per ton, 40,000 pounds minimum, that the value of the lime was \$3.50 a ton at the point of shipment, and that the carrier had accepted in settlement sums varying from 35 cents to \$14.35 per car less than such established rate, it was held that evidence that the shipper had claimed that each of the cars had been loaded with at least the minimum amount, but that various amounts had been lost in transit, and that the carrier had not exacted freight on the amount so lost, was admissible as showing absence of the carrier's intent to grant a concession from the established freight rate. *Atchison, etc., R. Co. v. U. S.*, (1909) 170 Fed. 250, 95 C. C. A. 446.

In *Standard Oil Co. v. U. S.*, (1910) 179 Fed. 614, 103 C. C. A. 172, the evidence was held to be sufficient to support a verdict finding that defendant knowingly accepted concessions as a shipper from the lawful rates established by railroad companies in violation of this Act.

An indictment against a railroad company containing a number of counts, each charging the granting of a concession by defendant to a shipper in violation of this section, by failing to collect a demurrage charge fixed by its published schedule of rates on a single carload shipment, was held to be supported as to any one count by proof that at a single settlement between defendant and the shipper after all the shipments charged had been made defendant made a concession equal to the demurrage charges on all of the cars. *U. S. v. Philadelphia, etc., R. Co.*, (1910) 184 Fed. 543.

For other cases under this paragraph, see *U. S. v. Milwaukee Refrigerator Transit Co.*, (1905) 142 Fed. 247; *U. S. v. Armour*, (1906) 142 Fed. 808; *Ex p. Chapman*, (1907) 153 Fed. 371; *Wisconsin Cent. R. Co. v. U. S.*, (C. C. A. 1909) 169 Fed. 76; *U. S. v. Standard Sanitary Mfg. Co.*, (1911) 187 Fed. 232.

### [Prosecutions — jurisdiction.]

**Constitutionality.**—The requirement that the prosecution of crimes against the United States be had in the state or district where the offense was committed, which is made by U. S. Const., Sixth Amend., is not violated by the provision of this Act, under which the offense of obtaining transportation of goods from one place to another at less than the carrier's published rates may be tried in any federal district through which such trans-

portation was conducted. *Armour Packing Co. v. U. S.*, (1908) 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 681.

**Failure to file rate schedule.**—The offense of failing to file a rate schedule with the commission is committed in Washington, where the commission has its office, and hence must be prosecuted there. *New York Cent., etc., R. Co. v. U. S.*, (1908) 166 Fed. 267, 92 C. C. A. 331.

## [Published rates to be adhered to.]

**Liability of carrier not publishing or filing schedule.**—A carrier which gives rebates from a joint rate on file with the Interstate Commerce Commission may, although it did not itself publish and file the rate, be convicted of violating this Act, which, *inter alia*, provides that the published rate shall be conclusively deemed, in any prosecution under

the Act, to be the legal rate as against the carrier who files the same or "participates in any rates so filed or published," and that any departure from such rate shall be deemed to be an offense under the Act. *U. S. v. New York Cent., etc., R. Co.*, (1909) 212 U. S. 514, 29 S. Ct. 313, 53 U. S. (L. ed.) 631.

## Vol. X, p. 172, sec. 3. [Equity courts to enforce tariffs, prohibit discrimination, etc.]

**Restraining rebating.**—Equity has jurisdiction to grant an injunction at the instance of the United States against carriers and other corporations, restraining them from giving and receiving rebates in violation of this Act, although such acts may also constitute a crime. *U. S. v. Milwaukee Refrigerator Transit Co.*, (1906) 145 Fed. 1007.

**Prior violations.**—See *U. S. v. Atchison, etc., R. Co.*, (1905) 142 Fed. 176.

**Necessity for going before commission.**—This section provides a remedy in court, without going before the Interstate Commerce Commission, for any discriminations forbidden by law, including the discriminations or preferences prohibited by sections 1 and 3 of the Act of Feb. 4, 1887, ch. 104, 24 Stat. L. 379, 380, 3 Fed. Stat. Annot. 809, 816. *Interstate Commerce Commission v. Chicago G. W. R. Co.*, (1905) 141 Fed. 1003, *affirmed* (1908) 209 U. S. 108, 28 S. Ct. 493, 52 U. S. (L. ed.) 705.

**Sufficiency of bill.**—In *U. S. v. Milwaukee Refrigerator Transit Co.*, (1905) 142 Fed. 247, it was held that in a suit of equity by the United States against interstate carriers and others, brought under this Act, to enjoin the giving and receiving of unlawful rebates, in which the lawfulness of payments made by the carriers depended upon the intent with which they were made and received, the bill was sufficient on its face to show the unlawful intent and illegality of the payments, where it alleged that the defendant brewing company, which was a larger shipper of beer prior to the enactment of such statute, habitually received rebates from carriers; that shortly after such enactment its officers, who were also its controlling stockholders, organized a transit company (defendant) and became its officers and the owners of practically all of its stock, and on behalf of the brewing company contracted with it to make

all the shipments for the brewing company, and that the transit company contracted for shipments with such interstate carriers as would pay it from one-tenth to one-eighth of the published rate for the transportation, ostensibly as a commission for obtaining the business, but in fact, as was well known to the carrier defendants, as a rebate for the benefit of the brewing company.

**Venue.**—An action by certain shippers to restrain an interstate carrier from enforcing a reconsignment charge of five dollars per car, as unreasonable, though maintainable at common law, is nevertheless a suit within the Interstate Commerce Act, so that federal jurisdiction is not alone dependent on diverse citizenship, and hence it can be brought only in the district of which the defendant is an inhabitant, as provided by Judiciary Act March 3, 1887, ch. 373, sec. 1, 24 Stat. L. 552, as amended by Act Aug. 13, 1888, ch. 866, 25 Stat. L. 434, 4 Fed. Stat. Annot. 265. *Sunderland v. Chicago, etc., R. Co.*, (1908) 158 Fed. 877.

**Evidence.**—In a case of an equivocal act which is unlawful if so intended, but not otherwise, or which is claimed to have been accidental or through mistake, evidence of unconnected but similar facts is always admissible to show intent or system or to rebut accident; and, under such rule, upon an issue as to whether a corporation organized and owned by the officers and stockholders of another is in fact an independent corporation or was organized merely as a dummy to enable the other through it to collect and obtain illegal rebates from carriers, the fact that the latter had previously and habitually received rebates in violation of law is pertinent and may be allowed and proved. *U. S. v. Milwaukee Refrigerator Transit Co.*, (1905) 142 Fed. 247.

## [District attorneys to bring suits, etc. — recovery of damages.]

**Suits without direction of commission.**—The Attorney-General has authority to institute a proceeding to restrain rebating by interstate carriers of his own motion, without

direction or investigation on the part of the Interstate Commerce Commission. *U. S. v. Milwaukee Refrigerator Transit Co.*, (1906) 145 Fed. 1007.

## Vol. X, p. 173, sec. 4.

**Retroactive effect.**—The remedies given by section 3 of this Act were so far made applicable to prior pending proceedings to en-

force the former Act by the provision of section 4, that pending causes shall not be affected by the repeal of conflicting laws

provided for therein, but shall be prosecuted to a conclusion in the matter theretofore provided "and as modified by the provisions of this Act," that a decree granting the relief prayed for in a suit brought on behalf of the United States by its law officers to enjoin discrimination between localities, which suit was unauthorized because brought before the

passage of the later Act, must be reversed and the cause remanded for further proceedings consistent with the Act to Regulate Commerce as originally enacted and subsequently amended. *Missouri Pac. R. Co. v. U. S.*, (1903) 189 U. S. 274, 23 S. Ct. 507, 47 U. S. (L. ed.) 811.

## Vol. X, p. 173, sec. 1.

For an amendment to this Act, see Act of June 30, 1906, ch. 3920, 34 Stat. L. 798, 1909 Supp. Fed. Stat. Annot. 708.

**"Proceeding."**—The examination of witnesses before a grand jury concerning an alleged violation of the Anti-trust Act is a "proceeding" within the meaning of the proviso to this Act. *Hale v. Henkel*, (1906) 201 U. S. 43, 26 S. Ct. 371, 50 U. S. (L. ed.) 652.

**Sufficiency of statutory immunity.**—The right of a witness to claim his privilege against self-incrimination, afforded by the U. S. Const., Amend. 5, when examined concerning an alleged violation of the Anti-trust Act, is taken away by the proviso to this Act which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity

from prosecution in the state courts for the offense disclosed. *Hale v. Henkel*, (1906) 201 U. S. 43, 26 S. Ct. 371, 50 U. S. (L. ed.) 652; *Nelson v. U. S.*, (1906) 201 U. S. 92, 26 S. Ct. 358, 50 U. S. (L. ed.) 673.

**A shield against successful prosecution,** available to the accused as a defense, and not immunity from the prosecution itself, is what was secured by this Act. *Heike v. U. S.*, (1910) 217 U. S. 423, 30 S. Ct. 539, 54 U. S. (L. ed.) 821.

**Persons filing answer under oath.**—This section as amended by Act of June 30, 1906, ch. 3920, 34 Stat. L. 798, 1909 Supp. Fed. Stat. Annot. 708, does not immunize persons who have filed answers under oath in a proceeding under the Anti-trust Act. *U. S. v. Standard Sanitary Mfg. Co.*, (1911) 187 Fed. 229.

## 1909 Supp., p. 255, sec. 1.

**Constitutionality.**—The provision of Const. U. S., art. 1, sec. 9, that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another," does not prevent the exercise of the power of Congress by delegated authority to regulate commerce between ports of different states merely because such regulation may incidentally affect the commerce of a port in still another state. *Louisville, etc., R. Co. v. Interstate Commerce Commission*, (1910) 184 Fed. 118.

**Construction.**—The sections of this Act which are amendatory of the Act of Feb. 4, 1887, ch. 104, 24 Stat. L. 379, 3 Fed. Stat. Annot. 809, are to be treated, as to matters occurring after the enactment of such Act, as if such section had been in the original Act. *State v. Adams Express Co.*, (1908) 171 Ind. 138, 85 N. E. 337.

**Free passes — Passes in payment of claims for damages — Invalidating contracts for free transportation.**—An agreement by an interstate carrier to issue annual passes for life in consideration of a release of a claim for damages, though entered into prior to this Act, was made unenforceable by the prohibition of section 2 against demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property or for any service in connection therewith, than that specified in the carrier's published schedule of rates. *Louisville, etc., R. Co. v. Mottley*, (1911) 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297.

**Employees of railway mail service.**—The provision of this Act that no carrier subject

to this Act shall issue in interstate commerce free transportation, except to railway mail employees, cannot be construed to prohibit the issuance of a free pass to an employee of the railway mail service for transportation of such employee while not in the actual discharge of his official duties. *Schuyler v. Southern Pac. Co.*, (Utah 1910) 109 Pac. 459.

**Defense to actions for death from negligence.**—Where an interstate carrier issued free transportation to an employee of the railway mail service for use by such employee while not on duty, it was held that it could not avoid liability to the personal representatives of such employee for its negligence in causing his death, by alleging that such transportation was issued in violation of this Act. *Schuyler v. Southern Pac. Co.*, (Utah 1910) 109 Pac. 459.

**Persons punishable.**—Under the provision of this section which makes it a misdemeanor for any common carrier subject to its provisions to issue any free ticket, free pass, or free transportation for passengers, except to persons therein excepted, and further provides that "any person other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty," one who, having in his possession an interstate free ticket or pass issued by a railroad company, sells it to another, knowing that he is not the person named therein, and is not entitled to ride thereon, with intent that he shall so use it, which he does by riding free on an interstate journey, is guilty of

using the ticket in violation of the statute. *U. S. v. Martin*, (1910) 176 Fed. 110.

**State laws.**—An order of a state commission which provided that ten days' free storage should be allowed on less than carload shipments when destined to consignees who lived at interior points five miles or more from the railroad station, in so far as it applied to interstate commerce was held to be void for the reason that it was in conflict with and superseded by sections 1 and 2 of this Act, and for the further reason that it interfered with and imposed upon interstate commerce an unreasonable burden. *St. Louis, etc., R. Co. v. State*, (Okla. 1910) 107 Pac. 329.

Since the Oregon statute requiring railroads to furnish cars on demand by shippers (Act of Feb. 18, 1907, Laws of 1907, p. 77, sec. 26) covers a field not occupied by the Interstate Commerce Act, in that it regulates the manner of making the request, the excuses that may be made for a failure to deliver cars, and adds an additional penalty by way of demurrage for failure to comply with its terms, it is not superseded by nor in conflict with the federal statute. *Martin v. Oregon R., etc., Co.*, (1910) 113 Pac. 16.

This Act regulating the transportation and delivery of goods by express companies superseded the Indiana statute (Act Ind. March 6, 1901, Act 1901, p. 97, ch. 62, Burns' Annot. Stat. 1901, sec. 3312a), relating to the same subject-matter. *State v. Adams Express Co.*, (1908) 171 Ind. 138, 85 N. E. 337.

**Common-law or contractual duties.**—The liability of connecting carriers for breach of their common-law or contractual duty in respect to property received for shipment is not regulated or affected by this section, though the shipment is an interstate one, and therefore an action against them for injuries to the property caused by negligence and delay in transportation, being based on a breach of such duty and not on any infraction of said Act, is properly brought in a state court. *Chicago, etc., R. Co. v. Clements*, (1909) 53 Tex. Civ. App. 143, 115 S. W. 664.

**Reasonableness of terminal charges.**—A terminal charge for delivering carloads of live stock to the Union Stock Yards in Chicago, a point beyond the carrier's line, if in itself just and reasonable, and separately stated in the tariff schedules, as required by section 2 of this Act, cannot be condemned or the carrier required to reduce it on the ground that it, taken with prior charges of transportation over the lines of the carrier, or of connecting carriers, makes the total charge to the shipper unreasonable. *Interstate Commerce Commission v. Stickney*, (1909) 215 U. S. 98, 30 S. Ct. 66, 54 U. S. (L. ed.) 112, affirming (1908) 164 Fed. 638.

**Compelling switch connection.**—The remedy given by this section, on complaint by the shipper to the Interstate Commerce Commission, when an interstate railway carrier refuses to establish a switch connection with a lateral branch line, is exclusive, and the gen-

eral powers given by other sections of the statute cannot be deemed to authorize a complaint to the commission by the lateral branch railway company. *Interstate Commerce Commission v. Delaware, etc., R. Co.*, (1910) 216 U. S. 531, 30 S. Ct. 415, 54 U. S. (L. ed.) 605.

**Limitation of liability to fixed valuation.**—This Act does not prevent a shipper from recovering the actual loss to a live stock shipment, though the stock was shipped on the valuation of \$100 per head. *Betus v. Chicago, etc., R. Co.*, (Ia. 1911) 129 N. W. 962.

**Street railroads.**—The Interstate Commerce Act does not apply to street railway companies engaged in the transportation of passengers between cities in different states. *Omaha, etc., R. Co. v. Interstate Commerce Commission*, (1910) 179 Fed. 243.

**Shipments wholly within a territory.**—Prior to this amendment the Interstate Commerce Commission had no jurisdiction to fix or adjust charges or rates on shipments, the carriage of which was wholly within a territory. *Ft. Smith, etc., R. Co. v. Chandler Cotton Oil Co.*, (Okla. 1909) 106 Pac. 10.

**In the commodities clause cases — Matters not settled by earlier decisions.**—The adjudication in the commodities clause cases (*U. S. v. Delaware, etc., Co.*, (1909) 213 U. S. 366, 29 S. Ct. 527, 53 U. S. (L. ed.) 836) set out in the original note, that the ownership by a railway carrier of stock in a *bona fide* corporation manufacturing, mining, producing, or owning the commodity carried is not the interest in such commodity forbidden to the carrier by the Hepburn Act, is not *res judicata* of the right of such carrier to exert its power as a stockholder so as to deprive the other corporation of all real independent existence, and to make it virtually but an agency, or dependency, or department of the carrier. *U. S. v. Lehigh Valley R. Co.*, (1911) 220 U. S. 257, 31 S. Ct. 387, 55 U. S. (L. ed.) 458.

**Stock ownership in sham corporation.**—The exercise by a railway carrier of its power as a stockholder in a corporation manufacturing, mining, producing, or owning the commodity carried in such manner as to deprive the latter corporation of all independent existence, and to make it virtually but an agency, or dependency, or department of the carrier, is forbidden by the provisions of this section, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect." *U. S. v. Lehigh Valley R. Co.*, (1911) 220 U. S. 257, 31 S. Ct. 387, 55 U. S. (L. ed.) 458.

**Cars not owned by shipper.**—The case cited in the original note was reversed on other grounds in *U. S. v. Baltimore, etc., R. Co.*, (1910) 215 U. S. 481, 30 S. Ct. 164, 54 U. S. (L. ed.) 292.

## 1909 Supp., p. 260, sec. 2.

**Contract for special facilities.**—A shipper cannot, under a special contract with a carrier, claim special facilities in transportation, such as that the freight be transferred in a single covered express wagon by itself, so that, in an action by a shipper based on such special contract, the express company could show as a defense that the tariff rates applicable did not provide for such special privileges. *Winn v. American Express Co.*, (Ia. 1910) 128 N. W. 663.

**Question of fact.**—What is an undue or unreasonable preference or advantage given by a carrier of goods to a shipper within the inhibition of this section is a question of fact. *State v. Adams Express Co.*, (1908) 171 Ind. 138, 85 N. E. 337.

**Discrimination against localities.**—Under the Interstate Commerce Act, as amended by this section, forbidding carriers to give any unreasonable preference or advantage to any shipper or locality, a carrier cannot lawfully make rates so as to overcome the natural advantage of one locality over another, or so as to build up one place at the expense of another. *State v. Adams Express Co.*, (1908) 171 Ind. 138, 85 N. E. 337.

**Filing rates.**—In a prosecution against certain interstate carriers for shipping certain freight at a ten cent rate when the published and filed rate was fifteen cents per hundred weight, evidence that the ten cent rate had been published by defendant's connections, and sent "broadcast," though not filed, was held to be inadmissible as a matter of defense, since the charging of a rate less than the filed rates constitutes a concession to the shipper, in violation of the Act, as a matter of law. *U. S. v. Merchants', etc., Transp. Co.*, (1911) 187 Fed. 363.

**Presumption as to compliance.**—There is no presumption that interstate carriers sued for overcharge for icing cars had filed with the Interstate Commerce Commission a schedule of freight rates, including icing charges, and that such rates were promulgated as required by the Act, in the absence of allegations to that effect, so as to defeat the jurisdiction of a state court. *N. H. Blitch Co. v. Atlantic Coast Line R. Co.*, (1910) 87 S. C. 107, 69 S. E. 16.

**Knowledge.**—In a prosecution of an interstate carrier for shipping freight at a rate less than that filed with the Interstate Commerce Commission, it was held that defendant could not be heard to say that it did not know of the filed rate, which it had established in accordance with the law, as a justification for its departure therefrom. *U. S. v. Merchants', etc., Transp. Co.*, (1911) 187 Fed. 363.

**Compensation for transportation.**—A carrier engaged in interstate commerce cannot lawfully charge, collect, or receive anything but money for transportation on its road since the enactment of this section, prohibiting any carrier from demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in con-

nection therewith, than that specified in its published schedule of rates. *Louisville, etc., R. Co. v. Mottley*, (1911) 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297, *reversing* (1909) 133 Ky. 652, 118 S. W. 982.

**Effect of Act on contracts for transportation.**—The interstate commerce law abrogated the right of the carrier and shipper to fix the freight rate by contract; the law fixing the rate. *Baltimore, etc., R. Co. v. New Albany Box, etc., Co.*, (Ind. 1911) 94 N. E. 906.

Where carriers have filed and published schedules of joint through rates, it is the right of a shipper to have his property transported upon the lines joining in such schedules and at the rates therein specified, and the carrier receiving it cannot avoid its obligation by any contract inserted in its bill of lading. *Dickerson v. Louisville, etc., R. Co.*, (1910) 187 Fed. 874.

**Release of damage claims.**—An interstate carrier cannot make a valid contract to issue annual passes for life in consideration of a release of a claim for damages, since the enactment of this section expressly prohibiting any carrier from demanding, collecting, or receiving "a greater or less or different compensation" for the transportation of persons or property, or for any service in connection therewith, than that specified in its published schedule of rates. *Louisville, etc., R. Co. v. Mottley*, (1911) 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297, *reversing* (1909) 133 Ky. 652, 118 S. W. 982.

**The constitutional liberty of the citizen to make contracts** was not infringed by the enactment by Congress, in the exercise of its power over commerce, of the provisions of this section, which rendered unenforceable a prior contract, valid when made, by which an interstate carrier agreed to issue annual passes for life in consideration of a release of a claim for damages. *Louisville, etc., R. Co. v. Mottley*, (1911) 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297, *reversing* (1909) 133 Ky. 652, 118 S. W. 982. See also under this title, vol. 3, p. 827, sec. 6.

**Damages for failure to post freight rates.**—Where a railroad company failed to post a schedule of tariff rates, and a shipper in ignorance of such schedule, relying upon a schedule previously in force, contracted for shipment of grain, to his damage, it was held that he could recover of the railroad company therefor at common law. *Illinois Cent. R. Co. v. Henderson Elevator Co.*, (1910) 138 Ky. 220, 127 S. W. 779.

**Time rate takes effect.**—The tariff of rates is established and put in force when the schedules have been published and filed with the Interstate Commerce Commission, and approved and promulgated by it, the posting of the schedules in the carrier's office or stations not being a condition to the taking effect of the rate. *Baltimore, etc., R. Co. v. New Albany Box, etc., Co.*, (Ind. 1911) 94 N. E. 906.

**Separating terminal charges.**—Carriers separately state the terminal charges for delivering live stock beyond their own lines to

the Union Stockyards in Chicago, as required by this section, where their tariff schedules inform shippers that the live stock rates to Chicago apply only to deliveries at the carriers' own yards, and that for transportation to the Union Stockyards a stated additional charge will be made, the amount of

such charge being entered, not upon the general freight charges of the companies, but as a separate item. *Interstate Commerce Commission v. Stickney*, (1909) 215 U. S. 98, 30 S. Ct. 66, 54 U. S. (L. ed.) 112, *affirming* (1908) 164 Fed. 638.

## 1909 Supp., p. 265, sec. 4.

**Constitutionality of delegation.**—The power delegated by Congress to the Interstate Commerce Commission to prescribe railroad rates for the future is legislative in its nature, and, since it concerns the administrative affairs of the government, which by reason of variable conditions cannot be covered in detail by direct legislation, its delegation is not in violation of the Constitution, and it may be as fully exercised by the commission as Congress might have exercised it, subject to any limitations imposed by Congress itself. *Louisville, etc., R. Co. v. Interstate Commerce Commission*, (1910) 184 Fed. 118. See also (1905) 25 Op. Atty.-Gen. 422.

**Extent of power of commission.**—This section places no restrictions on the commission in respect to the matters which it may take into consideration, or the weight it shall give to every of such matters in informing itself what opinion it ought to give, except that it shall not abuse its authority and proceed arbitrarily without regard to the justice of the case, or give a judgment not fairly within its power. *Louisville, etc., R. Co. v. Interstate Commerce Commission*, (1910) 184 Fed. 118.

**Establishing through routes and joint rates.**—In *Interstate Commerce Commission v. Northern Pac. R. Co.*, (1910) 216 U. S. 538, 30 S. Ct. 417, 54 U. S. (L. ed.) 608, it was held that the personal preferences of many travelers for a southern route between eastern points and points on the Northern Pacific Railway between Portland and Seattle do not make the through route via the Northern Pacific Railway unreasonable or unsatisfactory, so as to justify the Interstate Commerce Commission, in the exercise of its power under this section to establish through routes and joint rates where "no reasonable or satisfactory through route exists," in ordering the establishment of through rates and joint rates between those points via the Union Pacific Railway, so as to put the latter road on an equal footing with the Northern Pacific Railway Company in the use for through travel of the road belonging to the latter between Portland and Seattle.

**Regulation of distribution of railway cars.**—An order of the Interstate Commerce Commission commanding a railway company to desist from its practice not to take into account the company's fuel cars in the daily distribution of coal cars in time of car shortage to the bituminous coal mines on its line, and requiring it for a future period of two years to count such cars against the share of the mine receiving them, is within the authority delegated by this section, upon complaint duly made, to declare a rate or practice affecting

rates illegal, and to determine and prescribe for a term not exceeding two years what will be a just and reasonable rate, and what regulation or practice in respect to transportation is just, fair, and reasonable thereafter to be followed. *Interstate Commerce Commission v. Illinois Cent. R. Co.*, (1910) 215 U. S. 452, 30 S. Ct. 155, 54 U. S. (L. ed.) 280.

**Allowance of elevator charges.**—The Interstate Commerce Commission cannot make the allowance by a carrier to the owner of an elevator of the cost of the elevation in transit of grain in which he has an interest, conditioned upon his failure to use the opportunity afforded during the process of elevation to treat, weigh, inspect, or mix the grain, since such allowance cannot be deemed an undue preference or discrimination forbidden by the Act to regulate commerce, in view of the provisions of this section, recognizing that services in transportation, rendered by an owner of the property transported, are to be paid for by the carrier. *Interstate Commerce Commission v. Diefenbach*, (1911) 222 U. S. 42, 32 S. Ct. 22, *modifying and affirming* 176 Fed. 409.

**Procedure.**—The procedure prescribed by section 13 of the Act of Feb. 4, 1887, ch. 104, 3 Fed. Stat. Annot. 842, requiring a statement of charges against a carrier filed with the Interstate Commerce Commission to be forwarded "to such common carrier," who shall be required to answer the same, which procedure is required to be followed in case of hearings for the prescribing of rates under section 4, is analogous to that in all legal controversies, and sufficient, and it is no objection to the validity of an order of the commission prescribing rates to be charged by a carrier between certain localities that it will affect the rates of other carriers, not before the commission, who may be in the succession of all or any interstate transportation which includes that in question. *Louisville, etc., R. Co. v. Interstate Commerce Commission*, (1910) 184 Fed. 118.

**Validity of order.**—It is no objection to the validity of an order of the Interstate Commerce Commission determining and prescribing rates to be charged by a carrier, that it would derange the schedule of rates on other routes. *Louisville, etc., R. Co. v. Interstate Commerce Commission*, (1910) 184 Fed. 118.

**Effect upon power of courts to pass on reasonableness of rates.**—The courts have no jurisdiction to enjoin the filing, publication, or enforcement of a proposed rate alleged to be unreasonable, in advance of action thereon by the Interstate Commerce Commission, which is by said Act vested with exclusive

jurisdiction to determine the reasonableness of rates in the first instance. *Columbus Iron, etc., Co. v. Kanawha, etc., R. Co.*, (1909) 171 Fed. 713, *affirmed* (1910) 178 Fed. 261, 101 C. C. A. 621. See also *Houston Coal, etc., Co. v. Norfolk, etc., R. Co.*, (1909) 171 Fed. 723, *affirmed* (1910) 178 Fed. 266, 101 C. C. A. 626; *Wickwire Steel Co. v. New York Cent., etc., R. Co.*, (C. C. A. 1910) 181 Fed. 316; *Mitchell Coal, etc., Co. v. Pennsylvania R. Co.*, (1911) 183 Fed. 908.

The original jurisdiction of the federal courts under section 9 of the Interstate Commerce Act (Act Feb. 4, 1887, ch. 104, 24 Stat. L. 379, 3 Fed. Stat. Annot. 833) has not been entirely destroyed, and they still may redress such wrongs as can consistently with the Act be redressed without previous action by the Interstate Commerce Commission, and, when one sues for discrimination by a carrier, it is necessary in the first instance to determine whether the wrong can be redressed by the courts. *Langdon v. Pennsylvania R. Co.*, (1911) 186 Fed. 237.

As to the authority of the courts to enjoin a proposed rate as unjust and unreasonable, see also, *supra*, this title, p. 1191, vol. 3, p. 851, sec. 22, *Equity Jurisdiction*.

**Review by courts.**—A court having no constitutional power to regulate commerce or to fix rates to be charged by a carrier cannot suspend or vacate an order of the Interstate Commerce Commission prescribing rates un-

der the power conferred by section 15 of the Interstate Commerce Act as amended by Act June 29, 1906, ch. 3591, sec. 4, except on the ground that in making such order the commission transcended its power or exercised such power without due regard to law and in violation of some legal, constitutional, or natural right of the carriers affected. *Philadelphia, etc., R. Co. v. Interstate Commerce Commission*, (1909) 174 Fed. 687.

The courts may review the determination of the Interstate Commerce Commission upon the question whether "no reasonable or satisfactory through route exists" within the meaning of this section, conditioning the authority of the commission to establish through routes and joint rates upon the non-existence of such route. *Interstate Commerce Commission v. Northern Pac. R. Co.*, (1910) 216 U. S. 538, 30 S. Ct. 417, 54 U. S. (L. ed.) 608.

But the courts cannot, under the guise of exerting judicial power, usurp merely administrative functions by setting aside an order of the Interstate Commerce Commission within the scope of the power delegated to such commissioner, upon the ground that such power was unwisely or inexpediently exercised. *Interstate Commerce Commission v. Illinois Cent. R. Co.*, (1910) 215 U. S. 452, 30 S. Ct. 155, 54 U. S. (L. ed.) 280, *reversing* (1908) 173 Fed. 930.

## 1909 Supp., p. 268, sec. 5.

**Powers of commission.**—A reduction in that part of the through rates in Atlantic seaboard shipments to Missouri river cities which applies to the haul between the Mississippi and Missouri rivers is not beyond the power of the Interstate Commerce Commission as introducing a new system of rate-making by artificially apportioning the country into zones tributary to given trade centres, in order to build up or protect certain distributive centres at the expense of others, where the commission, by its order, intended only to correct through rates which it found upon complaint were unreasonable in themselves, by substituting therefor reasonable rates. *Interstate Commerce Commission v. Chicago, etc., R. Co.*, (1910) 218 U. S. 88, 30 S. Ct. 651, 54 U. S. (L. ed.) 946, *reversing* (1909) 171 Fed. 680.

**Conclusiveness of findings of commission.**—Findings of the Interstate Commerce Commission that certain through rates are unreasonable in themselves carry with them a presumption of correctness. *Interstate Commerce Commission v. Chicago, etc., R. Co.*, (1910) 218 U. S. 88, 30 S. Ct. 651, 54 U. S. (L. ed.) 946, *reversing* (1909) 171 Fed. 680.

**Parties.**—Parties injuriously affected by the orders of the Interstate Commerce Commission may lawfully institute suits in the Circuit Courts to enjoin, suspend, or annul such orders, although they were not parties to the proceeding before the commission on which the orders are based. Parties similarly situated may intervene in such suits.

*Peavey v. Union Pac. R. Co.*, (1910) 176 Fed. 409, *affirmed* 222 U. S. 42, 32 S. Ct. 22.

**Judicial inquiry concerning rates fixed by commission.**—The wisdom or expediency of the lawful discharge of the administrative duties of the Interstate Commerce Commission is not reviewable by the courts. But the courts may relieve from orders of the commission which deprive complainants of their property without due process of law, or take it without just compensation, from those which are beyond the delegated power of the commission, and from those which evidence so unreasonable an exercise of its power as to be substantially without though formally within it. *Peavey v. Union Pac. R. Co.*, (1910) 176 Fed. 409, *affirmed* 222 U. S. 42, 32 S. Ct. 22; *Louisville, etc., R. Co. v. Interstate Commerce Commission*, (1910) 184 Fed. 118.

**Complaint.**—Under the provision that all complaints for damages shall be filed with the Interstate Commerce Commission within two years from the time the cause of action accrues, a letter to the commission setting out the facts and containing a substantial prayer for relief by way of damages is a sufficient complaint, no formal pleadings being required by the Act. *Dickerson v. Louisville, etc., R. Co.*, (1910) 187 Fed. 875.

**Necessity for fixing reasonable rate as condition precedent to recovery of overcharge.**—In a proceeding before the Interstate Commerce Commission to recover damages on a complaint by a shipper that the amount collected by the carrier at the lawfully estab-

lished rate had been excessive because that rate was unreasonable, the finding and prescription by the commission of a reasonable maximum rate to be observed in the future and an order by the commission forbidding the use of a rate in excess thereof are conditions precedent to its exercise of its power to order reparation. *Denver, etc., R. Co. v. Baer Bros. Mercantile Co.*, (C. C. A. 1911) 187 Fed. 485.

## 1909 Supp., p. 271, sec. 7.

**Liability of carrier beyond own line.**—Under this amended section the liability of an initial carrier is the same whether its contract as issued reads to the end of its own line or to a destination over the lines of connecting carriers. *Galveston, etc., R. Co. v. Johnson*, (Tex. 1911) 133 S. W. 725.

The initial carrier is liable for damage caused by the wrongful diversion of an interstate shipment by a connecting carrier in another state. *Kemendo v. Fruit Dispatch Co.*, (Tex. 1910) 131 S. W. 73.

**Constitutionality.**—To the same effect as the first paragraph of the original note, see *Atlantic Coast Line R. Co. v. Riverside Mills*, (1911) 219 U. S. 186, 31 S. Ct. 164, 55 U. S. (L. ed.) 167, *affirming* (1909) 168 Fed. 987, cited in the original note; *St. Louis, etc., R. Co. v. Heyser*, (1910) 95 Ark. 412, 130 S. W. 562; *Fry v. Southern Pac. Co.*, (1911) 247 Ill. 564, 93 N. E. 906; *Louisville, etc., R. Co. v. Scott*, (1909) 133 Ky. 724, 118 S. W. 990; *Dodge v. Chicago, etc., R. Co.*, (1910) 111 Minn. 123, 126 N. W. 627; *Reid v. Southern R. Co.*, (1910) 153 N. C. 490, 69 S. E. 618; *Galveston, etc., R. Co. v. Wallace*, (Tex. 1909) 117 S. W. 169; *Missouri, etc., R. Co. v. Harriman*, (Tex. 1910) 128 S. W. 932; *Houston, etc., R. Co. v. Lewis*, (Tex. 1910) 129 S. W. 594; *Galveston, etc., R. Co. v. Johnson*, (Tex. 1911) 133 S. W. 725; *Norfolk, etc., R. Co. v. Dixie Tobacco Co.*, (1911) 111 Va. 813, 69 S. E. 1106.

**Effect.**—To the same effect as the original note, see *Central of Georgia R. Co. v. Sims*, (1910) 169 Ala. 295, 53 So. 826; *Kansas City Southern R. Co. v. Carl*, (1909) 91 Ark. 97, 121 S. W. 932.

Under this section an initial carrier is liable for its own negligence or that of connecting carriers resulting in delay in the transportation of cattle by reason of which they failed to reach their destination within a reasonable time, whether they were shipped under an oral or under a written contract attempting to limit the carrier's liability for its own acts or delays occurring on its own line. *Chicago, etc., R. Co. v. Miles*, (1909) 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043.

**Jurisdiction of courts.**—To the same effect as the first paragraph of the original note. *Central of Georgia R. Co. v. Sims*, (1910) 169 Ala. 295, 53 So. 826; *St. Louis, etc., R. Co. v. Heyser*, (1910) 95 Ark. 412, 130 S. W. 562; *Louisville, etc., R. Co. v. Warfield*, (1909) 6 Ga. App. 550, 65 S. E. 309, *following* *Southern Pac. Co. v. Crenshaw*, (1909) 5 Ga. App. 675, 63 S. E. 865; *Louisville, etc., R. Co.*

**Limitation of action.**—Under the proviso in this section that claims accrued prior to the passage of this Act may be presented within one year, it was held that a claim which accrued prior to the passage of the Act may be presented at any time within two years after the date of its accrual, although complaint is not filed until more than a year after the passage of the Act. *Dickerson v. Louisville, etc., R. Co.*, (1910) 187 Fed. 874.

*v. Scott*, (1909) 133 Ky. 724, 118 S. W. 990; *Gibson v. Atlantic Coast Line R. Co.*, (S. C. 1911) 70 S. E. 1030; *Houston, etc., R. Co. v. Lewis*, (Tex. 1910) 129 S. E. 594.

To the same effect as the second paragraph of the original note, see *Fry v. Southern Pac. Co.*, (1911) 247 Ill. 564, 93 N. E. 907.

Under the provision of this amendment that initial carriers issuing receipts or bills of lading shall be liable for loss caused by connecting carriers, the state courts have jurisdiction of actions against an initial carrier for the negligence of connecting carriers, despite sections 8 and 9 of the original Act of Feb. 4, 1887, 3 Fed. Stat. Annot. 833, which, respectively, make carriers subject to the provisions of the Act liable for damages caused by the doing of certain things, and provide that any person claiming such damages may complain to the Interstate Commerce Commission or bring suit in the federal courts, for the above sections relate only to the original Act. *Gibson v. Atlantic Coast Line R. Co.*, (S. C. 1911) 70 S. E. 1030.

**State laws.**—The proviso of this section, "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he had under existing law," leaves a shipper free to resort to the laws of the state applicable to his contract. *Latta v. Chicago, etc., R. Co.*, (1909) 172 Fed. 850, 97 C. C. A. 198.

In *Atchison, etc., R. Co. v. Rodgers*, (N. M. 1911) 113 Pac. 805, it was held that this section did not displace a previously existing state statute restricting the right of a common carrier to limit liability upon interstate shipments.

A state rule that a carrier cannot contract for exemption from or limitation of its liability arising from its negligence, or that of its servants, is not affected by this section. *Wright v. Adams Express Co.*, (Pa. 1911) 79 Atl. 760.

**Prior to the enactment of this section** each of several connecting carriers was responsible only for loss occurring on its own line. *Central of Georgia R. Co. v. Chicago Varnish Co.*, (1910) 169 Ala. 287, 53 So. 832.

As to interstate through shipments made by an initial carrier before the amendment of the Interstate Commerce Act forbidding the limitation by an initial carrier of its liability as insurer where it contracts to carry through, it could limit its liability as insurer for a consideration such as a reduced rate of freight. *Blackmer, etc., Pipe Co. v. Mobile,*



etc., R. Co., (1909) 137 Mo. App. 479, 119 S. W. 1.

**Notice of damage.** — A provision of a transportation contract, requiring notice of loss or damage and of an intent to claim damages within thirty hours after arrival of the goods at destination, was not invalidated by this section. *St. Louis, etc., R. Co. v. Keller*, (1909) 90 Ark. 308, 119 S. W. 254.

**Loss by fire.** — The statute does not prohibit carriers from placing any limitation whatever upon their common-law liabilities, but merely forbids them from limiting their liability as to damages caused by the respective carriers, for which damage a carrier is liable, irrespective of negligence, if it is responsible for the cause thereof, so that, where the contract of carriage exempted the carrier from liability for loss by fire, it could show that the fire occurred from causes beyond its control. *St. Louis Southwestern R. Co. v. Ray*, (Tex. 1910) 127 S. W. 231.

**Termination of liability.** — Where a connecting carrier's liability as a carrier for an interstate shipment had terminated when it sold the goods for freight charges, the initial carrier would not be liable for the value of the goods under this section. *Norfolk, etc., R. Co. v. Stuart's Draft Milling Co.*, (1909) 109 Va. 184, 63 S. E. 415.

**Limitation of amount of liability.** — The purpose of this section is to render the initial carrier of interstate shipments over connecting lines liable to the holder of the bill of lading for any loss to the property, whether occurring on its line or not, and to prevent interstate carriers from exempting themselves from liability for the loss of property after it has passed into the hands of another carrier for transportation, but it does not abrogate the right of the carriers to regulate their charges for carriage by the value of the goods or to agree with the shipper on valuation of the property carried, and a contract limiting the carrier's liability to a specified sum in consideration of the rate charged regulated by the value of the goods is not invalid. *Bernard v. Adams Express Co.*, (1910) 205 Mass. 254, 91 N. E. 325; *McElvain v. St. Louis, etc., R. Co.*, (1910) 151 Mo. App. 126, 131 S. W. 736; *Travis v. Wells*, (1909) 79 N. J. L. 83, 74 Atl. 444; *Greenwald v. Barrett*, (1910) 199 N. Y. 170, 92 N. E. 218; *Larsen v. Oregon Short Line R. Co.*, (Utah 1910) 110 Pac. 983.

Arbitrary limitations of value and pre-adjustments of the damage in contracts of carriage are invalid under this section. *Louisville, etc., R. Co. v. Warfield*, (1909) 6 Ga. App. 550, 65 S. E. 309.

**Liability for negligence.** — This Act does not in any manner supersede or amend the rule at common law with reference to the liability of a common carrier for its negligence in the transportation of property by interstate shipments. *Miller v. Chicago, etc., R. Co.*, (1909) 85 Neb. 458, 123 N. W. 449.

**Who may question validity.** — Under the rule that one not within a class affected by a statute may not attack its constitutionality, an initial carrier in an action against it, based on section 7, making the initial carrier

liable for loss of or injury to interstate shipments caused by any connecting carrier, may not question the validity of the provision permitting it to recover from the connecting carrier for the loss sustained by it. *Central of Georgia R. Co. v. Sims*, (1910) 169 Ala. 295, 53 So. 826.

**Contract for through shipment.** — A bill of lading dated in one state, showing a destination in another, and containing stipulations governing the entire transportation, specifying rights, duties, or limitations relating not only to the parties, but also to subsequent carriers, is a "contract for a through shipment" within this section. *Southern Pac. Co. v. Meadors*, (Tex. 1910) 129 S. W. 170.

**Judgment as evidence against connecting carrier.** — The provision in this section, making the initial carrier of an interstate shipment liable for loss of or injury thereto caused by a connecting carrier, and permitting the initial carrier to recover from the connecting carrier causing the loss or injury the amount it may be required to pay to the owner of the property, as evidenced by any receipt or judgment, makes a judgment against the initial carrier only *prima facie* evidence against the connecting carrier, and it is not invalid as depriving the connecting carrier of its property without due process of law. *Central of Georgia R. Co. v. Sims*, (1910) 169 Ala. 295, 53 So. 826.

**Failure to divert shipment as desired.** — An initial carrier, which was under no obligation, by contract or otherwise, to notify a connecting carrier that the shipper desired a diversion of the shipment at a point on the connecting carrier's line, having delivered the shipment to the connecting carrier, was not liable for failure of the connecting carrier to make the diversion, as no fault was attributable to the connecting carrier. *Patton v. Texas, etc., R. Co.*, (Tex. 1911) 137 S. W. 721.

**Enforcement of contracts limiting liability.** — A bill of lading of an interstate shipment, which contains clauses repugnant to this section, is not thereby entirely vitiated, but the holder thereof may recover for a failure to safely transport the goods. *Central of Georgia R. Co. v. Sims*, (1910) 169 Ala. 295, 53 So. 826.

The word "caused," as used in this section, implies not only active misconduct and deeds of commission, but also passive neglect and deeds of omission, and failure to exercise duties faithfully. *Louisville, etc., R. Co. v. Warfield*, (1909) 6 Ga. App. 550, 65 S. E. 308.

The word "state," as used in the part of this section regarding the limitation of liability, is used in its limited sense to represent and include only the states of the federal Union, and such section has no application to a shipment of cotton from a point in Texas to a foreign country. *Houston, etc., R. Co. v. Inman*, (Tex. 1911) 134 S. W. 275.

**Delivery to interstate railroad.** — Delivery of an interstate shipment of freight to an interstate railroad under a through bill of lading and a guaranty of a through rate is a through shipment, and is governed by this

section, making initial carriers liable for loss or injury caused by connecting carriers. *Veeder v. Gilmer*, (Tex. 1910) 129 S. W. 595.

**No receipt or bill of lading given.**—A railroad company engaged in interstate commerce, which receives goods to be transported from a point in this state to a point in another state, is liable by force of this section for a loss of the property caused by it or any connecting carrier, although the receiving company failed to issue a receipt or bill of lading therefor. *International Watch Co. v. Delaware, etc., R. Co.*, (1910) 80 N. J. L. 553, 78 Atl. 49.

**Limiting liability for property before placed on cars.**—This section does not prevent a carrier of cattle from one state to another to exempt itself by contract from liability until the cattle are loaded on its cars, since a carrier need not take possession of property before the same is placed on its cars for transportation. *St. Louis, etc., R. Co. v. Jones*, (1910) 93 Ark. 537, 125 S. W. 1025.

**Right to sue intermediate carrier.**—The holder of a bill of lading is not bound to sue the initial carrier, but may sue directly an intermediate carrier for loss of or damage to goods on its line. *St. Louis Southwestern R. Co. v. Ray*, (Tex. 1910) 127 S. W. 281.

**Recovery of overcharges.**—Where an interstate carrier represents to the shipper that a certain freight rate has been established between given points, and such rate has in fact been published, and the shipper sends his goods on the faith of such representation, and is thereafter coerced into paying a higher rate, a state court has jurisdiction to hear and determine his suit for recovery of the amount thus overpaid. *Pine Tree Lumber Co. v. Chicago, etc., R. Co.*, (1909) 123 La. 583, 49 So. 202.

**For other cases under this section**, see *Central of Georgia R. Co. v. Dowe*, (1909) 6 Ga. App. 858, 65 S. E. 1091; *Pittsburgh, etc., R. Co. v. State*, (1909) 172 Ind. 147, 87 N. E. 1034; *Pittsburg, etc., R. Co. v. Mitchell*, (Ind. 1910) 91 N. E. 735; *Louisville, etc., R. Co. v. Scott*, (1909) 133 Ky. 724, 118 S. W. 990; *Holland v. Chicago, etc., R. Co.*, (1910) 139 Mo. App. 702, 123 S. W. 987; *International Watch Co. v. Delaware, etc., R. Co.*, (1910) 80 N. J. L. 553, 78 Atl. 49; *Missouri, etc., R. Co. v. Carpenter*, (1908) 52 Tex. Civ. App. 585, 114 S. W. 900; *St. Louis, etc., R. Co. v. Fenley*, (Tex. 1909) 118 S. W. 845; *Southern Pac. Co. v. Meadors*, (Tex. 1910) 129 S. W. 170; *Texas Cent. R. Co. v. Hico Oil Mill*, (Tex. 1910) 132 S. W. 381; *Patton v. Texas, etc., R. Co.*, (Tex. 1911) 137 S. W. 721.

## 1909 Supp., p. 276, sec. 11.

**Time of taking effect.**—To the same effect as the original note, see *Southern Pac. Co. v. Meadors*, (Tex. 1910) 129 S. W. 170.

# JUDGMENTS.

## Vol. IV, p. 2, sec. 966.

**Interest prior to judgment.**—In *U. S. v. Sargent*, (C. C. A. 1908) 162 Fed. 81, it was said: "In the proceeding at common law before a jury, the verdict of the jury assessing the amount of the damages would not become effective until the same should be affirmed by the judgment of the court, and interest would not attach until after judgment of condemnation, conformably to section 966, R. S. It could not have been in the contemplation of

Congress, in adopting the Conformity Act of 1888, that the government should thereby become amenable to the payment of any interest anterior to the rendition of judgment, which a state legislature might adopt in the admeasurement of the just compensation to be awarded to the property owner, different from what it would be under the common-law procedure."

## Vol. IV, p. 5, sec. 1.

**Lien expressly given.**—A judgment constitutes a lien on the defendant's real estate from the date of its rendition, or whenever thereafter the judgment debtor acquires

property. *Owen v. Brown*, (C. C. A. 1903) 120 Fed. 812. See also *Great Falls Nat. Bank v. McClure*, (C. C. A. 1910) 176 Fed. 208.

# JUDICIAL DISTRICTS AND CIRCUITS.

## Vol. IV, p. 16, sec. 531.

This section has been cited in *Clement v. U. S.*, (C. C. A. 1906) 149 Fed. 305; *U. S. r. Newark Meadows Imp. Co.*, (1909) 173 Fed. 426.

## Vol. IV, p. 17, sec. 532.

This section has been cited in *Birch v. Steele*, (C. C. A. 1908) 165 Fed. 577.

## Vol. IV, p. 20, sec. 1.

This section has been cited in *Geiger v. Tacoma R., etc., Co.*, (1905) 141 Fed. 169.

## Vol. IV, p. 20, sec. 3. [*Act Aug. 5, 1886.*]

Previously existing courts not disturbed. — It has been held that the statute does not disturb the previously existing courts in California, except to the necessary extent of cutting off part of their territorial jurisdiction, and substituting "Northern District of California" for "District of California" as the designation of the original district. It detached from the district as previously existing certain named counties, but omitted to attach the new district to the Ninth Circuit, or any circuit, and it did not designate the judges authorized to hold the Circuit Court therein, unless inferentially by providing in

section 8 "that the circuit and district judges of said Southern District of California shall each, respectively, appoint a clerk for their respective courts." It is only by reason of the fact that the territory comprised within the Southern District of California was within the Ninth Circuit, and is geographically situated so as to be conveniently attached to the Ninth Circuit, and because the Act did not express an intention to change the boundaries of the circuit, that said district can be considered as being, by legal implication, a constituent of the Ninth Circuit. *Geiger v. Tacoma R., etc., Co.*, (1905) 141 Fed. 169.

## Vol. IV, p. 22, sec. 1. [*Colorado.*]

This section has been cited in *Withaup v. U. S.*, (C. C. A. 1903) 127 Fed. 534.

## Vol. IV, p. 26, sec. 1. [*Idaho.*]

This statute has been cited in *Dwyer v. U. S.*, (C. C. A. 1909) 170 Fed. 160.

## Vol. IV, p. 28, sec. 1. [*Act July 20, 1882, ch. 312.*]

This statute has been cited in *Spencer v. U. S.*, (C. C. A. 1909) 169 Fed. 562; *Dwyer v. U. S.*, (C. C. A. 1909) 170 Fed. 160.

## Vol. IV, p. 30, sec. 1. [*Act June 1, 1900, ch. 601.*]

This statute has been cited in *Spencer v. U. S.*, (C. C. A. 1909) 169 Fed. 562.

## Vol. IV, p. 32, sec. 1. [*Act Feb. 12, 1901, ch. 355.*]

This statute has been cited in *Geiger v. Tacoma R., etc., Co.*, (1905) 141 Fed. 169.

## Vol. IV, p. 33, sec. 1. [*Act Aug. 8, 1888, ch. 789.*]

This statute has been cited in *Dwyer v. U. S.*, (C. C. A. 1909) 170 Fed. 160.

## Vol. IV, p. 36, sec. 1. [Act April 26, 1890, ch. 167.]

This statute has been cited in *Hubbard v. Chicago, etc., R. Co.*, (1910) 176 Fed. 994.

## Vol. IV, p. 40, sec. 1. [Act Feb. 28, 1887, ch. 271.]

This statute has been cited in *Petri v. F. E. Creelman Lumber Co.*, (1905) 199 U. S. 487, 26 S. Ct. 133, 50 U. S. (L. ed.) 281.

## Vol. IV, p. 41, sec. 1.

This statute has been cited in *Hodge v. Chicago, etc., R. Co.*, (C. C. A. 1903) 121 Fed. 48.

## Vol. IV, p. 42, sec. 541.

Western District of New York created.—The division of the Northern District of New York into the Northern and Western Districts by Act May 12, 1900, ch. 391, 31 Stat. L. 175, amending R. S. sec. 541, did not have

the effect of enlarging the jurisdiction of the Circuit Court for the Southern District to include causes of action arising in the Western District. *Hartford F. Ins. Co. v. Erie R. Co.*, (1909) 172 Fed. 899.

## Vol. IV, p. 55, sec. 9.

This statute has been cited in *International Bank, etc., Co. v. Scott*, (C. C. A. 1908, 159 Fed. 61.

## Vol. IV, p. 59, sec. 550.

The territorial limits of the Eastern and Western Districts of Wisconsin are fixed by the Act of Congress referred to (R. S. sec. 550), and are, of course, unaffected by the

subsequent state legislation organizing new counties and changing county lines. *Hyde v. Victoria Land Co.*, (1903) 125 Fed. 972.

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## JUDICIAL OFFICERS.

## Vol. IV, p. 70, sec. 363.

This section is not limited in its effect by R. S. sec. 366, 4 Fed. Stat. Annot. 71. They are independent sections, originally forming parts of independent Acts. *U. S. v. Twining*, (1904) 132 Fed. 129.

Authority of special assistant.—An attorney appointed under this section may perform any of the duties which devolve on the district attorney. *U. S. v. Cobban*, (1904) 127 Fed. 713.

A special assistant appointed to assist a district attorney in a certain class of suits and prosecutions in his district may, by direction of the district attorney, appear before the grand jury, and assist in the conducting of examinations by that body. *U. S. v. Cobban*, (1904) 127 Fed. 713.

But see *U. S. v. Rosenthal*, (1903) 121 Fed. 362, wherein it was held that a special assistant to the Attorney-General, appointed to investigate and report concerning alleged fraudulent importations of Japanese silks at the port of New York, and to prepare and conduct such civil and criminal proceedings as may result therefrom, is not authorized by law to conduct, or to aid the conduct of,

proceedings before a federal grand jury, and indictments based upon such proceedings so conducted should be quashed upon motion.

And in *U. S. v. Virginia-Carolina Chemical Co.*, (1908) 163 Fed. 66, it was held that the Attorney-General was not authorized to appoint special assistants to a district attorney having the authority or the right to appear before and participate in the proceedings of a grand jury; and the presence of such attorneys, specially appointed for a particular case, and their examination of witnesses on whose testimony an indictment was returned, render such indictment invalid.

Not an officer.—A special assistant to the Attorney-General is not an officer of the department of justice. *U. S. v. Rosenthal*, (1903) 121 Fed. 362.

Compensation.—Where third persons assured the Attorney-General that, if necessary, they would furnish funds to compensate the special assistant who should be appointed for such purpose; it was held that this arrangement was *inter alios*, and did not disqualify the appointee, who became an employee of the United States, to whom alone he could

look for compensation, and for whom he performed his duty with fidelity and probity. *U. S. v. Rosenthal*, (1903) 121 Fed. 862.

**Validity of appointment.**—The fact that an attorney appointed by the department of justice as a special assistant to a district attorney in the prosecution of criminal

actions against the officers of an insolvent national bank had previously been employed by the receiver of such bank to prosecute civil suits against such officers does not affect the validity of his appointment. *U. S. v. Twinning*, (1904) 132 Fed. 129.

## Vol. IV, p. 71, sec. 8.

**Assistant district attorneys** appointed by a United States district judge, as authorized by this section, are officers of the United

States courts for their respective districts. *In re Leaken*, (1905) 137 Fed. 680.

## Vol. IV, p. 81. [*Clerks of courts not to be receivers, etc.*]

**Appointment of deputy clerk as special master.**—Where a Circuit Court determines that a special reason exists for appointing a deputy clerk special master, such appointment is not reversible error because, through inadvertence, the reason is not assigned in the order. *Briggs v. Neal*, (C. C. A. 1903) 120 Fed. 224.

In *Quinton v. Neville*, (C. C. A. 1907) 154 Fed. 432, it was held that where an order appointing a clerk of the Circuit Court of the United States special master to conduct a judicial sale of certain land under a decree of the Circuit Court did not specify special reasons therefor, the order was held to be erroneous to that extent. But it was also decided that the error might be cured by amend-

ment, and that it did not affect the balance of the decree.

This Act was intended to prevent abuses which it was assumed had arisen out of favoritism for officers of the court. It nevertheless recognized and contemplated that special reasons might exist in the particular case or instance for departing from the interdiction of the statute; but as a safeguard that the spirit as well as the letter of the statute should be observed, while reposing a discretion in the judge of the court in making such appointment, it requires that he should assign in the order of appointment the special reasons inducing such selection. *Quinton v. Neville*, (C. C. A. 1907) 154 Fed. 432.

## Vol. IV, p. 81, sec. 715.

**Bailiffs and criers** of the federal courts, appointed to attend the same, as authorized by this section, though not constitutional officers, are officers of the court. *U. S. v. McCabe*, (C. C. A. 1904) 129 Fed. 708.

**Per diem fees.**—Court criers and bailiffs appointed under this section are entitled to *per diem* fees for attendance on the Circuit Court on days when the court was adjourned by written order of the judge. *U. S. v. McCabe*, (1903) 122 Fed. 653.

Where criers and bailiffs attend a Circuit Court on days to which the court is adjourned by written orders of the judge, they are entitled to receive their *per diem* fees therefor, though the court was not actually opened by a judge, and they were not specifically directed by the court or judge to attend. *U. S. v. McCabe*, (C. C. A. 1904) 120 Fed. 708.

## Vol. IV, p. 82, sec. 795.

**Breach of bond.**—A clerk of a Circuit Court who has given bond as required by R. S. sec. 795, or under the provisions of Act Feb. 22, 1875, ch. 95, sec. 3, 18 Stat. L. 333, conditioned that he shall "faithfully discharge the duties of his office . . . and properly account for all moneys coming into his hands as required by law," and who fails to pay out to the persons entitled thereto money deposited with him by litigants to secure costs under an order or rule of the court, or to account for and pay over the same to his successor in office, commits a breach of such bond. *U. S. v. Abeel*, (C. C. A. 1909) 174 Fed. 12.

**Suit on bond.**—Where a clerk of a Circuit Court in the course of a number of years received a large number of deposits of money

made by litigants to secure costs, as required by a rule of court, and failed to pay the same out to the persons who became entitled to the same as fees, or to turn the fund over to his successor in office, but converted it to his own use, the United States, as payee, may maintain an action on his official bond to recover the amount, and is not required in its pleading to name all or any of the persons entitled to share in the fund as use plaintiffs, since the sums so deposited can in no event become the property of the clerk beyond the amount he is entitled to retain for his own fees, but must legally remain subject to the orders of the court, which has power, on the recovery of the fund, to see that it is properly disbursed. *U. S. v. Abeel*, (1909) 174 Fed. 12, 98 C. C. A. 50.

## Vol. IV, p. 89, sec. 823.

This section means that whatever costs were properly taxable in favor of attorneys, solicitors, and proctors are still to be theirs, in addition to the compensation provided for by section 824. *Matheson v. Hanna-Schoelkopf Co.*, (1904) 128 Fed. 164.

Where libellant was the prevailing party in a suit in admiralty, but for equitable reasons the court directed that the costs be divided and paid by the parties in stated proportions, such order should be construed as including the statutory fee for libellant's proctor, which

in ordinary course would have been taxed as costs, but not a fee for respondent's proctor. *The L. F. Munson*, (1904) 127 Fed. 707.

**Ordinary counsel fees not taxable.**—This section does not prevent attorneys from charging and receiving from their client, in addition to this taxable docket fee, reasonable compensation for their services, but it must be from their client, and not his adversary, in the nature of costs. *Doddridge County Oil, etc., Co. v. Smith*, (1909) 173 Fed. 388.

## Vol. IV, p. 90, sec. 824.

"On a trial before a jury" contemplates not only an examination and hearing of evidence before a jury, but a determination of the question at issue, or a final submission of the cause for such determination, so that on a case on trial before a jury being settled pursuant to a stipulation before submission, no docket fee is allowable. *Howler v. Chicago, etc., R. Co.*, (1909) 166 Fed. 828.

**Counsel fees.**—A federal court of equity has power to make an allowance for counsel fees to a complainant who, as a joint owner of a fund or property, has maintained a suit for its preservation or protection, where it has been brought within the custody or control of the court, such allowance to be charged thereon; but the power is discretionary, and will only be exercised where it is clear that a direct benefit has resulted to the property or those interested therein. *Cuyler v. Atlantic, etc., R. Co.*, (1904) 132 Fed. 570.

**Consolidated suits.**—Where two suits are brought in a federal court between the same parties, which are consolidated for trial but separate verdicts are returned, two attorney's docket fees of twenty dollars each are taxable against the losing party. *U. S. v. Venable Constr. Co.*, (1904) 158 Fed. 833.

**Proctor's fees.**—Where there are several distinct causes of action in different parties although consolidated in a single suit, each claimant is entitled to a docket fee of ten dollars. *Title Guaranty, etc., Co. v. Crane Co.*, (1910) 219 U. S. 35, 31 S. Ct. 140, 55 U. S. (L. ed.) 72.

Fees taxable for taking depositions in interrogatories in a federal court when not

taken by a United States commissioner are not governed by the state statute, but may properly be taxed at twenty cents per folio by analogy with those allowed the clerk by R. S. sec. 828. *U. S. v. Venable Constr. Co.*, (1904) 158 Fed. 833.

**Must be used on hearing of cause.**—This section refers to depositions taken out of court to be used on the hearing of the cause, and has no application to evidence taken either in court or before a master on a reference. *Kissinger-Ison Co. v. Bradford Belt- ing Co.*, (C. C. A. 1903) 123 Fed. 91.

**Must be admitted in evidence.**—Attorney's fees for taking depositions can be taxed in a federal court under this section only for such depositions as were "admitted in evidence." *U. S. v. Venable Constr. Co.*, (1904) 158 Fed. 833.

**Depositions used in several cases on joint trial.**—Where depositions, though written out but once, were taken to be read in several cases, and were entitled and admitted in evidence in each, on the joint trial thereof the successful party is entitled to tax costs thereof in each case, in the absence of an agreement to the contrary. *L. E. Waterman Co. v. Lockwood*, (1904) 128 Fed. 174.

**Testimony given before an examiner may be treated as a "deposition."** *Missouri v. Illinois*, (1906) 202 U. S. 599, 20 S. Ct. 713, 50 U. S. (L. ed.) 1160.

**Cases discontinued.**—Where, pending trial to a jury, the case was settled pursuant to stipulation before submission, it was not "discontinued." *Howler v. Chicago, etc., R. Co.*, (1909) 166 Fed. 828.

## Vol. IV, p. 95, sec. 828.

The clerk of the Circuit Court is entitled to demand his fees in advance, being required to account therefor to the government whether collected or not, having once been earned. *Hoysradt v. Delaware, etc., R. Co.*, (1910) 182 Fed. 880.

**Right to recover costs.**—Though the legal title to costs, including officers' fees, is in the successful party, he holds the same as trustee, and the officers may therefore recover them in his name. *Hoysradt v. Delaware, etc., R. Co.*, (1910) 182 Fed. 880.

Though a taxation or retaxation of costs can only be made at the instance of a party,

and must be confined to the compensation of the parties for the expenses of litigation, as distinguished from officers' fees, it is unnecessary that unpaid fees of officers shall be formally taxed as costs in order to support an execution therefor, it being sufficient that they are noted of record or are entered on the writ. *Hoysradt v. Delaware, etc., R. Co.*, (1910) 182 Fed. 880.

**Fees due by indigent defendants.**—Charges for services of a clerk of a federal court on behalf of indigent defendants in criminal cases, which consist in administering oaths by order of court to defendant's witnesses, in

administering oaths to affidavits of poverty, and affixing jurats, in filing and entering applications for process, in filing and entering motions of defendants for new trial, and in rendering services to defendant in a capital case, by order of court, in prosecution of writ of error, are properly allowed. *U. S. v. Jones*, (1904) 193 U. S. 531, 24 S. Ct. 561, 48 U. S. (L. ed.) 776.

**Docket fees.**—Separate trials under one indictment against several defendants are separate causes, within the meaning of this section. *U. S. v. Keatley*, (1907) 204 U. S. 562, 37 S. Ct. 404, 51 U. S. (L. ed.) 618.

**Recording abstract of judgment.**—The services of a clerk of a federal court for recording abstracts of judgments, as required by a rule of court, are not covered by the docket fees prescribed by the tenth paragraph of this section, and separate charges therefor are justified by the eighth paragraph. *U. S. v. Keatley*, (1907) 204 U. S. 562, 27 S. Ct. 404, 51 U. S. (L. ed.) 618.

**Fees taxable for taking depositions on interrogatories in a federal court when not taken by a United States commissioner are not governed by the state statute, but may properly be taxed at twenty cents per folio, under this section.** *U. S. v. Venable Constr. Co.*, (1904) 158 Fed. 833.

**Administering oaths.**—An allowance to a clerk of a federal court of charges for administering oaths on the *voir dire* of grand and petit jurors cannot be justified under this section. *U. S. v. Jones*, (1904) 193 U. S. 531, 24 S. Ct. 561, 48 U. S. (L. ed.) 776.

**Copies.**—The right and duty of a clerk of a Circuit Court to charge the fees fixed by this section for each copy of an injunctive order directed by the court to be certified and served on each defendant in a suit is not affected by the fact that the copies, being large in number, were printed. *Cudahy Packing Co. v. McGuire*, (1905) 135 Fed. 891.

**Certifying copies.**—Charges of a clerk of the federal court for certificates to copies of *sci. fa.*, and certain orders of the court, are properly disallowed where no direction of the court as to such certificates is shown. *U. S. v. Jones*, (1904) 193 U. S. 531, 24 S. Ct. 561, 48 U. S. (L. ed.) 776.

**Entering decree.**—The clerk may refuse to enter a decree until his fees are paid, and the decree, though remaining physically in the clerk's office, is neither effective nor entered until the fees are paid. *Ommen v. Talcott*, (1910) 180 Fed. 925.

**Making, certifying, and returning record.**—Where a clerk of a Circuit Court makes and certifies a record in response to a writ of error or appeal, he is not merely making a transcript or copy, but is "making a record," within the meaning of this section, and he is entitled to fifteen cents a folio. *Hoysradt v. Delaware, etc., R. Co.*, (1910) 182 Fed. 880.

For making return to an order contained in a writ of error to a Circuit Court directing it "to send the record and proceedings aforesaid, with all things concerning the same," to the appellate court, the clerk is entitled to charge the fee of fifteen cents for

each folio authorized for making any "return" by this section. *Mohrstadt v. Mutual L. Ins. Co.*, (1906) 143 Fed. 751.

Where a clerk of the Circuit Court charged ten instead of fifteen cents per folio for making and certifying a record on a writ of error for defendant, and after reversal of the judgment the parties settled on the basis of a statement of the costs made by the clerk, containing the same mistake, it was held that such settlement did not relieve plaintiff, who lost the suit and was east for the costs, from the obligation to respond to the clerk for the difference. *Hoysradt v. Delaware, etc., R. Co.*, (1910) 182 Fed. 880.

**Per diem compensation.**—A clerk of a federal District and Circuit Court is entitled to his statutory *per diem* compensation for days on which he refers to the referee in bankruptcy voluntary petitions in bankruptcy filed during the absence of the judge from the district, though without written orders to open the court for that or any other purpose. *U. S. v. Marvin*, (1909) 212 U. S. 275, 29 S. Ct. 297, 53 U. S. (L. ed.) 510.

**For receiving, keeping, and paying out money, in pursuance of any statute or order of court, the clerk is entitled to one per centum on the amount as received, kept, and paid.** See *In re Michigan Cent. R. Co.*, (C. C. A. 1903) 124 Fed. 731; *The Adula*, (1901) 127 Fed. 851.

Under the provision of this section, which is the only authority on which the clerk's right to a commission rests, four things must be combined, namely: first, receiving; second, keeping; third, paying out; and fourth, in pursuance of a statute or order of court. *Edwards v. Bay State Gas Co.*, (1910) 177 Fed. 575.

**Money must be in clerk's custody or control.**—But this section is applicable only to money which the clerks were required to receive, keep, and pay out pursuant to statute or order of court, and does not entitle such clerks to commissions on funds paid into the hands of court commissioners and disbursed by them, without at any time being in the custody or under the control of the clerks. *S. Morgan Smith Co. v. Rockingham Power Co.*, (1909) 173 Fed. 923.

To entitle a clerk of a Circuit Court to a commission for "receiving, keeping, and paying out money," under R. S. sec. 828, such money must be paid to him or be subject to his order, so that he becomes responsible for its keeping and payment. *Michigan Cent. R. Co. v. Harsha*, (1904) 134 Fed. 217, 67 C. C. A. 145.

A clerk is not entitled to commissions on part of a fund in the hands of a receiver appointed by the court, not deposited in a designated United States depository, but under order of the court in a national bank to the credit of the receiver, subject to the checks drawn by the receiver and countersigned by the judge of the courts. *Edwards v. Bay State Gas Co.*, (1910) 177 Fed. 575.

A clerk of a Circuit Court is not entitled to a commission on the proceeds of mortgaged property sold under a foreclosure decree, which by order of the court is paid by the

master making the sale directly to the mortgagee. *Michigan Cent. R. Co. v. Harsha*, (1904) 134 Fed. 217, 67 C. C. A. 145.

A fund paid by a master into a United States depository, pursuant to an order of the court, and subject to be withdrawn on its order, is neither actually nor constructively in the keeping of the clerk, and he is not entitled to a commission thereon when it is so paid out. *Michigan Cent. R. Co. v. Harsha*, (1904) 134 Fed. 217, 67 C. C. A. 145.

Railroad bonds deposited in a Circuit Court as collateral security by its order, and kept in a bank vault to which the clerk kept the key, are not "money," and the clerk is not entitled to a commission thereon, under R. S. sec. 828, when by order of the court he takes

them from the bank and surrenders them to the depositor; nor is there any authority outside of the statute for the allowance of such a commission. *Michigan Cent. R. Co. v. Harsha*, (1904) 134 Fed. 217, 67 C. C. A. 145.

Where a bidder is permitted to make a deposit with the master in the form of a check or certificate of deposit, and to pay for the property by crediting the amount on the decree in his favor, neither the deposit nor the purchase money is required to be deposited in court. And, in such case, a motion by the clerk to require the master to deposit the proceeds of the sale will be denied. *Curtice v. Crawford County Bank*, (1903) 124 Fed. 919.

### Vol. IV, p. 107, sec. 829.

**Mileage.**—A United States marshal is not entitled to mileage for the distance traveled in serving warrants of arrest, in excess of the usually traveled route between the place of receiving the writs and the place of service, however great the necessity of pursuing a circuitous route, in view of R. S. sec. 829, which directs such mileage to be computed "from the place where the process is returned to the place of service." *U. S. v. Nix*, (1903) 189 U. S. 199, 23 S. Ct. 495, 47 U. S. (L. ed.) 775.

The allowance by the district judge of the account of a United States marshal is *prima facie* evidence of the correctness of the mileage items of such account. *U. S. v. Nix*, (1903) 189 U. S. 199, 23 S. Ct. 495, 47 U. S. (L. ed.) 775.

The per diem fee for the attendance of a United States marshal at a court which has been opened for business by order of the judge is allowable, although business may not have been transacted in court on such day, and the judge may not have been present. *U. S. v. Nix*, (1903) 189 U. S. 199, 23 S. Ct. 495, 47 U. S. (L. ed.) 775.

**"Caretaker for vessel."**—A marshal who has taken possession of a vessel on a process from a court of admiralty is responsible for her safekeeping to all parties in interest; and if he dispenses with a caretaker at the request of one party, it is within his discretion to again take possession and incur the expense of a keeper, as authorized by this section. *The Robert R. Kirkland*, (C. C. A. 1907) 153 Fed. 864.

**Effect of marshal's negligence.**—The expense of transporting a prisoner under a warrant of commitment cannot be allowed a United States marshal, where such prisoner escaped from the custody of his deputy before he could be delivered to the penitentiary, and there is no finding of due diligence on the part of the officer to prevent the escape. *U. S. v. Nix*, (1903) 189 U. S. 199, 23 S. Ct. 495, 47 U. S. (L. ed.) 775.

**When court "in session."**—When the court is open by its own order for the transaction of business, it is in session within the meaning of this section. *U. S. v. Dietrich*, (1904) 126 Fed. 659.

### Vol. IV, p. 118, sec. 830.

**The expenses paid by a marshal for meals of officers in charge of prisoners and witnesses in custody are allowable under this section.** *Swift v. U. S.*, (1904) 128 Fed. 763.

**Extra bailiffs.**—The provision of R. S. sec. 830, that marshals shall be paid their expenses necessarily incurred for fuel, lights,

and "other contingencies that may accrue in holding the courts" within their districts, is sufficient to entitle a marshal to reimbursement for the expense of extra bailiffs ordered by the court to take charge of a jury and witnesses in custody. *U. S. v. Swift*, (C. C. A. 1905) 139 Fed. 225.

### Vol. IV, p. 120, sec. 833.

**Clerk is a "debtor" with respect to amount payable by him.**—The duty of a clerk of a federal District Court to pay over to the United States the surplus fees and emoluments of his office which his half-yearly return or the audit thereof shows to exist over and above the compensation and allowances authorized by law to be retained by him is not governed by the federal statutes relating

to the embezzlement of "public money" or "money or property of the United States;" but such fees and emoluments are received by the clerk, not as moneys or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties; and with respect to the amount payable when the return is made, the clerk



is not a trustee, but a debtor. *U. S. v. Mason*, (1910) 218 U. S. 517, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133.

**Oath to return.**—The oath of a clerk of a District Court to his semi-annual return may be taken by the district judge. *U. S. v. Mason*, (1910) 177 Fed. 552.

**Bankruptcy forms not a necessary expense.**—Where a federal district judge decided that bankruptcy forms were reasonably necessary for the proper administration of justice in

order to insure uniformity, and thereupon ordered the District Court clerk to have certain approved forms printed and distributed, and to pay for the same from the receipts of his office, the printing of such forms, in so far as they were to be used for records by referees, etc., could not be regarded as stationery or a necessary expense of the clerk's office, within this section. *U. S. v. Mason*, (C. C. A. 1904) 129 Fed. 742.

## Vol. IV, p. 122, sec. 837.

**Docket fee.**—Sections 824 and 837 of the Revised Statutes authorize the taxation and allowance, on a trial before a jury in a civil or criminal action prosecuted by the government, of a docket or attorney's fee of forty dollars. These provisions, so far as they may

relate to the district attorney, are not repealed or modified by Act May 27, 1898, ch. 252, 29 Stat. L. 179, placing district attorneys on salaries, except as to the disposition of such fees. *U. S. v. Southern Pac. Co.*, (1909) 172 Fed. 911.

## Vol. IV, p. 123, sec. 839.

That "necessary office expenses" may be allowed as a proper credit appears from sections 833 and 839. *U. S. v. Mason*, (C. C. A. 1904) 129 Fed. 742.

## Vol. IV, p. 137, sec. 7.

**Purpose of section.**—The fragmentary character of the provisions of the Acts of Congress upon the subject of salaries of district attorneys is due to the fact that they were framed in recognition of an almost universal

usage in courts of justice of allowing costs to the prevailing party, rather than to any supposed necessity for affirmative legislation. *Western Coal, etc., Co. v. Petty*, (C. C. A. 1904) 132 Fed. 603.

## Vol. IV, p. 146, sec. 21.

Where a special examiner took depositions which were read and used in three cases tried together, it was held that he was entitled to a fee of three dollars a day in but one case,

and to ten cents a folio for certifying and filing the depositions in the second and third case. *L. E. Waterman Co. v. Lockwood*, (1904) 128 Fed. 174.

## Vol. IV, p. 155, sec. 771.

This section has been cited in *In re Beavers*, (1904) 131 Fed. 366; *U. S. v. Rea-Read Mill, etc., Co.*, (1909) 171 Fed. 501.

## Vol. IV, p. 159, sec. 787.

This section has been cited in *Leas v. Merriman*, (1904) 132 Fed. 510.

## Vol. IV, p. 161, sec. 788.

This section has been cited in *Leas v. Merriman*, (1904) 132 Fed. 510.

## Vol. IV, p. 165, sec. 1778.

A bill for an injunction in a federal court, verified before a commissioner of deeds of the city of New York, is improperly verified.

*Stationary Engineer Pub. Co. v. Comerford*, (1907) 155 Fed. 667.

## Vol. X, p. 179, sec. 4.

The term "Northern District of Illinois" is used to designate the district as it existed both before and after the passage of the Act. The purpose of the statute was to give to the

new judge all the power possessed by a judge for the Northern District of Illinois. *Walsh v. U. S.*, (C. C. A. 1909) 174 Fed. 615.

## Vol. X, p. 181, sec. 12.

This section has been cited in *Citizens' Sav., etc., Co. v. Illinois Cent. R. Co.*, (1907) 205 U. S. 46, 27 S. Ct. 425, 51 U. S. (L. ed.) 703.

## Vol. X, p. 184, sec. 1. [Washington.]

This section, which divides Washington into two judicial districts, interpreted consistently with the practice of Congress and the judicial history of the country, and the general laws in force relating to the federal judiciary and the jurisdiction and powers of the federal courts and judges, lacks none of the essentials of a sufficient organic law, and the Circuit and District Courts of the Western District of Washington as thereby created are the same courts as those previously existing in the District of Washington, having the same judges and officers and the same powers and jurisdiction within that part of the original district remaining after the Eastern District had been carved therefrom, and being still within the boundaries are constituent parts of the Ninth Judicial Circuit. While the Act does not "ordain and establish" courts in said Western District as required by Const.,

art. 3, sec. 1, in express words, nor define their jurisdiction and powers further than to fix their terms, nor assign the district to either of the nine judicial circuits, nor provide for the appointment of judges and officers therein otherwise than by providing that the district judge and officers of the District of Washington then in office shall be the district judge and officers of the Western District, the intention of Congress in respect to all such matters is clear from the Act, and in the provisions necessary to carry out such intention. *Geiger v. Tacoma R., etc., Co.*, (1905) 141 Fed. 169.

This section did not in effect abolish the existing Circuit and District Courts, but left them restricted only as to territory, and intact in all other respects. *Seattle Electric Co. v. Hartless*, (C. C. A. 1906) 144 Fed. 379.

## JUDICIARY.

## Vol. IV, p. 218, sec. 563, cl. first.

There are no common-law offenses, so called, against the United States, and the courts of the United States have only such jurisdiction as Congress has conferred upon them to try and punish such acts as it shall have previously declared to be crimes against the United States and fixed the penalty for such violations. *U. S. v. Hudson*, (1812) 7 Cranch 32, 3 U. S. (L. ed.) 259; *U. S. v. Hall*, (1878) 98 U. S. 343, 345, 25 U. S. (L. ed.) 180; *U. S. v. Eaton*, (1892) 144 U. S. 677, 687, 12 S. Ct. 764, 36 U. S. (L. ed.) 591; *U. S. v. Martin*, (1910) 176 Fed. 110.

Excepting that treason is defined by the Constitution, there are no crimes against the

United States save such as Congress has expressly defined or recognized and made punishable. The federal courts have no jurisdiction over common-law crimes. *U. S. v. Dietrich*, (1904) 126 Fed. 676, 678.

**Drawing grand jury.**—By this clause the jurisdiction of a District Court is by law made coextensive with the territorial area of the district, and, unless limitations are found in the congressional acts, the right to draw a grand jury from the district as a whole would seem to be unquestionable. *Clement v. U. S.*, (C. C. A. 1906) 149 Fed. 308, 308, *certiorari denied* (1907) 206 U. S. 562, 27 S. Ct. 795, 51 U. S. (L. ed.) 1189.

## Vol. IV, p. 220, sec. 563, cl. fourth.

**Suits by United States.**—Duties are a personal debt or charge upon the importer; and in the District of Maine an action of debt is the appropriate remedy for their recovery.

The federal District Courts have jurisdiction of such actions. *U. S. v. National Fibre Board Co.*, (1904) 133 Fed. 596.

## Vol. IV, p. 220, sec. 563, cl. sixth.

The right of the United States to sue for recovery of money obtained from it by means of a fraudulent claim is one existing at common law, and under this clause the District Court has jurisdiction of an action by the

United States to recover money fraudulently obtained by defendant in payment of a false claim for a pension. *Pooler v. U. S.*, (C. C. A. 1904) 127 Fed. 519.

## Vol. IV, p. 220, sec. 563, cl. eighth.

**Nature and scope of admiralty jurisdiction.**—Admiralty is "a branch of the law not hampered by the rigid rules of the common law and which deals with causes upon considerations even more elastic than pertain to the broad jurisdiction of courts of chancery." *Toledo Steamship Co. v. Zenith Transp. Co.*, (C. C. A. 1911) 184 Fed. 391, 399.

"The maritime law subsists as an entirety as the subject of federal jurisprudence, and is to be administered by the federal courts without impairment by state legislation." *Mack Steamship Co. v. Thompson*, (1910) 176 Fed. 499, 100 C. C. A. 57.

A citizen of the United States cannot be deprived by treaty of his constitutional right to invoke the jurisdiction of the national courts of admiralty to determine a cause within the admiralty and maritime jurisdiction to which he is a party, and which is cognizable within the United States. *The Neck*, (1905) 138 Fed. 144.

**Determination of equitable titles.**—A court of admiralty has no jurisdiction to determine the equitable title or conflicting claims to partnership property, although it consists of a steamboat and attendant barges employed in commerce upon navigable waters of the United States. *Hulings v. Jones*, (1908) 63 W. Va. 696, 60 S. E. 874.

**Jurisdiction to administer a fund.**—Although a court of admiralty has not jurisdiction to foreclose mortgages on vessels, when it has a fund to dispose of it may entertain claims based on mortgages, and its jurisdiction to administer a fund applicable, in whole or in part, to the payment of maritime liens, being exclusive, is not affected by the fact that mortgages may also have claims against the same fund or by the pendency of foreclosure suits brought by them in a state court. *The Conveyor*, (1906) 147 Fed. 586.

**Jurisdiction of Circuit Court excluded.**—Under this subdivision with the third paragraph of R. S. sec. 711, 4 Fed. Stat. Annot. 494, a federal Circuit Court, which through its receiver had sold vessels subject to maritime liens and liens under the state law for supplies, etc., had no jurisdiction to determine and enforce such liens, such jurisdiction belonging exclusively to the District Court in admiralty. *Hudson v. New York, etc., Transp. Co.*, (1909) 175 Fed. 519.

**Saving of common-law remedy.**—"Although not directly decided, it seems to be fairly inferable from *American Steamboat Co. v. Chase*, (1872) 16 Wall. 532, 21 U. S. (L. ed.) 369, that this saving clause is applicable in all cases where the action in the state court is in form a common-law action against the person, without any of the ingredients of a proceeding *in rem* to enforce a maritime lien." *The Lotta*, (1907) 150 Fed. 219.

The saving of a right of a common-law remedy "leaves open to the common law jurisdiction of the state courts over torts committed at sea." *The Hamilton*, (1907) 207 U. S. 398, 404, 28 S. Ct. 133, 52 U. S. (L. ed.) 264.

"The clause 'saving to suitors a common-

law remedy where the common law is competent to give it' is intended to save the remedy or right of action in those courts which proceed according to the course of the common law as distinguished from admiralty proceedings, and the words 'common-law remedy' do not necessarily imply an action or remedy obtainable in a common-law court, but are equivalent to 'the means employed to enforce a right or redress an injury,' nor are they limited to such causes of action as were known to the common law at the time of the passage of the Judiciary Act." *Johnson v. Westerfield*, (1911) 143 Ky. 10, 135 S. W. 425.

The federal courts did not have exclusive jurisdiction of a suit to partition a vessel between several owners. Such a suit was maintainable in a state court. And the fact that the admiralty courts have no admiralty or maritime jurisdiction to compel the sale of a vessel and the division of the proceeds where there is a majority owner does not affect the jurisdiction of state courts to afford such relief. *Reynolds v. Nielson*, (1903) 116 Wis. 483, 93 N. W. 455.

The state courts have jurisdiction of an action based on a maritime contract to be performed on the high seas. *Ransberry v. North American Transp., etc., Co.*, (1900) 22 Wash. 476, 61 Pac. 154; *Gill v. North American Transp., etc., Co.*, (1905) 37 Wash. 694, 79 Pac. 778, affirmed (1906) 203 U. S. 579, 27 S. Ct. 778, 51 U. S. (L. ed.) 326.

The seizure of a vessel under the Wisconsin attachment law was held not to invade the jurisdiction of the federal admiralty courts, because the vessel itself was not proceeded against; it being simply the reaching of property rights in the property by attachment in a personal action against the owner as a common-law remedy. *Phillips v. Eggert*, (1907) 133 Wis. 318, 113 N. W. 686.

In an action against a carrier for damage to goods in shipment to plaintiff, the pleadings did not show a case within the exclusive jurisdiction of the federal courts where the answer alleged that the goods were shipped by water, and that the damage was caused by reason of the dangers of navigation, by the grounding of the vessel, and it becoming necessary to lighten the same, which had been assumed by plaintiff by a bill of lading exempting the carrier from liability for loss from perils of navigation and by a general average bond. *John Meunier Gun Co. v. Lehigh Valley Transp. Co.*, (1904) 123 Wis. 143, 101 N. W. 386.

The owner of a vessel who has been held liable in an action at law in a state court for damages caused by collision, may maintain a suit in admiralty to compel contribution from another vessel, alleged to have also been in fault for such collision, even if he failed to avail himself of a provision of the state statute under which he might have brought in the owner of such other vessel in the state court. *The Ira M. Hedges*, (1910) 218 U. S. 264, 31 S. Ct. 17, 54 U. S. (L. ed.) 1039, reversing (1908) 163 Fed. 587.

**Nonmaritime transactions in general.**— "It is true that a court of admiralty is often spoken of as one of equity, but that phrase means no more than that equitable principles are applied to the solution of matters of maritime jurisprudence. It is a perversion of the phrase to argue from it that because admiralty seeks for aid in the analogies of equity, a maritime court is therefore entitled to draw within its jurisdiction matters primarily of nonmaritime cognizance." *United Transp., etc., Co. v. New York, etc., Transp. Line*, (1910) 180 Fed. 902.

A cause of action to obtain relief against a fraudulent contract between two corporations, made by an officer common to both, is not maritime in its nature and cannot be brought by either an original or cross libel within the jurisdiction of a court of admiralty, although the contract itself was maritime. *United Transp., etc., Co. v. New York, etc., Transp. Line*, (1911) 185 Fed. 386.

**Waters and places.**—It has been frequently held that the admiralty jurisdiction of the United States attaches to all such bodies of water as the bays, indentations, and streams in which the tide ebbs and flows, along the south shore of Long Island, and this admiralty jurisdiction can be lost only when the particular water loses the character of a stream capable of carrying on interstate commerce or of navigation in and out from the ocean for pleasure and business purposes. *U. S. v. Banister Realty Co.*, (1907) 155 Fed. 533, 595.

"It is not in the power of any state to say that the admiralty shall not have jurisdiction over any waters which but for that legislation would be subject to that jurisdiction." *Maryland v. Miller*, (1910) 180 Fed. 796, citing *Workman v. New York*, (1900) 179 U. S. 552, 21 S. Ct. 212, 45 U. S. (L. ed.) 314.

The public laws of New Jersey are in force in the littoral waters of Sandy Hook peninsula below low-water mark, whether enacted prior or subsequently to the cession to the United States, by N. J. Act March 12, 1846, of jurisdiction over a portion of that peninsula for military purposes. *Hamburg American Steamship Co. v. Grube*, (1905) 196 U. S. 407, 25 S. Ct. 352, 49 U. S. (L. ed.) 529.

The city of New York was engaged in filling up Riker's Island in East river, embankments and cribwork having been constructed around the outside, leaving a gap through which the tide ebbed and flowed, and through which tugs and scows passed into the interior, carrying material for filling. A scow, having been so towed in, was left until the tide ebbed, when she settled on a projection in the bottom and was injured. It was held that the injury occurred in navigable water, and that an action to recover damages therefor was within the jurisdiction of a court of admiralty. *Dailey v. New York*, (1904) 128 Fed. 796.

**"High seas."**—A collision which occurred off a foreign port, although within a marine league of the coast, was nevertheless on the "high seas" for the purposes of jurisdiction of a suit arising therefrom. *The Kaiser Wilhelm der Grosse*, (1909) 175 Fed. 213.

**Property subject to admiralty jurisdiction.**—A navigable structure intended for the transportation of a permanent cargo, as a scow carrying a pile driver and engine, which has to be towed in order to navigate, is a "vessel" and within the admiralty jurisdiction. *The Raithmoor*, (1911) 186 Fed. 849.

**Vessel.**—A pumpboat, which consists of a floating structure equipped with engine, boiler, pumps, pipes, and capstans, used for pumping out coal barges, and which can be moved on the water by means of poles or ropes attached to its capstans, or towed, is a navigable structure intended for the transportation of a permanent cargo, to wit, its engine, boiler, pumps, and capstans, from place to place where required to do its work, and therefore is a "vessel" and subject to the admiralty jurisdiction. *Charles Barnes Co. v. One Dredge Boat*, (1909) 169 Fed. 895.

**Incompleted beacon.**—Concrete piles built in a navigable stream by a contractor for the government—intended to support a beacon, but which structure had not been completed—had not yet reached the stage when they were devoted to maritime purposes, and a court of admiralty was without jurisdiction of a suit to recover for their injury by a moving vessel. *The Raithmoor*, (1911) 186 Fed. 849.

**Suit for hire of dredge.**—A court of admiralty has jurisdiction of a suit to recover the hire of a Bowers hydraulic dredge, intended to operate a float, and generally used for maritime purposes, and should not decline such jurisdiction because the dredge was temporarily used for a partly land transaction in dredging material from a stream for the purpose of depositing the same by means of its pipes on land of the charterer. *Bowers Hydraulic Dredging Co. v. Federal Contracting Co.*, (1906) 148 Fed. 290, affirmed (C. C. A. 1907) 153 Fed. 870.

**Foreign persons or property.**—"It is the settled law of this country that our admiralty courts have jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, and the ship or party to be charged is within the jurisdiction of the court. It is a jurisdiction the court may decline to exercise where for some special reason it appears to be inexpedient." *Fairgrieve v. Marine Ins. Co.*, (1899) 94 Fed. 686, 37 C. C. A. 190, quoted in *The Koenigin Luise*, (1910) 184 Fed. 170, which held that the alienage of a seaman did not disentitle him to maintain a suit in a court of admiralty against a foreign vessel within the jurisdiction.

Where the aid of an American court of admiralty is invoked in a settlement for wages between foreign seamen and a foreign vessel, in the absence of treaty stipulations, it rests in the discretion of the court whether it will take jurisdiction, and the courts are inclined to take jurisdiction when, but only when, it is necessary to prevent a failure of justice. *The Albani*, (1909) 169 Fed. 220, dismissing the libel under the particular circumstances.

A federal admiralty court is not bound to exercise jurisdiction of a libel for wages brought by alien seamen against a foreign

vessel, but will use its discretion. Where the voyage is ended, "jurisdiction is usually exercised in the absence of reasons to the contrary." *The Bound Brook*, (1906) 146 Fed. 160.

A United States court of admiralty has jurisdiction of a suit by a seaman against a foreign vessel to recover wages, and the exercise of such jurisdiction is discretionary. Where the libellant is an American citizen, signed in an American port, although on board the vessel, and claims to have been wrongfully discharged, jurisdiction will be entertained. *The August Belmont*, (1907) 153 Fed. 639.

A court of admiralty of the United States may, in its discretion, take jurisdiction of a suit by seamen to recover wages from a foreign ship, and will exercise such discretion in favor of jurisdiction where libellants are American seamen and a strong case for immediate relief is shown, or where they invoke the provisions of the statutes of the United States. *The Alnwick*, (1904) 132 Fed. 117.

The provision of the treaty of Dec. 11, 1871, art. 13, 7 Fed. Stat. Annot. 558, between the German Empire and the United States, that the consular agents of either country "shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall have the exclusive power to take cognizance of and to determine differences of every kind which may arise, either at sea or in port, between the captains, officers, and crews," does not include a claim by a seaman against a vessel or owner for a tort, so as to exclude the jurisdiction of a United States court of admiralty of a suit on such a claim against a German vessel. *The Baker*, (1907) 157 Fed. 485. But the court is without jurisdiction of a suit against a German vessel to recover wages, brought by seamen who are not citizens of the United States, but who signed before a German consul in a port thereof and were discharged in another port after completing their term of service without objection; and such jurisdiction is not conferred merely by the fact that they were paid wages in advance, in violation of the Act of Dec. 21, 1898, ch. 28, sec. 24, 30 Stat. L. 763, 6 Fed. Stat. Annot. 871. *The Bound Brook*, (1906) 146 Fed. 160. The treaty provision does not, however, deprive the admiralty courts of the United States of jurisdiction to determine the rights of an American seaman who enters and leaves the service of a German vessel within this country. *The Neck*, (1905) 138 Fed. 144.

The admiralty court has jurisdiction of a suit against the charterer of a foreign vessel to recover for damage to cargo where it obtains jurisdiction over the defendant, notwithstanding a provision of the bill of lading that any disputes arising thereunder shall be determined by the law of a foreign country and in a court thereof. *Gough v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft*, (1907) 158 Fed. 174.

A court of admiralty of the United States has jurisdiction of an action *in personam* against the owner of a foreign ship to recover for injuries sustained by an American passenger on the high seas, irrespective of

the law of the ship's flag, the case being governed by the general maritime law as administered in this country. *Elder Dempster Shipping Co. v. Poupirt*, (C. C. A. 1903) 125 Fed. 732.

A court of admiralty of the United States is not required to decline jurisdiction of a suit brought against foreign vessels, seized within its jurisdiction, belonging to different nations, for an injury which took place on the high seas, in the absence of any treaty provision affecting the case. *The Kaiser Wilhelm der Grosse*, (1909) 175 Fed. 215.

The right to object to the assumption of jurisdiction by a court of admiralty in a suit by a foreign subject against a vessel of his own country is waived by a general appearance and the filing of an answer by the claimant. *The Ucayali*, (1908) 159 Fed. 800.

**Accounting.**—While a court of admiralty is without jurisdiction of a suit to obtain an accounting as such, it has jurisdiction to decree an accounting as incidental to the principal cause of action of which it has undoubted jurisdiction as between the owners of a vessel, with respect to her past earnings in a suit for her sale for partition. *The Emma B.*, (1906) 140 Fed. 771.

**Mortgages.**—A contract by which a vessel is mortgaged to secure money borrowed to pay the purchase price thereof is not maritime in character, and a court of admiralty will not entertain a suit by the mortgagee to recover possession of the vessel thereunder. *The Clifton*, (1906) 143 Fed. 460, 74 C. C. A. 594.

**Possessory suits.**—In a possessory action a court of admiralty may take notice of an equitable title when it comes up incidentally, and especially when it is alleged by way of defense by the claimant in possession. *Chirurg v. Knickerbocker Steam Towage Co.*, (1909) 174 Fed. 188.

In a possessory action in a court of admiralty to recover possession of vessels of which libellant alleged that he was owner claimant, a corporation filed an answer alleging that it was the owner and in possession, that it bought and paid for the vessels several years before, and had been in possession ever since, that it had the title conveyed to its then president in trust for it, and that he, although having no personal interest in such vessels, in collusion with libellant, who knew all of the facts, fraudulently executed a bill of sale to libellant. It was held that such answer stated a defense cognizable in a court of admiralty, which had jurisdiction to determine whether or not libellant's title, alleged as the basis of his right of possession, was fraudulent. *Chirurg v. Knickerbocker Steam Towage Co.*, (1909) 174 Fed. 188.

When a libel for the possession of a vessel shows that the action, which it institutes, involves a mortgage, the validity of which the court would be required to pass upon, and to try questions of fraud and mistake, jurisdiction will not be entertained for the purpose of ousting the mortgagee from possession. *The Helys*, (1909) 173 Fed. 928.

**Affreightment and charter-parties.**—Contracts of affreightment are matters of admi-

rality jurisdiction. *U. S. Shipping Co. v. U. S.*, (1908) 146 Fed. 914.

Libellant chartered a vessel and made advances for her disbursements to the master, pursuant to the terms of the charter-party, which provided that such advances should be deducted in all cases from the freight and should be so receipted for the master on the bills of lading. They were so receipted for, but in settling the freight at the end of the voyage, through oversight or mistake, a part of such advances were not deducted, and the owner of the vessel refused to repay the same. It was held that a suit to recover the same was one for breach of the charter, of which a court of admiralty had jurisdiction, and that it might be brought *in rem* against the vessel, which was bound for the performance of the contract. *The Oceano*, (1906) 148 Fed. 131.

**Maritime fire insurance.**—A policy of insurance on a vessel engaged in navigation, although it insures her against fire risks alone, is a maritime contract because of its subject-matter, and an action *in personam* to enforce payment thereon, is within the jurisdiction of a court of admiralty. *North German F. Ins. Co. v. Adams*, (1905) 142 Fed. 439, 73 C. C. A. 555.

**Salvage.**—A court of admiralty may entertain a suit for salvage, in which the claimant pleads a contract under which it is alleged the services were performed, but which libellant seeks to avoid on the ground of fraud or mistake; such court having equitable jurisdiction, in the sense of applying rules of equity to questions incidentally arising in a suit within its general jurisdiction, at least where no objection is made prior to the hearing. *The Stanley H. Miner*, (1909) 172 Fed. 486.

"It is settled that the distress or danger from which a vessel has been saved need not, in order to justify a recovery of salvage compensation, have arisen solely by reason of a peril of the sea in the strict legal acceptance of those words." Accordingly, a court of admiralty has jurisdiction of a libel claiming salvage for services rendered by tugs in subduing a fire communicated from the shore to a vessel undergoing repairs in a dry dock from which all the water had been emptied. *The Steamship Jefferson*, (1909) 215 U. S. 130, 30 S. Ct. 54, 54 U. S. (L. ed.) 125.

Where a charge for landing a steamer in distress was really a claim for salvage, it was rightfully cognizable by a court of admiralty in a proceeding wherein the members of the salving vessel's crew could participate; and hence such claim was properly withdrawn from an action by the owner of the salving vessel in a state court against the owner of the vessel saved to recover on an account for services rendered, etc. *Neel v. Iron City Sand Co.*, (1907) 149 Fed. 980, 79 C. C. A. 490.

**Maritime contract.**—"The rule is well settled that the test of admiralty jurisdiction in contract cases is their nature and subject-matter." *U. S. Shipping Co. v. U. S.*, (1908) 146 Fed. 914.

"No pure case of storage, even on the

water, can be regarded as maritime in its character;" but where the storage is incidental to the transportation of the goods stored by water, as where they were stored by the carrier for delivery to the consignee, it is maritime, and a court of admiralty has jurisdiction of an action for its breach by nondelivery to the consignee. *Evans v. New York, etc., Steamship Co.*, (1906) 145 Fed. 841.

A contract on the part of respondent, a railroad company operating a line of road having a seaport terminus, to furnish to libellant all the cargoes which it then had or might thereafter have at such port during the term of the contract for shipment over sea, and on the part of libellant to furnish steamships to carry such cargoes, is maritime, and an action for its breach is within the admiralty jurisdiction. *Graham v. Oregon R., etc., Co.*, (1905) 135 Fed. 608.

A suit to recover for an injury to a scow from a charterer, whose duty it was to exercise ordinary care to return her to the owner in good condition, arises out of a maritime contract, and is within the admiralty jurisdiction, irrespective of the place of the injury. *Dailey v. New York*, (1904) 128 Fed. 796.

A contract by the master of a steamboat to collect and transport certain cotton seed from one port to another within a reasonable time, for freight specified, is a maritime contract, a breach of which entitles the shipper to recover damages in admiralty. *Florence Cotton Oil Co. v. Alabama Towboat Co.*, (C. C. A. 1904) 128 Fed. 915.

A corporation of Washington contracted with a dock company to bring six hundred Japanese laborers from Honolulu to Seattle on respondent steamship, owned by a steamship company, for which the corporation was to pay a stated sum per head for carriage. A Japanese agent of the dock company in Honolulu advertised for laborers and contracted with libellants and others to transport them to Seattle, collecting from them a part of the passage money agreed upon, and taking their notes for the balance. A representative of the steamship company went to Honolulu and there received from the agent a portion of the passage money, and issued tickets for carriage to Victoria, B. C., the vessel being of the Canadian register and not entitled to carry passengers from there to any United States port. Libellants being unable to read the tickets, which were in English, did not know that they were not to be taken to Seattle until they had gone on board, but on learning such fact left the vessel, and libeled her for breach of the contracts. It was held, on evidence showing that the arrangement between the dock company and the steamship company was not a charter but a joint enterprise in the profits of which each was to share, and that the Japanese agent who made the contracts also represented the owner of the vessel, that the contracts were maritime, and gave a right of action in admiralty against the ship. *The Stanley Dollar*, (C. C. A. 1908) 160 Fed. 911.

While a suit to collect brokerage and money

expended in negotiating a charter-party is not a case of admiralty and maritime jurisdiction, nor cognizable in a court of admiralty, a libel which alleges that libellant as agent for respondent executed a charter-party in his own name, by which respondent became obligated as his principal, and that by reason of respondent's breach of the contract libellant was compelled, as the nominal party, to pay damages which he seeks to recover by subrogation to the rights of the other party, is one founded on the charter-party and within the admiralty jurisdiction. *Adler v. Galbraith*, (1907) 156 Fed. 259.

A vessel insured under a policy payable to the owners was sunk; the insurance was adjusted, and the money paid to a custodian under an agreement between the owners, various lien claimants, and certain mortgagees, that it should be applied (1) to pay for the raising of the boat; (2) to the payment of all maritime, labor, and supply liens against it; (3) to the repair of said boat; and (4) the remainder to be paid to the mortgagees. The boat was raised, but was not repaired, and was sold in admiralty proceedings by the lien claimants. It was decided that the contract under which the insurance money was held was maritime, and the fund subject to administration by the admiralty court, unaffected by the fact that the contract was not fully executed, and that under its terms the seamen and supply claimants were entitled to payment from the fund, leaving the mortgagees to resort to the proceeds of the vessel for any deficiency on their claims. *The Conveyor*, (1906) 147 Fed. 586.

**Passage contract.**—A libel in admiralty *in rem* was maintainable for injuries to a passenger of a steamboat on the Great Lakes resulting from negligence in the performance of the transportation contract, by reason of which negligence the passenger's stateroom was entered, and she was assaulted and robbed. *The Western States*, (C. C. A. 1908) 159 Fed. 354, *certiorari denied* 210 U. S. 433, 28 S. Ct. 762, 52 U. S. (L. ed.) 1136.

**Nonmaritime contract.**—Where a contract sued on is not maritime, a court of admiralty is without jurisdiction of the subject-matter, which cannot be conferred by consent, and the objection may be taken at any time. *The Oceano*, (1906) 148 Fed. 131.

A sale by a merchant to fishermen, who are about to go on a fishing voyage under a lay contract, of tobacco, clothing, and other articles for their personal use, is not a maritime transaction, and a court of admiralty is without jurisdiction of a suit to enforce collection therefor, although a lien is claimed on the vessel under a state statute. *The Mary F. Chisholm*, (1904) 129 Fed. 814.

A lease of space at a wharf for use by a vessel at a fixed annual rent is a lease of real estate, and not a maritime contract on which a suit in admiralty can be maintained for the collection of the rent, since it has not necessarily any connection with navigation or the commerce of the seas. *The James T. Furber*, (1904) 129 Fed. 808.

A contract between a marine insurance

company and an insurance broker, by which the latter agreed to procure insurance for the company on marine risks on commission, and to be responsible for all premiums due on such insurance, is not a maritime contract, and an action thereon by the company to recover such premiums is not cognizable in a court of admiralty. *St. Paul F. & M. Ins. Co. v. Birrell*, (1908) 164 Fed. 104.

A lease to a steamer and owners of the privilege of running a line of steamers from a wharf for a certain term for a gross rental, which gives the lessee the exclusive right to use the wharf during such term, and contains a covenant on his part to restore it in as good condition as when the lease went into effect, with certain exceptions, and which makes the rent payable, whether or not the wharf is used by the lessee, is not wholly a maritime contract, and cannot be enforced in a court of admiralty, nor can the lessor be permitted to waive the contract and enforce a lien on the vessel named for wharfage for such use as she in fact made of the wharf; the rights and remedies of the parties being governed by the contract as made. *The James T. Furber*, (1907) 157 Fed. 128.

A corporation organized to conduct a boys' school on shipboard chartered a vessel for the purpose, and also entered into contracts with libellants, by which it engaged to take pupils for the school year, who were to be received on board and taught the ordinary studies of a preparatory course. During the year the ship was to make a voyage to foreign countries, and the pupils were to be organized into a cadet corps and given instruction in nautical and naval matters. It was held that such contracts were not maritime, and that their breach by the corporation did not give libellant a lien on the vessel enforceable in admiralty. *The Pennsylvania*, (1907) 154 Fed. 9, 83 C. C. A. 139.

A bond given by the charterer of a vessel to secure his performance of the conditions of the charter-party, which neither requires nor authorizes the surety to perform such contract in case of the default of the principal, but merely to respond in damages for its breach, is not a maritime contract, and an action thereon is not within the admiralty jurisdiction. *Pacific Surety Co. v. Leatham, etc.*, *Towing, etc., Co.*, (1907) 151 Fed. 440, 80 C. C. A. 670.

A traffic agreement between a railroad company and the owner of certain steamships, which were to be used in connection with the railroad of the first party as a part of a through line of transportation, by which agreement the parties were to co-operate in the operation of such line and divide the receipts as connecting carriers, as therein specified in detail, is not maritime in its nature, and a court of admiralty is without jurisdiction of a suit for its breach. *Graham v. Oregon R., etc., Co.*, (1904) 134 Fed. 454.

A contract to furnish material for the construction of a dock, reserving a lien thereon to the seller, is not a matter of maritime jurisdiction, within the exclusive cognizance of the federal courts. *Arnold v. Eastin*, (1903) 116 Ky. 686, 76 S. W. 855.

Contracts of a mixed nature are not cognizable in the admiralty courts, and where the principal subject-matter of a controversy belongs to the jurisdiction of a court of common law or of equity, the incidental matters must also be relegated to the appropriate jurisdiction, although of themselves they might be cognizable in admiralty. The Pennsylvania, (1907) 184 Fed. 9, 83 C. C. A. 189.

"A towage contract is a maritime contract." Mack Steamship Co. v. Thompson, (1910) 176 Fed. 499, 100 C. C. A. 57.

**Lien.** — "The jurisdiction of the admiralty court to enforce maritime liens against boats is exclusive: Ballard v. Wiltshire, (1867) 28 Ind. 341." The Conveyor, (1906) 147 Fed. 586, 589.

"(1) For foreign repairs and supplies there arises a lien, apart from statute, enforceable *in rem* in a court of admiralty, and not so enforceable in the state courts, whether expressly given by statute or otherwise. (2) For domestic repairs and supplies there is no lien, apart from statute (except the possessory lien); but a state statute may give a maritime lien for them enforceable *in rem* in a court of admiralty, and not so enforceable in the state courts. (3) For construction there is no lien, apart from statute; but a state statute may give a lien, not ordinarily enforceable, *in rem* or otherwise, in a court of admiralty, but enforceable in the state courts by proceedings which are undistinguishable from proceedings *in rem*. Even a federal court is not altogether excluded from the enforcement of a statutory lien for the construction of a vessel. If the vessel has been libeled, and sold by a court of admiralty in the enforcement of a maritime claim, the surplus, after satisfying the maritime claim, will be handed over to the person entitled thereto. In the distribution of this surplus the court recognizes claims and liens other than maritime, such as pledges, mortgages, and statutory liens for construction. The Guiding Star, (1881) 9 Fed. 521, on appeal (1885) 18 Fed. 263; The Maud Carter, (1886) 29 Fed. 156. On the ground of diversity of citizenship, a suit to enforce the statutory lien for construction may be brought in the Circuit Court or removed thereto. The Winnebago, (1905) 141 Fed. 945, 73 C. C. A. 295, 142 Mich. 84, 105 N. W. 527, 113 Am. St. Rep. 566, (1907) 205 U. S. 854, 27 S. Ct. 509, 51 U. S. (L. ed.) 836." American Trust Co. v. W. & A. Fletcher Co., (C. C. A. 1909) 173 Fed. 471.

A state statute giving a lien on vessels cannot enlarge the jurisdiction of a court of admiralty, which depends upon whether or not the subject-matter of the suit is maritime in its nature. The James T. Furbur, (1904) 129 Fed. 808; The Mary F. Chisholm, (1904) 129 Fed. 814.

"It is undoubtedly true that proceedings against vessels *in rem* to enforce maritime liens are vested exclusively in the District Courts of the United States." Hudson v. New York, etc., Transp. Co., (C. C. A. 1910) 180 Fed. 673; Holding, however, that a Circuit Court could sell vessels free from such liens,

if the lienors voluntarily submitted themselves to the Circuit Court's jurisdiction.

If holders of maritime liens against vessels come into the Circuit Court having possession of the res, and ask for adjudication upon their liens, they should be held to have assented to the jurisdiction of the Circuit Court for all purposes, including a substitution of the proceeds of sale for the res whenever in the sound discretion of the court such substitution is necessary to preserve the property from deterioration or secure a better price for it. Hudson v. New York, etc., Transp. Co., (C. C. A. 1910) 180 Fed. 673.

A contract for repairs furnished to a canal boat in a port of the state to which she belongs is a maritime contract, and a state statute providing for a lien for repairs upon vessels cannot be enforced by proceedings *in rem* as also provided in the statute, the federal District Court having exclusive jurisdiction. The Robert W. Parsons, (1903) 191 U. S. 17, 24 S. Ct. 8, 48 U. S. (L. ed.) 73.

Under Comp. Laws Mich. 1897, sec. 10789, which gives a lien on waterfront constructed, or being constructed, for towage, a charge for towage of a new vessel being built in that state and completed, except for her fittings, whether regarded as a completed vessel or not, may be enforced by a proceeding *in rem* against her in an admiralty court, where the contract was with the owner, who was a resident of another state; the contract for towage being maritime. Mack Steamship Co. v. Thompson, (1910) 176 Fed. 499, 100 C. C. A. 57.

Where a steamboat on which a lien for supplies is claimed has been sold, and the money due on the purchase price is brought into the state court, and the construction of a statute of the state becomes necessary, the state court has jurisdiction to construe the statute, and, having construed it, it has jurisdiction to direct to whom the money shall be paid. Shailer v. Hanlon, (1904) 26 Ohio Cir. Ct. Rep. 120.

A state court can only sell the right of the shipowner subject to maritime liens, and where the purchaser at a receivership sale paid, over and above his bid, a certain sum of money to lien claimants, who had filed a libel against the vessel in a court of admiralty, the insolvent estate had no ownership or equity in the money so paid and received, and the lien claimants, who were also creditors of the insolvent, could not be compelled to account for the same in the receivership proceedings. *In re Red River Line*, (1905) 115 La. 867, 40 So. 250.

**Torts — In general.** — A court of admiralty of the United States has jurisdiction of an action *in personam* against the owner of a foreign ship to recover for injuries sustained by an American passenger on the high seas, irrespective of the law of the ship's flag, the case being governed by the general maritime law as administered in this country. Elder Dempster Shipping Co. v. Pouppirt, (C. C. A. 1903) 125 Fed. 732 (certiorari denied 191 U. S. 576, 24 S. Ct. 848, 48 U. S. (L. ed.) 309), affirming on this point 132 Fed. 996.



The fact of locality alone does not give a court of admiralty jurisdiction of an action for a tort committed on the high seas or navigable waters, but it must further appear that the tort was maritime in character, having some relation to a vessel or its owners. *Campbell v. Hackfeld*, (C. C. A. 1903) 125 Fed. 696.

An action against a contracting stevedore by an employee to recover for personal injuries sustained while discharging a vessel, through the alleged negligence of defendant or his other employees, is not within the admiralty jurisdiction, where no fault is charged against the vessel, her owners, officers, or crew. *Campbell v. Hackfeld*, (C. C. A. 1903) 125 Fed. 696.

A court of admiralty is without jurisdiction of an action against an agent who issued a policy of marine insurance, brought under Act Pa. May 1, 1876 (P. L. 66), sec. 48, which provides that the agent of any foreign company which does not comply with the laws of the state shall be personally liable "on all contracts of insurance" made by him on behalf of such company. Such an action is not one on contract, but one to recover statutory damages for a tort committed in violating the law, and imposed for the benefit of the person injured, and is not maritime. *Reliance Lumber Co. v. Rothschild*, (1904) 127 Fed. 745.

An action to recover damages for a personal injury received by libellant by falling from a deck when attempting to go on board a vessel after dark, charged to have been due to the negligence of those in charge of the vessel in removing the gang plank, is not maritime, and therefore not within the jurisdiction of a court of admiralty, where the right of recovery is based on the tort. *The Albion*, (1903) 123 Fed. 189.

*Injuries by vessel.*—The admiralty jurisdiction of the federal courts extends to a libel *in rem* against a vessel for negligently colliding with and destroying a beacon standing some fifteen or twenty feet from the channel, in water twelve or fifteen feet deep, though it is built upon piles driven firmly into the bottom. *The Blackheath*, (1904) 195 U. S. 361, 25 S. Ct. 46, 49 U. S. (L. ed.) 236.

In *The Curtin*, (1907) 152 Fed. 588, the court expressed the opinion, without positively so deciding, that an action for injury to a pier by a moving vessel is not cognizable in admiralty.

A pontoon floating upon the water of a navigable stream, between high and low water mark, rising and falling with the tide and used as a landing in connection with a ferry, although fastened to the shore by a cable, is not land, and an action for an injury to a person thereon by a moving vessel is for a maritime tort and within the admiralty jurisdiction. *The Mackinaw*, (1908) 165 Fed. 351.

*Injuries to structures on land.*—A court of admiralty has no jurisdiction of a libel *in rem* against a vessel, based on injuries inflicted to the piers or abutments of a railroad bridge spanning a navigable stream,

to the piling placed around the centre abutment in order to protect vessels from injury, and to a shore deck or wharf. *Cleveland Terminal, etc., R. Co. v. Cleveland Steamship Co.*, (1908) 208 U. S. 316, 28 S. Ct. 414, 52 U. S. (L. ed.) 508. Nor can redress be afforded in admiralty for injuries inflicted by a colliding vessel upon the draw of a bridge over a navigable stream, and to its centre pier protection. *The Troy*, (1908) 208 U. S. 321, 28 S. Ct. 416, 52 U. S. (L. ed.) 512.

A collision in a navigable river between vessels and the surface part of borings made to locate an aqueduct under the bed of the river for municipal purposes is not in any sense maritime, and a suit to recover damages for injury to such borings is not within the admiralty jurisdiction. *The Poughkeepsie*, (1908) 162 Fed. 494, affirmed 212 U. S. 558, 29 S. Ct. 687, 53 U. S. (L. ed.) 451.

Admiralty had no jurisdiction of the injury where a pier of a lawfully constructed bridge resting in the bottom of a navigable river was run into by a vessel, causing a span of the bridge to fall into the stream, though the damage was largely effected by the action of the water after the fall of the bridge. *West v. Martin*, (1908) 51 Wash. 85, 97 Pac. 1102.

*Contribution.*—A court of admiralty has jurisdiction of a libel brought by one of two vessels, which were both adjudged to be in fault for a collision, to enforce contribution on account of its payment of the entire damage to the cargo of the other vessel. *Erie R. Co. v. Erie, etc., Transp. Co.*, (1907) 204 U. S. 220, 27 S. Ct. 246, 51 U. S. (L. ed.) 450.

*Right of action for a death.*—There is no admiralty jurisdiction under the general maritime law authorizing the maintenance of a proceeding *in rem* against a vessel for the death of a person injured as the result of negligence. *The Lotta*, (1907) 150 Fed. 219. There is no right of action for wrongful death under the general maritime law. *Williams v. Quebec Steamship Co.*, (1903) 126 Fed. 591.

In the absence of an Act of Congress or a state statute giving a right of action therefor and a lien on a vessel, a libel *in rem* cannot be maintained in admiralty to recover for the death of a human being on the high seas, resulting from negligence. *The Aurora*, (1908) 163 Fed. 633; *Williams v. Alaska Commercial Co.*, (1903) 2 Alaska 43, 64.

"In the admiralty, it has become well settled that where damages or death occur, it is not sufficient that the wrong originated upon the water. If it was not consummated upon the water, jurisdiction does not exist." *Ryley v. Philadelphia, etc., R. Co.*, (1909) 173 Fed. 839, holding that the court had no jurisdiction to award damages for the death of a person on shore from injuries caused by a collision in the Delaware river.

The steamer *Bertha* engaged to tow the schooner *Dora B.* to Lituga bay, but owing to rough weather passed that port and steered for Yakutat. Before reaching Yakutat, and while off the coast of Alaska, the hawser parted. Instead of returning to the tow and rendering further assistance, the *Bertha* kept

on her course, abandoning the Dora B., which was carried on the coast and wrecked, and the deceased lost his life. It was held to be immaterial that the parting of the hawser happened over three miles off shore and out of the jurisdiction of the court, it appearing that the disaster which caused the decedent's death happened upon the shore within the three-mile limit and within the jurisdiction of the court. *Williams v. Alaska Commercial Co.*, (1903) 2 Alaska 43.

"The decision in *The Harrisburg*, (1886) 119 U. S. 199, 7 S. Ct. 140, 30 U. S. (L. ed.) 358, settled the proposition definitely, that in the absence of federal or state legislation giving a right of action therefor, a suit in admiralty cannot be maintained to recover damages for death caused by wrongful act or negligence upon the high seas. Whether an action *in rem* in the admiralty can be maintained upon the statute of a state, unless a lien is distinctly given, and whether such an action will lie, even if a lien be given, are questions about which the courts have differed." *Fisher v. Boutelle Transp., etc., Co.*, (1908) 162 Fed. 994.

The statutory law of a state authorizing recovery for wrongful death may be enforced in a court of admiralty where the death occurred in a collision in the waters of the state. *Trauffer v. Detroit, etc., Nav. Co.*, (1910) 181 Fed. 256.

A statute of a state may be applied to a suit in admiralty to recover for a death on the high seas arising purely from tort, where the vessel belonged to the state in question; but the burden rests upon the libellant to establish by satisfactory evidence that the vessel was one of such state, where it is denied, which cannot be presumed from the fact that her owner is a corporation of such state. *Fisher v. Boutelle Transp., etc., Co.*, (1908) 162 Fed. 994.

## Vol. IV, p. 235, sec. 563, cl. sixteenth.

An act cannot be held to be a tort either in violation of the law of nations, or of a treaty of the United States, when the Executive, Congress, and the treaty-making power all have adopted the Act. *O'Reilly de Camara v. Brooke*, (1908) 209 U. S. 45, 28 S. Ct. 439, 52 U. S. (L. ed.) 676.

Defendant, while governor of Cuba during its occupation by the United States, abolished a valuable franchise owned by plaintiff, who was a Spanish subject. On appeal the Secretary of War of the United States confirmed the governor's order. Subsequently, by the so-called "Platt Amendment," incorporated in the treaty between the United

A section in the Oregon statutes declared that, when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law against the latter, if the former might have maintained an action, had he lived, against the latter for the injury done by the same act or omission. Another section declared that every boat or vessel used in navigating the waters of the state shall be subject to a lien for all demands for damages for injuries done to persons or property by such boat or vessel; another section provided for the priority of liens; and another section declared that any person, instead of proceeding against the master, owner, or agent, may sue the boat or vessel by name. It was held that, where a longshoreman employed by a vessel was killed while assisting in loading her by an alleged defect in the gang plank, his administratrix was entitled to maintain a libel *in rem* in the admiralty courts of the United States to recover damages for his death. *The Aurora*, (1908) 163 Fed. 633.

Code Pub. Gen. Laws Md. 1904, art. 67, secs. 1, 2, creating a cause of action for wrongful death, and providing for assessment of damages by a jury, is not for that reason unenforceable in the federal courts of admiralty sitting in that state by a libellant to recover for wrongful death happening in consequence of a negligent obstruction in the navigable waters of the state; the right of trial by jury not being indispensable to the enforcement of the right conferred. *Maryland v. Miller*, (1910) 180 Fed. 796.

**Seizures.** — In cases of seizures on land, the District Court proceeds, not as a court of admiralty, but as a court of common law upon a trial by jury. *U. S. v. Spraul*, (C. C. A. 1911) 185 Fed. 405, 408.

States and the republic of Cuba, it was provided that "all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected." It was held that such ratification was equivalent to an original authorization of defendant by the United States government to make the order in question and exempted defendant from any personal liability to plaintiff for depriving her of her property right in the franchise. *O'Reilly de Camara v. Brooke*, (1906) 142 Fed. 858, affirmed (1908) 209 U. S. 45, 28 S. Ct. 439, 52 U. S. (L. ed.) 676.

## Vol. IV, p. 236, sec. 566.

**Application of statute.** — *The provision for a jury trial "in causes of admiralty and maritime jurisdiction"* applies only to the Great Lakes and waters connected therewith, and then only to such issues of fact as arise in cases of contract or tort, the statute having no reference to foreign vessels or those

trading between ports of the same state. *The Western States*, (C. C. A. 1908) 159 Fed. 354, certiorari denied 210 U. S. 433, 28 S. Ct. 762, 52 U. S. (L. ed.) 1136.

**Proceedings for deportation** under section 13 of the Chinese Exclusion Act of Sept. 13, 1888, 25 Stat. L. 479, 1 Fed. Stat. Annot. 772,

are administrative rather than judicial, and are not "causes" in the proper sense of that word as used in section 566, providing for a jury trial. *Toy Tong v. U. S.*, (C. C. A. 1906) 146 Fed. 343.

*Proceeding for recovery on forfeited recognizance.*—Under this section and the provisions in the 7th Amendment to the Federal Constitution, 8 Fed. Stat. Annot. 37, defendants in a proceeding by scire facias on a forfeited recognizance in a federal District Court in which the United States sought to recover \$1,000 were entitled to a trial by jury of issues of fact tendered unless such right was waived. *Hollister v. U. S.*, (C. C. A. 1906) 145 Fed. 773.

*Effect of verdict.*—In *The Western States*, (C. C. A. 1908) 159 Fed. 354, certiorari denied 210 U. S. 433, 28 S. Ct. 762, 52 U. S. (L. ed.) 1136, a passenger filed a libel against a steamboat *in rem*, charging the owners with negligence in performing the contract for libellant's transportation, and the issue was tried by a jury under this section. It was held that the verdict was not merely advisory, and that the power of the court can go no further than to grant a new trial, but that the district judge properly set aside a verdict for \$15,000 on the ground that it was the result of passion and prejudice, or a misunderstanding of his charge, and entered a decree for libellant for \$5,000.

*Trial without a jury.*—R. S. sec. 649, 4 Fed. Stat. Annot. 393, which provides for the waiving of a jury, applies only to the Circuit Court. *U. S. v. Cleage*, (C. C. A. 1908) 161 Fed. 85; *U. S. v. St. Louis, etc.*, R. Co., (C. C. A. 1909) 169 Fed. 73; *Low v. U. S.*, (C. C. A. 1909) 169 Fed. 86.

In *Low v. U. S.*, (C. C. A. 1909) 169 Fed. 86, a criminal case, the defendants and the government waived a jury, and the case was heard upon the evidence by the court, and a general judgment rendered of guilty upon certain counts and not guilty upon others. On writ of error it was held that the judge must be regarded only as an arbitrator, the court also saying: "For the reason indicated we may not inquire into the sufficiency

of the evidence to support any judgment, or any matter of form in respect to the indictment, nor review the action of the court below upon the admission or rejection of evidence, nor any question of law arising out of or upon the evidence. But if there appears upon the record proper, the process, the pleadings, and the judgment, defects which should have prevented the rendition of the judgment, and for which it should have been arrested, such apparent defect or insufficiency in law is equally fatal upon writ of error." *Bond v. Dustin*, (1884) 112 U. S. 604, 5 S. Ct. 296, 28 U. S. (L. ed.) 835; *Kentucky L. etc., Ins. Co. v. Hamilton*, (1894) 63 Fed. 93, 90, 11 C. C. A. 42.

*Review on writ of error after trial by court.*—Where an action at law triable by jury under this section is by consent of the parties tried to the court without a jury, no question of fact or law decided upon or in connection with the trial is subject to re-examination in an appellate court. *U. S. v. Louisville, etc.*, R. Co., (C. C. A. 1908) 167 Fed. 306; *U. S. v. St. Louis, etc.*, R. Co., (C. C. A. 1909) 169 Fed. 73.

In *U. S. v. Cleage*, (C. C. A. 1908) 161 Fed. 85, the court said: "In these respects the law applicable to the District Courts and to the review of their judgments is to-day precisely the same as was the law applicable to the Circuit Courts and to the review of their judgments before the enactment of the statute now embodied in sections 649 and 700 of the Revised Statutes [4 Fed. Stat. Annot. 393, 450]. . . . Where, in a cause otherwise triable by jury, the parties agree upon a statement of the ultimate facts, and not the evidence of them, and the cause is then submitted to the court, without a jury, for its decision of the questions of law arising upon the facts so stated, the judgment may be reviewed upon a writ of error; and this because there the facts are not determined upon a trial by the court, but by the agreed statement, which is spread at large upon the record, as part of it, as would be a special verdict."

## Vol. IV, p. 239, sec. 607.

This section is superseded by Judicial Code, sec. 118, *ante*, p. 192 of this Supplement.

The measure of the power and authority of a circuit judge within the territorial limit of his circuit is the power and authority of the circuit justice allotted to that circuit. If the circuit justice may exercise his authority in chambers either inside or outside his circuit, and outside of the particular district

of the litigation, a circuit judge may do the same judicial acts, provided only he acts within his circuit. *Horn v. Pere Marquette R. Co.*, (1907) 161 Fed. 626, holding that a circuit judge, sitting at chambers within his circuit, may appoint a receiver in a cause pending in another district of the circuit. See also R. S. sec. 368, 4 Fed. Stat. Annot. 257.

## Vol. IV, p. 243, sec. 609.

This section is expressly repealed by Judicial Code, sec. 297, *ante*, p. 250 of this Supplement; and Circuit Courts are abolished by Judicial Code, sec. 289, *ante*, p. 249.

One of the judges named, sitting alone, exercises the power of all three. *Cuyler v. Atlantic, etc.*, R. Co., (1904) 132 Fed. 568.

A district judge is a judge of the Circuit Court, and, when presiding therein, has jurisdiction to appoint a commissioner to select jurors from which a grand jury is to be drawn for that court under the Act of June 30, 1879, ch. 52, sec. 2, 4 Fed. Stat. Annot. 749. *U. S. v. Miller*, (1911) 187 Fed. 369.

## Vol. IV, p. 246, sec. 629, cl. third.

**Officers of the United States.**—A receiver of a national bank is an officer of the United States, and an action by him to recover assets of the bank is one of which a federal Circuit Court has jurisdiction without re-

gard to the amount involved or the citizenship of the parties. *Schofield v. Palmer*, (1904) 134 Fed. 753; *Murray v. Chambers*, (1907) 151 Fed. 142.

## Vol. IV, p. 246, sec. 629, cl. fourth.

**Under Act providing revenue from imports.**—The Circuit Court has jurisdiction of an action at law against a collector of customs who withholds refunds accruing under a decision by the Board of General Appraisers. *Klampp v. Thomas*, (C. C. A. 1908) 162 Fed. 883.

**Postal laws.**—This subdivision does not confer exclusive jurisdiction on the federal courts in controversies arising under the postal laws, but only concurrent with the courts of the states, and for this reason state courts may take cognizance of such cases. *Lewis Pub. Co. v. Wyman*, (1907) 152 Fed. 200.

## Vol. IV, p. 249, sec. 629, cl. sixteenth.

This subsection "has reference solely to those actions brought under the statute to redress the deprivation of the civil rights secured by sections 1977 and 1979 of the Revised Statutes [1 Fed. Stat. Annot. 791, 795]." *Holt v. Indiana Mfg. Co.*, (1900) 178 U. S. 68, 20 S. Ct. 272, 44 U. S. (L. ed.) 374.

**Alleged deprivation of due process of law.**—A suit against the governor and certain officers of the national guard of a state, founded on imprisonment for two and one-half months under the order of the governor, without sufficient reason, but in good faith in the exercise of his power under the state

constitution and laws to call upon the military arm of the government to suppress an insurrection, is not within the original jurisdiction of a federal Circuit Court as a suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States. In such case it cannot be successfully contended that plaintiff was deprived of his liberty without due process of law. *Moyer v. Peabody*, (1909) 212 U. S. 78, 29 S. Ct. 235, 53 U. S. (L. ed.) 410, affirming judgment in (1906) 148 Fed. 870.

## Vol. IV, p. 251, sec. 631.

This section is expressly repealed by Judicial Code, sec. 297, *ante*, p. 250, of this Supplement; and Circuit Courts are abolished by Judicial Code, sec. 289, *ante*, p. 249.

**Effect of Circuit Courts of Appeals Act.**—The pecuniary limitation of appellate juris-

diction in this section was not transferred to the appellate jurisdiction of the Circuit Court of Appeals by section 4 of the Act of 1891, 4 Fed. Stat. Annot. 397, creating the latter court. *The Joseph B. Thomas*, (C. C. A. 1906) 148 Fed. 762.

## Vol. IV, p. 257, sec. 638.

This section is embodied in Judicial Code, sec. 9, *ante*, p. 134; Circuit Courts being abolished by Judicial Code, sec. 289, *ante*, p. 249.

**Appointment of receiver at chambers.**—This statute is little, if anything, more than a recognition of the inherent and ancient powers of a chancellor exercising the powers

of equity judges in matters of equitable cognizance, according to the rules and practice of the English courts of equity, at the time of the adoption of the Constitution. *Horn v. Pere Marquette R. Co.*, (1907) 151 Fed. 626, holding that a federal circuit judge had authority at chambers to make an order appointing a receiver in a pending cause.

## Vol. IV, p. 258, sec. 641.

The denial in summoning or impaneling jurors, of any equal civil rights secured to an accused by the Federal Constitution or laws, does not, unless authorized by the state constitution or laws, as interpreted by its highest court, give the right to remove a criminal prosecution from a state to a federal Circuit Court, under this section. *Kentucky v. Powers*, (1906) 201 U. S. 1, 26 S. Ct. 387, 50 U. S. (L. ed.) 633.

A local statute relative to the qualifications of grand jurors, and providing that persons to be competent must be above the age of twenty-one and under the age of sixty-five years, and that no exception to any such juror on account of his age shall be allowed after he has been sworn, does not deny or prevent the enforcement of any rights secured to a person indicted by the grand jury under any law providing for equal civil rights of

citizens of the United States, within the meaning of R. S. sec. 641. *New Jersey v. Corrigan*, (1906) 139 Fed. 758.

Under a local law which provides that no person shall be a competent juror for the trial of a criminal case, unless he be a citizen at least twenty-one years of age, a house-keeper, sober, temperate, discreet, and of good demeanor, and that juries *de medietate lingue* may be directed by the court, it was held that it did not appear as a matter of law that, because the statute also required jurymen in criminal cases to be citizens, the court had no power to grant an alien charged with a criminal offense a jury consisting of six citizens and six aliens of his own nationality, or that the state courts would so construe such sections as to deny an alien such right; and hence an alien charged with a crime was not entitled to have the prosecution removed to the federal courts because he could not secure a jury *de medietate lingue* in the state courts, under this section. *Kentucky v. Wendling*, (1910) 182 Fed. 140.

Removal of an indictment to a federal court on the ground that under the law of the state the petitioner has no right to challenge a grand juror after he has been sworn is unauthorized, as the petitioner has an adequate remedy for any alleged grievance in the state courts; and, failing therein, can obtain relief by a writ of error to the United States Supreme Court. *New Jersey v. Corrigan*, (1906) 139 Fed. 758. But see *Kentucky v. Powers*, (1906) 201 U. S. 1, 26 S. Ct. 387, 50 U. S. (L. ed.) 633.

**Denial of civil rights.**—The right of removal under this section, given to a defendant who is denied or cannot enforce his civil rights in the judicial tribunals of the state, is not affected by the fact that such rights may be enforced ultimately by proceedings in error in the Supreme Court of the United States. The remedy by removal is given by the statute to all who bring themselves within its provisions. *Kentucky v. Powers*, (1906) 201 U. S. 1, 26 S. Ct. 387, 50 U. S. (L. ed.) 633, reversing (1905) 139 Fed. 452.

While this section is not as broad as the provision of the Fourteenth Constitutional Amendment for the equal protection of the laws, since it is confined to the action of judicial tribunals, it is not restricted to cases where civil rights are denied by legislative action of the states; but it applies as well where, by rulings in other cases, or in the same case prior to final hearing, a rule of judicial decision has been established which will presumably so affect the judicial tribunals of the state as to cause a denial of civil rights to a defendant, or prevent their enforcement. *Kentucky v. Powers*, (1906)

201 U. S. 1, 26 S. Ct. 387, 50 U. S. (L. ed.) 633, reversing (1905) 139 Fed. 452.

Where the petitioner's failure to obtain a trial of an action in a state court resulted from her inability to secure an attorney for that purpose, or because the plaintiff had been able to secure postponements of the trial against defendant's protest, and not because of any command or authority of the state, or any provision of the laws of the state, it was held that the defendant was not entitled to remove the cause to the federal courts under R. S. sec. 641. *Scott v. Kinney*, (1905) 137 Fed. 1000.

The nonrecognition by the state courts of the validity of a pardon pleaded in bar of a criminal prosecution, even if involving a denial of a right secured to the accused by the Federal Constitution or laws, does not make a case for a removal of such cause from a state to a federal Circuit Court under this section. *Kentucky v. Powers*, (1906) 201 U. S. 1, 26 S. Ct. 387, 50 U. S. (L. ed.) 633, reversing (1905) 139 Fed. 452.

**Denial of equal protection of laws.**—A petition for removal filed by a defendant in a criminal prosecution, taken in connection with the transcript filed in the federal court, showed that petitioner had been tried three times on the charge in a Circuit Court of Kentucky, and that each time he had been convicted, and the judgment reversed by the state Court of Appeals; that the crime charged grew out of a political contest; that on the second and third trials petitioner had been discriminated against in the selection of the jurors by those charged under the state law with the duty of drawing the panel and summoning venire men, with the result that all the jurors by whom he was tried were in each case members of the opposite political party to himself; that on objections properly taken to the panel and jury on that ground, and on motions for new trial, the court refused to consider evidence offered to prove such discrimination, and ruled that the petitioner had no right to object thereto, inasmuch as the jurors chosen possessed the statutory qualifications. By Kentucky Code Crim. Prac., sec. 281, as construed by the Court of Appeals, such rulings of a trial court with respect to juries are made final, and are not subject to review. It was held that by such discrimination petitioner was denied the equal protection of the laws secured to him by the Fourteenth Amendment to the Federal Constitution, and that the petition showed a right of removal under this section. *Kentucky v. Powers*, (1906) 201 U. S. 1, 26 S. Ct. 387, 50 U. S. (L. ed.) 633, reversing (1905) 139 Fed. 452.

## Vol. IV, p. 260, sec. 643.

A petition for the removal of a criminal prosecution commenced in a state court against a revenue officer of the United States, under R. S. sec. 643, need not be filed until after the indictment of the defendant, where an indictment is required by the state law,

until which time the prosecution has not been "commenced" within the meaning of the statute. Such petition need not contain allegations of local prejudice. *Virginia v. Felts*, (1904) 133 Fed. 85.

This section authorizes a revenue officer

against whom a prosecution has been commenced in a state court on account of an act done under color of his office to remove the cause, "at any time before the trial thereof," into the "Circuit Court next to be holden in the district," but it does not require the petition for removal to be filed at the place where the next session of the Circuit Court is to be held after indictment, where there are several places of holding court in the district, and it may be filed, at any time before trial, at the place where the next term thereafter is to be held. Such requirement is directory only, and the filing of the petition in the clerk's office at a different place is not ground for remanding the cause to the state court. *Virginia v. Felts*, (1904) 133 Fed. 85.

To render an action against an officer of the United States removable from a state to a federal court by certiorari under this section, the acts which constitute the cause of action must have some rational connection with official duties under a "revenue law,"

and in some way affect the revenue of the government, and such fact must appear on the face of the complaint in the action or the petition for the writ. An action for libel against the Assistant Attorney-General for the Post Office Department and an inspector of such department, based on the promulgation by them of a fraud order against the plaintiff, does not meet such requirements and is not removable. *People's U. S. Bank v. Goodwin*, (1908) 162 Fed. 937.

*W. H. Thomas, etc., Co. v. Barnett*, (1905) 135 Fed. 172, *affirmed* (C. C. A. 1906) 144 Fed. 338, was a removed action against a surveyor of customs to recover damages for acts done in his official capacity.

*Schafer v. Craft*, (1906) 144 Fed. 907, was a removed action against a collector of internal revenue for the recovery of a tax and penalty paid under compulsion.

This section does not include actions against officers acting under the postal laws. *Lewis Pub. Co. v. Wyman*, (1907) 152 Fed. 200.

## Vol. IV, p. 265, sec. 647.

Congress has not conferred jurisdiction on the Circuit Courts over controversies between citizens of different states because, apart from diversity of citizenship, they may have

claimed title by grants from different states, even if it had power to do so. *Stevenson v. Fain*, (1904) 195 U. S. 165, 25 S. Ct. 6, 49 U. S. (L. ed.) 142.

## Vol. IV, p. 265, sec. 1.

Circuit Courts are now abolished by Judicial Code, sec. 289, see *ante*, title JUDICIARY, p. 249 of this Supplement. The jurisdiction formerly exercised by them, especially that which is prescribed in the text section, is conferred upon the District Courts by Judicial Code, sec. 24, see *ante*, title JUDICIARY, p. 139, and the text section is expressly repealed by Judicial Code, sec. 297, see *ante*, p. 250. The provision as to the venue of suits is now in Judicial Code, secs. 51-57, see *ante*, title JUDICIARY, pp. 153-155.

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### I. JURISDICTION OF CIRCUIT COURTS IN GENERAL.

The general object of the Act was to contract the jurisdiction of the federal courts,

and all doubts must be resolved against their jurisdiction. *Joy v. St. Louis*, (1903) 122 Fed. 524; *St. Louis, etc., R. Co. v. Davis*, (1904) 132 Fed. 629.

The judicial power of the United States, vested in the federal courts by U. S. Const., art. 3, sec. 1, embraces all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto, except so far as there are limitations expressed in the Constitution on the general grant of judicial power. *Kansas v. Colorado*, (1907) 206 U. S. 46, 27 S. Ct. 655, 51 U. S. (L. ed.) 956.

The entire judicial power of the nation granted to the federal courts by Const. U. S., art. 3, sec. 1, is not limited by the declaration in section 2 that "the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States," etc. *Kansas v. Colorado*, (1907) 206 U. S. 46, 27 S. Ct. 655, 51 U. S. (L. ed.) 956.

The cases and controversies prescribed by the Constitution for the courts to act upon judicially embrace claims brought before the courts by regular proceedings for the enforcement of rights, or for the prevention of wrongs. *Ayres v. U. S.*, (1908) 44 Ct. Cl. 110.

The term "controversies" in article 3 of the Constitution of the United States refers to cases in which such controversies are brought to the attention of the court, and not to quarrels, disputes, or controversies at large. So there could be no controversy of which the court could take or retain jurisdic-

tion without a cause pending. Hence a case which has been dismissed by order of the court is not a "controversy," but merely a dispute at large. *Baltimore, etc., R. Co. v. Larwill*, (1910) 83 Ohio St. 108, 93 N. E. 619.

**Limited jurisdiction of courts.**—The law is well settled that the courts of the United States, inferior to the Supreme Court, are mere creatures of Congress, and possess no powers except those specifically granted to them by an Act of Congress, and this limitation applies to all causes which, under the Constitution, Congress might have granted to the national courts jurisdiction to hear and determine. *Lewis Pub. Co. v. Wyman*, (1907) 152 Fed. 200. To the same effect see *Stevenson v. Fain*, (1904) 195 U. S. 165, 25 S. Ct. 6, 49 U. S. (L. ed.) 142; *U. S. v. Mar Ying Yuen*, (1903) 123 Fed. 159; *U. S. v. Barrett*, (1905) 135 Fed. 189; *Risley v. Utica*, (1909) 168 Fed. 737.

Under U. S. Const., art. 3, providing that the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish, an inferior court need not possess all the powers and subjects of jurisdiction of every other inferior court of the United States. *James v. U. S.*, (1903) 38 Ct. Cl. 615, *reversed* on other grounds in (1906) 202 U. S. 401, 26 S. Ct. 685, 50 U. S. (L. ed.) 1079.

Since federal courts exercise but a limited jurisdiction, conferred by the Federal Constitution and laws, there is no presumption in favor of their jurisdiction which must affirmatively appear of record. *Yeandle v. Pennsylvania R. Co.*, (C. C. A. 1909) 169 Fed. 938; *Newcomb v. Burbank*, (C. C. A. 1910) 181 Fed. 334.

An admission made on the trial of an action in the Circuit Court, of "the liability of defendant in this case and everything as alleged except the measure of damages," does not cure the omission of the declaration to allege facts giving the court jurisdiction. *Grand Trunk Western R. Co. v. Reddick*, (C. C. A. 1908) 160 Fed. 898.

**At law and in equity.**—The Circuit Courts of the United States have a jurisdiction in law and a jurisdiction in equity, vested in the same judges. *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, (C. C. A. 1910) 184 Fed. 199.

## II. SUITS OF A CIVIL NATURE AT COMMON LAW OR IN EQUITY.

**"Of a civil nature."**—A claim for future alimony under a judgment of a state court is an action of a civil nature within the jurisdiction of the federal courts, other jurisdictional requisites being present. *Israel v. Israel*, (1904) 130 Fed. 237.

The Massachusetts Employers' Liability Act, which authorizes an action to recover damages for the death of an employee, to be "assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable," is not a penal statute in such sense that an

action based thereon may not be maintained in a federal court. *Malloy v. American Hide, etc., Co.*, (1906) 148 Fed. 482.

**In equity.**—The equity jurisdiction of the federal courts is the same as that possessed by the High Court of Chancery in England, and is uniform throughout the states. *Union Pac. R. Co. v. Flynn*, (1910) 180 Fed. 565.

The equity jurisdiction of the federal courts is uniform throughout the states and not subject to limitation or restraint by state legislation. *Union Pac. R. Co. v. Flynn*, (1910) 180 Fed. 565.

The jurisdiction of a federal court was not granted by, and may not be annulled or impaired by, the law of any state. *Mechanics' Ins. Co. v. C. A. Hoover Distilling Co.*, (C. C. A. 1910) 182 Fed. 590.

A state statute precluding interference by a court of equity with the collection of taxes by injunction does not apply to the federal courts. *Western Union Tel. Co. v. Trapp*, (C. C. A. 1911) 186 Fed. 114.

Where federal jurisdiction attaches at law, it attaches for some purpose in equity, and *vice versa*. *Whelan v. Enterprise Transp. Co.*, (1908) 164 Fed. 95.

The jurisdiction in equity in the federal courts is concurrent with that of law; and in matters requiring an accounting, which would be difficult or impracticable for a jury to make, a court of equity will entertain jurisdiction. *London Guarantee, etc., Co. v. Bell Telephone Co.*, (1909) 171 Fed. 278.

A federal court of equity is not without jurisdiction of a suit expressly authorized by a state statute, and in which equity alone can afford the entire relief sought, because of the fact that legal questions are also involved. *New Jersey, etc., Land, etc., Co. v. Gardner-Lacy Lumber Co.*, (C. C. A. 1910) 178 Fed. 772, *reversing* (1908) 161 Fed. 768.

A proceeding by a stockholder or creditor of a corporation for an injunction and the appointment of a receiver for the corporation as an insolvent, under the New Jersey Corporation Act (P. L. 1896, p. 298, sec. 65), which authorizes such proceeding in the Court of Chancery whenever a corporation shall become insolvent or suspend its ordinary business for want of funds, is one involving a money controversy, so as to that extent to be within the jurisdiction of a federal court, where diversity of citizenship exists and the requisite amount is in dispute. *Jacobs v. Mexican Sugar Co.*, (1904) 130 Fed. 589.

The federal courts enforce a vendor's lien under the general rule in equity, when not in contravention of the jurisprudence of the state in which the suit is brought. *Wilson v. Plutus Min. Co.*, (C. C. A. 1909) 174 Fed. 317.

A federal court in equity has jurisdiction to disregard or enjoin enforcement of an unconscionable judgment of the state or national court for new causes, such as fraud, accident, or mistake, which led the court into rendition of a wrong judgment, or prevented the judgment defendant from availing himself of a meritorious defense. *Horton v. Stegmyer*, (C. C. A. 1910) 175 Fed. 756.

Jurisdiction stated of the federal court to enforce the trust impressed upon the property of a decedent in favor of his creditors, heirs, and legatees. *McClellan v. Carland*, (C. C. A. 1911) 187 Fed. 915.

The existence of a remedy at law in a state court does not oust a federal court of jurisdiction in equity, under the rule that a federal court of equity, following the chancery precedents, does not inquire concerning the remedies available in a state court, but whether a federal court of law offers an adequate remedy, which inquiry is confined to the remedies in the federal courts, regardless of the antiquity of the remedies offered by the state. *Borden's Condensed Milk Co. v. Baker*, (C. C. A. 1910) 177 Fed. 906, reversing (1909) 168 Fed. 111.

In determining whether or not a complainant has a plain, adequate, and complete remedy at law which will deprive a federal court of equity of jurisdiction, recourse is to be had to the principles of equity, and not to the statutes of the state in which the court sits. *Empire Circuit Co. v. Sullivan*, (1909) 160 Fed. 1009. And see also R. S. sec. 723, 4 Fed. Stat. Annot. 530, and the note to the corresponding place, *infra*, in this Supplement.

Jurisdiction of bills to perpetuate testimony, see R. S. sec. 866, 3 Fed. Stat. Annot. 20, and note p. 1061 of this Supplement.

Effect of state legislation.—The power of the federal courts was not granted by, and may not be revoked, impaired, or restricted by, any law or act of a state. *Brun v. Mann*, (1906) 151 Fed. 145, 80 C. C. A. 513; *Collins County Nat. Bank v. Hughes*, (C. C. A. 1907) 155 Fed. 389; *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, (C. C. A. 1907) 156 Fed. 1; *Dunlop v. Mercer*, (C. C. A. 1907) 156 Fed. 545.

The Constitution and laws of the United States confer jurisdiction and the duty on the national courts to enforce their judgments and to decide by their own independent judgment every controversy which affects their complete execution, and the power cannot be limited or diminished by the legislation of the states or the decisions of their courts. *Brun v. Mann*, (1906) 151 Fed. 145, 80 C. C. A. 513.

Rights created and remedies provided by the statutes of the state to be pursued in the state courts may be administered in the national courts, either at law or in equity, or in admiralty, as the nature of the rights and remedies may require. *Platt v. Leocacq*, (C. C. A. 1907) 158 Fed. 723, reversing (1906) 150 Fed. 391.

Where the laws of a state enlarge the jurisdiction of the probate courts, which ordinarily embraces proceedings *in rem* in respect to estates of decedents, as the probating of wills and the administration of estates by which the property of a decedent is devolved, to include also suits formerly cognizable in the form of ordinary suits at law or in equity in courts of general jurisdiction, they are dealing with that which may also be subject to the judicial power of the United States, and, while they may properly regulate the

jurisdiction of the courts of the state, they cannot restrict that of the federal courts. *Spencer v. Watkins*, (C. C. A. 1909) 169 Fed. 379.

If a suit, when viewed in the light of recognized principles of jurisprudence, appears to be a suit of a civil nature at common law or in equity, it matters not that by a local statute exclusive cognizance has been in terms reserved to the courts of the state generally or to some specially designated local tribunal. *Spencer v. Watkins*, (C. C. A. 1909) 169 Fed. 379.

A state statute authorizing the maintenance of a suit to quiet title, although the plaintiff is out of possession, is an enlargement of equitable rights which may be administered by a federal court, and, having jurisdiction to entertain such an action, the federal court may determine any question arising therein which could be determined by any state court. *Farr v. Hobe-Peters Land Co.*, (C. C. A. 1911) 188 Fed. 10, reversing (1908) 176 Fed. 644.

The provision of a state law prohibiting unqualified foreign corporations doing business in the state from suing in its courts, does not affect the power of the federal courts to determine controversies in bankruptcy proceedings or other controversies of which the Constitution and the Acts of Congress give them jurisdiction. *Dunlop v. Mercer*, (C. C. A. 1907) 156 Fed. 545.

Proceedings relating to wills.—Since the United States Circuit Courts in equity have the jurisdiction of the High Court of Chancery at the adoption of the Constitution, such courts have no jurisdiction of pure probate proceedings, *quasi in rem*, establishing the succession of a decedent's property, which at that time was within the exclusive jurisdiction of the ecclesiastical courts. *Underground Electric R. Co. v. Owsley*, (1909) 169 Fed. 671.

But a Circuit Court of the United States may, as a court of equity, having the full jurisdiction of the English Courts of Chancery as they existed at the time of the adoption of the Constitution, in a suit where it has jurisdiction of the parties, appoint a receiver of an estate pending the probate of a will, in the absence of the appointment of a custodian by the probate court, and this although proceedings for the probate of the will and the appointment of an executor are pending in such court which have been delayed by reason of litigation between parties in interest. *Underground Electric R. Co. v. Owsley*, (C. C. A. 1909) 176 Fed. 26.

If the statutes of the state in which the property of the deceased is being administered give to its courts of general jurisdiction the right to entertain an original action to set aside the probate of a will, such a suit may be maintained in a Circuit Court of the United States, in case the parties are citizens of different states and more than \$2,000 is involved. *Pulver v. Leonard*, (1909) 176 Fed. 586.

Where the controversy over the validity of a will arises between citizens of different states, the federal court has jurisdiction of a



proceeding to contest it, which the statutes of a state authorize to be instituted in the courts of general jurisdiction of the state. *Sawyer v. White*, (1903) 122 Fed. 223, 58 C. C. A. 587.

**Settlement of estates.**—Federal courts have no original jurisdiction in respect to the administration and general settlement of the estates of deceased persons. *Thiel Detective Service Co. v. McClure*, (1904) 130 Fed. 55.

Federal courts act with reference to estates of deceased persons only to ascertain and enforce claims between citizens of different states after the state courts have probated the will or established intestacy. *Underground Electric R. Co. v. Owsley*, (1909) 169 Fed. 671.

A person entitled to a distributive share of the estate of a deceased person may maintain a suit in a Circuit Court of the United States against the administrator concerning his right to such share. *Pulver v. Leonard*, (1909) 176 Fed. 566.

While federal courts will not take cognizance of purely administrative proceedings in the settlement of decedents' estates, and will not invade the possession of the assets taken by probate courts for the purpose of administration, federal courts will take jurisdiction of a suit by a widow, a citizen of one state, against the executors of her deceased husband's estate situated in another state, to set aside her election to take under the will, as procured by fraudulent concealment by one of the executors, and to establish and enforce her claim under the statute of descents and distribution of the state, allowing a widow to elect to take a statutory estate instead of the provision made for her by the will. *Eddy v. Eddy*, (C. C. A. 1909) 168 Fed. 590.

Under a statute relating to claims against the estates of decedents, which required such claims to be filed with the clerk of the District Court within the stated time to prevent the same from being barred by limitation and to fix their class, and unless approved by the executor or administrator they must thereafter be established by the court on notice in what is in effect an ordinary independent suit, it was held that the filing of a claim as so required by a nonresident creditor does not bar his right to maintain a suit to establish the same in a federal court where the jurisdictional facts exist, even if it be assumed that after such filing the matter is pending in the state court. *Farmers' Bank v. Wright*, (1906) 158 Fed. 841.

While a federal court cannot interfere with property in the hands of an administrator, which is in the custody of the state probate court, it may adjudge the rights of parties before it in such property, and such adjudication will be binding on the administrator and may be enforced against him personally. *Order of St. Benedict of New Jersey v. Steinhauser*, (1910) 179 Fed. 137.

A federal court has jurisdiction, equally with a state court of general jurisdiction, of a suit to establish a lien on the interest of defendants in funds belonging to the estate of a decedent and in the hands of an adminis-

trator; whatever action it may take, however, being subject to that of the probate court within its proper jurisdiction. *Ingersoll v. Coram*, (1903) 127 Fed. 418.

Though a creditor of a deceased person may establish the validity of his claim by a suit at law in the federal courts, provided requisite jurisdictional elements are present, yet on recovering judgment, if the same is not paid, the creditor must ordinarily seek relief by a marshaling of assets in the state courts having jurisdiction of the settlement of estates. *Thiel Detective Service Co. v. McClure*, (1904) 130 Fed. 55.

The chancery jurisdiction of the federal courts embraces a suit, where the requisite diversity of citizenship exists, to have the complainants adjudicated to be the heirs at law and next of kin of a decedent. *McClellan v. Carland*, (1910) 217 U. S. 268, 30 S. Ct. 501, 84 U. S. (L. ed.) 762.

The jurisdiction of a federal Circuit Court of a controversy between citizens of different states, presented by a bill which seeks to declare and foreclose an attorney's lien upon certain interests in the distributive shares of the property of a decedent within the district, is not defeated because the settlement of the estate is pending in a state probate court, where no interference with that court is sought or decreed, and rights between the parties arising from their transactions and contracts are adjudged and are decreed to be redressed only when the probate court shall have finished its functions. *Ingersoll v. Coram*, (1908) 211 U. S. 385, 29 S. Ct. 92, 53 U. S. (L. ed.) 208.

While proceedings for the probate of a will or the establishment of intestacy of a decedent's estate are in abeyance or in dispute, the federal Circuit Court has jurisdiction, at the instance of a noncitizen, to appoint receivers to preserve the estate. *Underground Electric R. Co. v. Owsley*, (1909) 169 Fed. 671.

Where the surviving partner of a firm is one of the executors of the estate of his deceased partner, the settlement of which is pending in the probate court of the state, a bill in equity will not lie in the federal Circuit Court to compel an accounting between such executors, involving an accounting by the surviving partner of his deceased partner's interest in the firm, such proceeding being within the jurisdiction of the probate court. *Moore v. Fidelity Trust Co.*, (1905) 134 Fed. 489, affirmed 138 Fed. 1, 70 C. C. A. 663.

**Mandamus proceedings.**—A federal Circuit Court has no jurisdiction of original proceedings seeking relief by mandamus. *Knapp v. Lake Shore, etc., R. Co.*, (1905) 197 U. S. 586, 25 S. Ct. 538, 49 U. S. (L. ed.) 870.

Any legal right which a stockholder of a national bank may have to obtain an inspection of its books may be enforced in the state courts by mandamus. *Guthrie v. Harkness*, (1905) 199 U. S. 148, 26 S. Ct. 4, 50 U. S. (L. ed.) 130, affirming (1904) 27 Utah 248, 75 Pac. 624, 107 Am. St. Rep. 664.

**Exercise of the function of *parens patrie*** for the determination of the right to the

custody of an insane person is not within the jurisdiction of a federal court. *Hoadly v. Chase*, (1904) 126 Fed. 818, *affirmed* (1903) 129 Fed. 1005, 64 C. C. A. 319.

### III. AMOUNT IN CONTROVERSY.

The jurisdictional amount prescribed in this section, viz. \$2,000, is increased to \$3,000 by the Judicial Code, sec. 24, first paragraph. See *ante*, title JUDICIARY, p. 139, of this Supplement.

In what cases jurisdictional amount is necessary — *Generally*. — Federal jurisdiction in an action at law between citizens of different states does not exist, unless the amount involved exceeds \$2,000, exclusive of interest and costs. *Shewalter v. Lexington*, (1906) 143 Fed. 161; *Southern Land, etc., Co. v. Johnson*, (1907) 156 Fed. 246; *Turner v. Jackson Lumber Co.*, (C. C. A. 1908) 159 Fed. 923; *Peters v. Queen Ins. Co.*, (1910) 182 Fed. 113.

The fact that a suit in a federal court involves a federal question is not sufficient to confer jurisdiction unless the amount involved exceeds \$2,000. *Shewalter v. Lexington*, (1906) 143 Fed. 161.

The jurisdiction of a federal court must affirmatively appear from the record, and a bill for the partition of lands does not state a case within the jurisdiction where it shows the value of the complainant's interest therein to be less than \$2,000. *Southern Land, etc., Co. v. Johnson*, (1907) 156 Fed. 246.

On an application to a federal court by a shareholder in a national banking association for a writ of mandamus to compel the association to permit him to inspect a list of its shareholders, based on R. S. sec. 5210, the pleadings must show that the matter in dispute exceeds the value of \$2,000 to give the court jurisdiction. *Large v. Consolidated Nat. Bank*, (1905) 137 Fed. 168.

But an action by a receiver of a national bank to collect a debt due the bank is one brought under authority of R. S. sec. 5234, and is within the jurisdiction of a federal court, regardless of the amount in controversy. *Schofield v. Palmer*, (1904) 134 Fed. 753. See also *Rankin v. Herod*, (1904) 130 Fed. 390; *Rankin v. Herod*, (1905) 140 Fed. 661.

Interest and costs excluded. — The amount in controversy is to be determined exclusive of the interest and costs. *Turner v. Jackson Lumber Co.*, (C. C. A. 1908) 159 Fed. 923.

Costs. — Thus where a statute provided that when an insurance company refuses to pay a loss within sixty days after demand it shall be liable to the policy holder, in addition to the loss, for not more than twenty-five per cent. on the company's liability, and also for all reasonable attorney's fees for the prosecution of the case, provided it shall appear that the insurer's refusal to pay the loss was in bad faith; it was held that the amount recoverable for attorney's fees under such section should be regarded as "costs," defined by the state court to include all charges fixed by statute as compensation for services rendered by officers of the court in the

progress of the cause; and hence, where a reasonable amount for attorney's fees under such statute was necessary to bring the amount in controversy up to \$2,000, the action, though between citizens of different states, was not within the jurisdiction of the federal Circuit Court. *Peters v. Queen Ins. Co.*, (1910) 182 Fed. 113.

Interest. — But where defendant refused to pay the amount due on an accident policy providing for payment of \$2,000 in case of assured's accidental death, and there was no contract for interest in the policy, it was held that interest was not a mere incident or accessory to the matter in dispute in an action in a federal court in assumpsit for \$3,000 damages for defendant's failure to perform, but constituted, with the amount of the policy, aggregate damages for the breach; and hence the action involved a sum in excess of \$2,000, exclusive of interest and costs, and was within federal jurisdiction. *Continental Casualty Co. v. Spradlin*, (C. C. A. 1909) 170 Fed. 322.

Absence of pecuniary value. — The Circuit Court has no jurisdiction of a suit to correct an ambiguity in the deed of a railroad right of way, and to restrain the removal of gates at a crossing in the inclosure thereof, where the value of the realty and the damage accruing to adjacent property from the road's construction are not shown to exceed \$2,000; and the fact that animals may stray on the track through the threatened openings in the inclosure, and cause wrecks occasioning great damage, does not help the case, since, when jurisdiction depends on a particular sum, suits where the right involved cannot be calculated in money are not within it. *Oregon R., etc., Co. v. Shell*, (1903) 125 Fed. 979.

"Matter in dispute" defined. — The value of the matter in dispute, on which the jurisdiction of the federal Circuit Court is based, is the value of that which complainant seeks to recover, or the value of that which defendant will lose if complainant obtains the recovery he seeks. *Cowell v. City Water Supply Co.*, (1903) 121 Fed. 53, 57 C. C. A. 393, *reversing* (1899) 96 Fed. 769.

An action by heirs to set aside, as fraudulent, judgment rendered by a probate court against the estate, none of which exceeds \$2,000, cannot be brought within the jurisdiction of the Circuit Court by reason of the fact that the real estate on which the judgments are liens exceeds in value that amount. *McDaniel v. Traylor*, (1905) 196 U. S. 415, 25 S. Ct. 369, 49 U. S. (L. ed.) 533, *reversing* (1903) 123 Fed. 338.

In a suit to set aside a conveyance of property, and mortgages given thereon, the value of the property and rights which will be affected if the relief prayed for is granted, and not the value of complainant's interest in the property, constitutes the amount in dispute, for the purpose of determining the jurisdiction of a federal court. *Cowell v. City Water Supply Co.*, (1903) 121 Fed. 53, 57 C. C. A. 393, *reversing* (1899) 96 Fed. 769.

In a suit by an alleged owner of 1/325 of certain real property, consisting of waterworks and their appurtenances, to cancel and avoid

mortgages thereon for \$475,000, and to declare his interest in the property free from the liens of such mortgages, the sum or value in dispute is the value of the 1/325 of the property, which complainant claims to own and seeks to relieve from the lien of the incumbrances. *Cowell v. City Water Supply Co.*, (1903) 121 Fed. 53, 57 C. C. A. 393, *reversing* (1899) 96 Fed. 769.

Where plaintiff sued to quiet title and to set aside a deed of trust on certain land, and also to vacate a deed executed to the purchaser under foreclosure of such deed of trust, but asked in the alternative that, if the deeds be not set aside, she be permitted to redeem on payment of the mortgage debt, interest, and costs, the amount involved, for the purpose of determining the jurisdiction of the federal Circuit Court, was held to be the value of the land, and not the amount required to redeem. *Greenfield v. U. S. Mortgage Co.*, (1904) 133 Fed. 784.

Where suit was brought in a federal court to quiet title to certain property as against certain street improvement certificates amounting to less than \$2,000, the amount of the certificates, and not the value of the land, constituted the subject-matter of the action, and was therefore insufficient to confer jurisdiction. *Shewalter v. Lexington*, (1906) 143 Fed. 161.

The amount of all the judgments against a municipality concerning which relief was sought, and which were directly adjudicated to be barred by the statute of limitations, and not simply the judgment fund in the hands of the treasurer, is the amount in controversy, for the purpose of a writ of error from the federal Supreme Court to a territorial Supreme Court, to review a judgment denying relief by mandamus, where the prayer was for a continuous levy of taxes by the municipal officers for the amount permitted by law annually to be applied in payment of the judgments. *Beadles v. Smyser*, (1908) 209 U. S. 393, 28 S. Ct. 522, 52 U. S. (L. ed.) 849, *reversing* (1906) 17 Okla. 162, 87 Pac. 292.

A suit by a surety for cancellation of a bond for \$40,000, on which, if valid, complainant is subject to a liability exceeding \$2,000, involves a sufficient amount to confer jurisdiction on a federal court. *Fidelity, etc., Co. v. Moshier*, (1907) 151 Fed. 806.

Where, in a suit to enforce a double liability of stockholders of an insolvent bank, the debts of complainants, who were citizens of Indiana, against the bank, a citizen of Kentucky, exceeded \$2,000, exclusive of interest and costs, and the trust fund to be collected from the stockholders was nominally \$200,000, it was held that the amount in controversy was sufficient to sustain federal jurisdiction. *Conway v. Owensboro Sav. Bank, etc., Co.*, (1908) 165 Fed. 822.

Where the primary purpose of a bill was to enjoin the execution of a contract for the construction of a city water system and to restrain the issuance and delivery of city bonds to the extent of \$600,000 on the ground that the issue of the bonds was void, and the bill alleged that if the bonds were issued

complainant would be required to pay in taxes a sum exceeding \$10,000, such amount represented the amount in controversy for the purpose of determining federal jurisdiction. *Helena v. Helena Waterworks Co.*, (C. C. A. 1909) 173 Fed. 18.

A controversy between a state corporation commission and a railway company, which involves not only the right to enforce against the railway company the payment of statutory penalties in excess of \$2,000, but also the right of that company to carry on interstate commerce in the state without being subject to orders and directions of the corporation commission, which so directly burdened such commerce as to amount to a regulation thereof, which right is alleged in the bill to be of the necessary jurisdictional value, such allegation being supported by testimony, and found to be the fact, is within the jurisdiction of a federal Circuit Court, although a dispute of some \$146 demurrage may have been the origin of the litigation. *McNeill v. Southern R. Co.*, (1906) 202 U. S. 543, 26 S. Ct. 722, 50 U. S. (L. ed.) 1142, *modifying* (1904) 134 Fed. 82.

In a suit concerning water rights, the thing in controversy is the right to the use of the water, and where that exceeds in value \$2,000, exclusive of interest and costs, a Circuit Court of the United States has jurisdiction. *Morris v. Bean*, (1906) 146 Fed. 423.

**How ascertained — Claim.** — The amount or value in controversy stated in plaintiff's complaint is the sole test of federal jurisdiction, so far as concerns courts of the first instance. *Eisele v. Oddie*, (1904) 128 Fed. 941. See also *Hayne v. Woolley*, (1910) 180 Fed. 573; *Baley v. Woolley*, (C. C. A. 1910) 183 Fed. 1021.

Plaintiff's allegations of value govern in determining the jurisdiction of a federal Circuit Court except where, upon the face of his own pleadings, it is not legally possible for him to recover the jurisdictional amount, or where such allegations are fraudulently made for the purpose of creating the jurisdiction. *Smithers v. Smith*, (1907) 204 U. S. 632, 27 S. Ct. 297, 51 U. S. (L. ed.) 656; *Hampton Stave Co. v. Gardner*, (1907) 154 Fed. 805, 83 C. C. A. 521.

But when, from the nature of the action as set forth in plaintiff's complaint, there could not legally be a judgment for the amount necessary to the jurisdiction of a federal court, jurisdiction cannot attach, though the damages are laid in a larger sum. *Vance v. W. A. Vandercook Co.*, (1898) 170 U. S. 468, 18 S. Ct. 645, 42 U. S. (L. ed.) 1111; *Battle v. Atkinson*, (1903) 191 U. S. 559, 24 S. Ct. 845, 48 U. S. (L. ed.) 302.

And the federal courts are required to take note of the fact, when it is a fact, that the plaintiff cannot, under the allegations of his petition, possibly recover as much as \$2,000, and the allegations as to the quantum of damages must in such case be regarded as merely colorable, and made solely for the purpose of stating a case apparently within the jurisdiction of the federal court as to amount. *Clement v. Louisville, etc., R. Co.*, (1907) 153 Fed. 979.

But a federal court will not dismiss a bill for want of jurisdiction on demurrer on the ground that the requisite jurisdictional amount is not involved in the suit where the bill alleges that the matter in dispute exceeds in value such amount, and discloses no facts which contradict such allegation. *North American Cold Storage Co. v. Chicago*, (1907) 151 Fed. 120.

On a bill to enjoin publication of complainant's biography in a set of books, an allegation that the right infringed is worth \$2,000 is *prima facie* sufficient to confer jurisdiction of the subject-matter on the federal Circuit Court, in the absence of proof that the facts which he gave for publication in another set of books were merely formal, or such as any one might learn. *Colgate v. White*, (1910) 180 Fed. 892.

In an action to recover damages for depriving plaintiff of rights secured to him by the Constitution and laws of the United States under color of a state statute or law, the plaintiff is not required to allege that defendants acted maliciously, and a failure to do so does not authorize the court to determine as matter of law that only nominal damages are recoverable, and that therefore the action is not within the jurisdiction of a federal court. *Brickhouse v. Brooks*, (1908) 165 Fed. 584.

A matter in dispute exceeding the value of \$2,000 is presented by a cross-bill which seeks to recover a balance of \$1,700 due on a contract for the exchange of soda fountain apparatus, where the original bill, which was dismissed on complainant's own motion, asked for the cancellation of his agreement to pay \$2,025 in consideration of the exchange. *Kirby v. American Soda Fountain Co.*, (1904) 194 U. S. 141, 24 S. Ct. 619, 48 U. S. (L. ed.) 911.

*Recovery.* — Under the Judiciary Act the amount in dispute in determining the jurisdiction of the court is the amount demanded in good faith, and not the amount ultimately recovered. *Denver City Tramway Co. v. Norton*, (1905) 141 Fed. 599, 73 C. C. A. 1.

The amount in dispute in an action for damages, in which the damages are determinable by the jury, is sufficient to give a federal court jurisdiction, where more than \$2,000, exclusive of interest and costs, is demanded, and the facts alleged are such as to justify the good faith of such demand. *O. J. Lewis Mercantile Co. v. Klepner*, (C. C. A. 1910) 176 Fed. 343.

Where a suit against a mutual benefit association to invalidate an assessment involved a certificate for \$2,000 and benefits, and defendant's allegation as to the amount involved was not traversed, it was held that the amount was sufficient to confer federal jurisdiction, notwithstanding a tender of premium. *Enders v. Supreme Lodge, etc.*, (1910) 176 Fed. 892.

*Aggregate of claims — Generally.* — The value of the matter in dispute, in a suit to set aside judgments of a probate court establishing claims against the estate of an intestate, which are a lien on his real property inherited by complainants, on the ground

that they were fraudulently obtained by defendants acting in concert, is the aggregate amount of the claims whose allowance was procured in furtherance of the unlawful combination. *McDaniel v. Traylor*, (1905) 196 U. S. 415, 25 S. Ct. 369, 49 U. S. (L. ed.) 533, reversing (1903) 123 Fed. 338; on second appeal (1909) 212 U. S. 428, 29 S. Ct. 343, 53 U. S. (L. ed.) 584.

In a suit by the several owners of water rights in a stream, joining as complainants for conveyance only, to enjoin the obstruction of the stream or the diversion of water therefrom by defendants, the matter in dispute must exceed \$2,000, exclusive of interest and costs, as to each complainant, in order to give a federal court jurisdiction. *Eaton v. Hoge*, (1905) 141 Fed. 64, 72 C. C. A. 74, reversing 135 Fed. 411.

In a suit brought in a federal court by creditors of an insolvent corporation on behalf of themselves and all other creditors similarly situated, to recover property alleged to belong to the corporation, but to have been fraudulently acquired by certain of the defendants, where the claims of some of the complainants exceed \$2,000, others may join although their claims are less than that amount. *Stanwood v. Wishard*, (1905) 134 Fed. 989.

Where county bonds were owned by the holders jointly, it was held that they were entitled to join as plaintiffs in a suit therein in the federal courts, and that the whole sum sued for, and not the value of the interest of each party, constituted the amount in controversy for the purpose of determining the court's jurisdiction. *Thomas v. Green County*, (C. C. A. 1908) 159 Fed. 399.

In an action in a federal court on several notes, the jurisdictional amount in controversy is the aggregate of the judgment prayed for. *Heffner v. Gwynne-Treadwell Cotton Co.*, (C. C. A. 1908) 160 Fed. 655.

The undivided interests of the joint owners and holders of the bonds and coupons on which suit is brought may be united for the purpose of making up the amount necessary to give jurisdiction to a federal Circuit Court. *Green County v. Thomas*, (1909) 211 U. S. 598, 29 S. Ct. 168, 53 U. S. (L. ed.) 843, affirming (C. C. A. 1908) 159 Fed. 399.

A person holding claims, each below the jurisdictional amount, but together aggregating more than \$2,000, and constituting, when so united, a single cause of action, may, if permitted by the local rules of joinder, bring them all together for determination into a federal court. *Hartford F. Ins. Co. v. Erie R. Co.*, (1909) 172 Fed. 899.

The aggregate sum of the possible penalties sued for in several actions brought by the United States against a carrier under Act June 29, 1906, ch. 3594, 34 Stat. L. 607, requiring the unloading of live stock during transit, and consolidated, is the amount in dispute for the purpose of sustaining the appellate jurisdiction of the federal Supreme Court. *Baltimore, etc., R. Co. v. U. S.*, (1911) 220 U. S. 94, 31 S. Ct. 366, 55 U. S. (L. ed.) 384, modifying (1908) 159 Fed. 33, 86 C. C. A. 223.

**Aggregate amount sufficient.**—Where a state railroad commission imposed a fine of \$2,000 on each of two connecting railroads for through charges made on shipments, in alleged violation of an order of the commission, a bill for an injunction, filed by the companies, as joint complainants, alleging such fact, and that the commission threatened and intended also to enforce its said order with respect to future shipments, shows a sufficient value in controversy to give a federal court jurisdiction. *Louisiana R. Commission v. Texas, etc., R. Co.*, (1906) 144 Fed. 68, 75 C. C. A. 226.

Where complainant sued to set aside special tax bills assessed against certain lots in a city, of which he owned the fee, and he was the equitable owner of other lots assessed, and the tax bills on all the lots amounted to over \$2,000, it was held that the federal court had jurisdiction. *Field v. Barber Asphalt Paving Co.*, (1902) 117 Fed. 925, modified (1904) 194 U. S. 618, 24 S. Ct. 784, 48 U. S. (L. ed.) 1142.

Where the assets of an insolvent corporation proceeded against under a state statute, exclusive of interest and costs, exceed \$2,000, and the claims of the creditors joined in the bill exceed such amount, though no creditor has a claim equal to that amount, the jurisdictional amount is sufficient to give a Circuit Court of the United States jurisdiction. *Jones v. Mutual Fidelity Co.*, (1903) 123 Fed. 506.

**Aggregate amount insufficient.**—Where, in a suit to restrain the enforcement of a franchise tax against a corporation amounting to about \$3,000, it was averred that \$1,117.04 of such amount was claimed by the state and the balance by the counties, cities, and towns for local purposes, and the bill was not sustainable in so far as it affected the amount claimed by the state on the ground that the suit was really against the state, which could not be sued without its consent, the amount of the tax in controversy which remained was insufficient to confer jurisdiction on the federal courts. *Coulter v. Fargo*, (1904) 127 Fed. 912, 62 C. C. A. 444.

Claims or demands assigned for collection only, the assignors remaining the absolute owners, and paying *pro rata* the expenses of collection, including costs and attorneys' fees, cannot be added to the amount of the assignee's own claim to create an amount in dispute in excess of \$2,000, for the express purpose of enabling suit to be brought in a federal Circuit Court. *Woodside v. Beckham*, (1910) 216 U. S. 117, 30 S. Ct. 367, 54 U. S. (L. ed.) 468, *affirming* (1906) 142 Fed. 617.

Under a state statute which authorized the joinder of several causes of action against several insurance companies liable for a single loss under several policies, it was held that where, notwithstanding such joinder, the liability of each was separate, and not joint, the federal court had no jurisdiction of such an action where the alleged liability of each insurance company did not exceed \$2,000. *Wisconsin Cent. R. Co. v. Phoenix Ins. Co.*, (1903) 123 Fed. 989.

Where a purchaser of real estate executed two vendor's lien notes for \$1,200 each, one of which was transferred to each of the plaintiffs, and, not having been paid, plaintiffs joined in a suit in the federal court to recover judgment on the notes and foreclose the lien, it was held that the lien which secured both notes was but an incident to the notes, and that the two notes could not be added for the purpose of establishing an amount in controversy sufficient to sustain federal jurisdiction. *Troy Bank v. Whitehead*, (1910) 184 Fed. 932.

**Suits for injunction.**—In a suit for an injunction in a federal court the amount in dispute for jurisdictional purposes is the value of the right to be protected, and where the requisite value is alleged and not denied it is immaterial how much, or whether any, actual loss has been sustained. *Southern Pac. Co. v. Bartine*, (1909) 170 Fed. 725.

In a suit by a railroad company in a federal court against a number of landowners to enjoin threatened interference with its use of its right of way through their lands, the value of the right sought to be protected, and not the value of the land constituting the right of way across the lands of defendants, constitutes the value in controversy for jurisdictional purposes. *Louisville, etc., R. Co. v. Smith*, (1904) 128 Fed. 1, 63 C. C. A. 1.

In a suit by a carrier to restrain the "scalping" of nontransferable round-trip tickets issued at a reduced fare on account of gatherings expected to be largely attended from various parts of the country, the value of the business so sought to be protected determines the amount in controversy for the purpose of determining the jurisdiction of the federal court. *Louisville, etc., R. Co. v. Bitterman*, (1906) 144 Fed. 34, 75 C. C. A. 192, *affirmed* (1907) 207 U. S. 205, 28 S. Ct. 91, 52 U. S. (L. ed.) 171; *Texas, etc., R. Co. v. Bitterman*, (1906) 144 Fed. 46, 75 C. C. A. 204.

A suit for an injunction to protect a claimed property right, from which it is alleged and shown that complainant realized \$30,000 per year, and which right is denied by defendant, involves a sufficient amount to be within the jurisdiction of a federal court. *Chicago Board of Trade v. Cella Commission Co.*, (1906) 145 Fed. 28, 76 C. C. A. 28, *reversing* (1903) 121 Fed. 1012; *Chicago Board of Trade v. Donovan Commission Co.*, (1906) 145 Fed. 31, 76 C. C. A. 16.

In a suit by a member of a nonstock corporation to restrain alleged illegal and *ultra vires* action by its governing body, the amount involved, for jurisdictional purposes, is the value of the rights sought to be protected; and a federal court has jurisdiction where it is shown by the bill that the mismanagement complained of, if not restrained, will result in the creation of debts, and may result in the loss of the corporation's property, which largely exceeds in value the jurisdictional amount. *McKee v. Chautauque Assembly*, (1903) 124 Fed. 308, *affirmed* (1904) 130 Fed. 536, 65 C. C. A. 8.

In a suit to enjoin the enforcement of an ordinance imposing a license tax on complainant's business, alleged to be prohibitory,

the amount in controversy, for the purpose of determining the jurisdiction of a federal court, is the value of such business. *Humes v. Little Rock*, (1898) 138 Fed. 929.

In a suit to restrain certain voluntary labor organizations, and officers and members of the same, from interfering with the business of complainant, the amount in dispute for the purpose of determining the jurisdiction of a federal court is the value of complainant's right to conduct its business, and an allegation in the bill that complainant will be damaged by the acts of defendants in a sum exceeding \$2,000 is sufficient to confer jurisdiction. *Rocky Mountain Bell Telephone Co. v. Montana Federation of Labor*, (1907) 156 Fed. 809.

A bill by the owner of a number of tugs and barges employed in navigation which required them to pass through defendant's canal to enjoin defendant from enforcing certain alleged illegal regulations and charges states a cause of action in the nature of a continuing trespass, and where it shows that complainant is subjected to charges owing to such exactions amounting to some \$1,600 per year, it discloses a sufficient amount in dispute to give a federal court jurisdiction. *Chesapeake, etc., Canal Co. v. Gring*, (C. C. A. 1908) 159 Fed. 662.

The jurisdictional amount involved in a suit brought by the New York Cotton Exchange to enjoin the defendant from receiving and using quotations of sales on such exchange until he shall have acquired the right to receive them from the exchange, or, with its consent and approval, from one of the telegraph companies authorized to distribute them, is to be measured by the value to the exchange of the right to control the quotations, and not by the rate paid by the defendant under his contract with the telegraph company furnishing him with such quotations. *Hunt v. New York Cotton Exch.*, (1907) 205 U. S. 322, 27 S. Ct. 529, 51 U. S. (L. ed.) 821, *affirming* (1906) 144 Fed. 511.

In a suit to enjoin the wrongful and unlawful interference with complainant's business, the amount in controversy, for the purpose of the jurisdiction of a federal court, is the value of the right sought to be protected, and a general averment in the bill that the value of the matter in dispute exceeds \$25,000, together with further allegations, showing the extent of complainant's business which has been interfered with, and which will be interfered with in the future, unless protected by injunction, tending to show that the value of such right sought to be protected in the future largely exceeds \$2,000, are sufficient, when not denied, to give the court jurisdiction. *Evenson v. Spaulding*, (1907) 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. N. S. 904, *affirming* (1906) 149 Fed. 913.

Where, in a suit in a federal court to enjoin the enforcement of a municipal smoke ordinance, complainant alleged that it was a foreign corporation, and that the amount involved was largely in excess of \$2,000, exclusive of interest and costs, it was held that the bill sufficiently showed the jurisdiction

of the federal courts. *Glucose Refining Co. v. Chicago*, (1905) 138 Fed. 209.

In a suit to enjoin the maintenance of a nuisance, the matter in dispute, for the purpose of determining the jurisdiction of a federal court, is not the damage resulting to complainant from the alleged nuisance, but the right of defendant to maintain the same, and the value of such right determines the amount in controversy. *American Smelting, etc., Co. v. Godfrey*, (C. C. A. 1907) 158 Fed. 225, 14 Ann. Cas. 8.

A suit by a minority stockholder to restrain a misapplication of corporate funds is brought in right of the corporation, and the amount involved, for the purpose of determining the jurisdiction of a federal court, is the value of the right of the corporation sought to be protected, and not the value of complainant's interest therein. *Larabee v. Dolley*, (1909) 175 Fed. 365.

A suit by a stockholder in a banking corporation for an injunction to restrain the acceptance by the bank of the provisions of the bank guaranty law of Kansas (Laws 1909, ch. 61), which contemplates a continuing course of business and an initial and annual deposit of money by the bank with the state treasurer aggregating more than \$2,000, which fund may be used by the state in paying losses of other banks, involves a sufficient amount to give a federal court jurisdiction. *Larabee v. Dolley*, (1909) 175 Fed. 365.

Under a state law which permits any numbers of persons whose burdens as taxpayers may be increased thereby to join in a suit to enjoin the unauthorized expenditure of public money by state officers, the value of the right sought to be protected from invasion, and not the loss which may result to each separate complainant, measures the amount in controversy for the purposes of federal jurisdiction. *Larabee v. Dolley*, (1909) 175 Fed. 365.

**To restrain collection of taxes.**—In a suit by an educational corporation to restrain public officers from levying and collecting taxes upon its property under an alleged exemption to its charter, the value of the matter in dispute for the purpose of determining the jurisdiction of a federal court is not limited to the amount of the particular tax which has been or is threatened to be levied, but is the value of the right to the exemption claimed. *Whitman College v. Berryman*, (1907) 156 Fed. 112.

A suit to enjoin the enforcement of a tax levied on lands under authority of a state by the sale of timber from such lands, where it is not alleged that the tax is illegal, but merely that it was erroneously levied, is not a suit to remove a cloud on title, and the amount involved for the purpose of determining the jurisdiction of a federal court is the amount of the tax, and not the value of the land. *Douglas Co. v. Stone*, (1903) 191 U. S. 557, 24 S. Ct. 843, 48 U. S. (L. ed.) 301, *affirming* (1901) 110 Fed. 812.

Where suit was brought against a tax collector to enjoin the collection of certain taxes, the amount of which was less than

\$2,000, the case was not within the jurisdiction of a federal court. *Turner v. Jackson Lumber Co.*, (C. C. A. 1908) 159 Fed. 926.

The Circuit Court has no jurisdiction of a suit to restrain the enforcement of a personal state tax amounting only to \$80, though the tax constitutes a cloud on the complainant's title to realty the value of which exceeds \$2,000. *Purnell v. Page*, (1903) 128 Fed. 496.

In ejectment to recover possession of land, including a mill site with the mill thereon, the amount in controversy to sustain federal jurisdiction is not the value of the whole property which plaintiff claimed as described in his complaint. *Butters v. Carney*, (1904) 127 Fed. 622.

In an action of ejectment in a federal court to recover a tract of land alleged to be of greater value than \$2,000, the court is not ousted of jurisdiction because the defendant by his answer disclaims as to all except a portion of the tract which is of less value. *Way v. Clay*, (1904) 140 Fed. 352.

In a suit for an accounting by a surviving partner, the amount in controversy is the value of the entire partnership property, and where that exceeds \$2,000 it is sufficient to sustain the jurisdiction of a federal court. *Rogers v. Lawton*, (1908) 162 Fed. 203.

In an action of unlawful detainer the federal court in Arkansas, by analogy to the requirements of Sand. & H. Dig., ch. 70, sec. 3449, requiring as a preliminary to the issuance of a writ of possession a bond in double the amount of two years' rent, will, in determining the value of possession as affecting its jurisdiction, regard the amount in controversy as a sum double the amount of the rent of the premises detained for two years. *Battle v. Atkinson*, (1903) 191 U. S. 559, 24 S. Ct. 845, 48 U. S. (L. ed.) 302, *affirming* (1902) 115 Fed. 384.

A creditors' suit brought by two complainants, one of whom has a judgment on which more than \$2,000 is due, exclusive of interest and costs, to subject property of greater value than \$2,000, involves an amount sufficient to confer jurisdiction on a federal court, although the claim of the other complainant is less than that amount. *Huff v. Bidwell*, (1907) 151 Fed. 563, 81 C. C. A. 43.

In a suit by a stockholder on behalf of himself and other stockholders to secure the distribution of a fund belonging to a dissolved corporation, the entire fund is the amount in controversy for the purpose of determining the jurisdiction of a federal court. *Kent v. Honsinger*, (1909) 167 Fed. 619.

In a suit by a railroad company to quiet title to a specific portion of its right of way which lies more than 100 feet from its tracks, and has never been used in the operation of its road, the amount in dispute for the purpose of determining the jurisdiction of a federal court is the value of the land in controversy, and not the value of the company's right to operate its road. *Union Pac. R. Co. v. Cunningham*, (1909) 173 Fed. 90.

**Pleading.**—Where the declaration in a suit in the federal courts contained the common counts and a special count, each alleging the

amount in controversy to be \$5,000, and a verdict was directed in favor of plaintiff for more than \$2,000, it was held that the necessary jurisdictional amount sufficiently appeared. *Chicago State Bank v. Cox*, (1906) 143 Fed. 91, 74 C. C. A. 285.

In an action between citizens of different states in a Circuit Court of the United States, where the complaint contains the requisite allegations respecting the amount in controversy, jurisdiction is not defeated because other matters stated in the complaint have a tendency to show that that allegation is not well founded, unless they are such as to create a legal certainty of that conclusion. *Henry v. Colorado Farm, etc., Co.*, (C. C. A. 1908) 164 Fed. 986.

It is not essential that a bill in a federal court should state the amount or value in controversy, if it appears to be within the jurisdictional limit, from the allegations of the bill, or otherwise from the record, or from evidence taken in the case before the hearing of objections to the jurisdiction. *Robinson v. Suburban Brick Co.*, (1904) 127 Fed. 804, 62 C. C. A. 484.

Where a bill in the federal courts to enjoin the business of buying and selling nontransferable railroad tickets alleged that the value of the business sought to be protected amounted to \$5,000, exclusive of interest and costs, such averment will be treated as *prima facie* true for the purpose of sustaining the court's jurisdiction, notwithstanding an allegation in the answer that the amount in controversy is less than \$2,000, until defendant has sustained the burden of affirmatively showing that the requisite jurisdictional amount is wanting. *Pennsylvania Co. v. Bay*, (1905) 138 Fed. 203.

A bill to enjoin defendants from diverting the waters of a stream in violation of complainant's prior right thereto, which is alleged to be of the value of \$2,000, and also to recover damages, in the sum of \$2,500, alleged to have been sustained by complainant by reason of the joint action of defendants in diverting such waters, shows the amount in controversy to be sufficient to give a federal court jurisdiction. *Morris v. Bean*, (1903) 123 Fed. 618.

But an averment in a bill in equity in a federal court that the amount or value in controversy exceeds \$2,000, exclusive of interest and costs, does not give the court jurisdiction, unless sustained by proof, where it is put in issue, and such issue may be taken by answer. *Oregon R., etc., Co. v. Shell*, (1903) 125 Fed. 979, *affirmed* on rehearing (1904) 143 Fed. 1004.

A bill to recover an interest in lands of a decedent, in which the only allegation with respect to the amount or value in controversy is that "complainants are informed and believe that the whole of said lands . . . are worth \$12,000, and the amount demanded by them herein is more than \$2,000," is argumentative, leaving the court to make a calculation, and, therefore, does not meet the statutory requirement to give a federal court jurisdiction. *Dupree v. Leggette*, (1905) 140 Fed. 776.

A complaint alleging that plaintiff employed defendant to locate him on a half section of government land, which he entered under the Homestead and Timber Acts, for which service he paid defendant \$200, and seeking to recover damages for false and fraudulent representations as to the quantity and quality of timber on such land, does not state a cause of action for the recovery of damages beyond the amount paid defendant, if there can be any recovery, and the action is not within the jurisdiction of a federal court, although the damages are laid in a sum exceeding the jurisdictional amount. *Wines v. Cobb Real Estate Co.*, (1904) 128 Fed. 198.

In an action of ejectment, where no special acts of damage are averred in the declaration, the damages recoverable are nominal only, and the amount of damages laid in the *ad damnum* clause cannot avail to give a federal court jurisdiction where the value of the land is insufficient. *Way v. Clay*, (1904) 146 Fed. 352.

A complaint for injunction alleging that complainant's trade name is worth in excess of \$5,000; that defendant's acts are calculated to deceive and mislead intending purchasers of complainant's product, to its "great loss, injury, and damage," and that unless defendant's acts are checked the reputation of complainant will still further suffer great and irreparable damage, does not show jurisdiction in the federal court, as it cannot be assumed that the trade name will be destroyed, or that complainant's damages are in excess of \$2,000. *Winchester Repeating Arms Co. v. Butler*, (1904) 128 Fed. 976.

#### IV. SUITS ARISING UNDER THE CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES.

State courts may exercise concurrent jurisdiction with the federal courts in cases arising under the Constitution, laws, and treaties of the United States, unless exclusive jurisdiction has been expressly or by necessary implication conferred on the federal courts. *Ex p. Martin*, (1910) 180 Fed. 209; *St. Louis, etc., R. Co. v. Hesterly*, (Ark. 1911) 135 S. W. 874.

**Case arising under the laws of the United States — Generally.** — An action to enforce a right, the existence of which depends upon an Act of Congress, necessarily involves the construction and application of the federal statute, and is within the jurisdiction of the federal courts. *Calhoun v. Central of Georgia R. Co.*, (1910) 7 Ga. App. 528, 67 S. E. 274.

A federal Circuit Court, having properly obtained jurisdiction of a suit by reason of the federal questions set up by the bill, has the right to decide all questions in the case, even though it decides the federal questions adversely to the party raising them, or even if it omits to decide them at all, but decides the case on local or state questions only. *Siler v. Louisville, etc., R. Co.*, (1909) 213 U. S. 175, 29 S. Ct. 451, 53 U. S. (L. ed.) 753; *Siler v. Illinois Cent. R. Co.*, (1909) 213 U. S. 199, 29 S. Ct. 458, 53 U. S. (L. ed.) 760.

#### *Suit involving taxation of federal bonds.* —

A federal court has jurisdiction of a suit to enjoin an assessment where the question involved is the right of the taxpayer to an exemption on account of United States bonds owned by him, regardless of the citizenship of the parties; and, having such jurisdiction, it may adjudicate other questions involved in the case, although it decides the federal question adversely to complainant. *People's Sav. Bank v. Layman*, (1905) 134 Fed. 635.

***Suit to enjoin the enforcement of schedule of freight rates pending decision by interstate commerce commission.*** — A suit in equity against a railroad company to enjoin the enforcement of a schedule of freight rates which has been filed by defendant with the interstate commerce commission, and which is alleged to be unjust and unreasonable, until the legality of such rates can be passed upon by the commission, is one arising under the laws of the United States and for the enforcement of such laws, of which the federal courts have exclusive jurisdiction. *Kalispell Lumber Co. v. Great Northern R. Co.*, (1907) 157 Fed. 845.

***Right of way under federal statute.*** — A bill by a railroad company, alleging that it acquired a right of way for its road over government lands under a federal statute, and is proceeding to construct its road thereon, but did not complete the same within the time limited by the Act, and that defendant, claiming that its rights have thereby been forfeited, has taken possession of a portion of such right of way, presents a question under the laws of the United States. *Columbia Valley R. Co. v. Portland, etc., R. Co.*, (C. C. A. 1908) 162 Fed. 603.

***The federal Employer's Liability Act*** (Act of April 22, 1908, ch. 149, sec. 2, 35 Stat. L. 65, 66, 1909 Supp. Fed. Stat. Annot. 584, which makes common carriers by railroad within the territories of the United States liable for injuries to employees as therein stated, supersedes the common law in the territories with respect to such liability, and any cause of action within its terms is necessarily one arising under a law of the United States, and on that ground within the jurisdiction of a federal Circuit Court, where the requisite amount is involved. *Cound v. Atchison, etc., R. Co.*, (1909) 173 Fed. 527; *Clark v. Southern Pac. Co.*, (1909) 175 Fed. 122.

***Water privileges.*** — One who has acquired a right to the use of water from a stream flowing through public land for domestic or irrigation purposes, in accordance with the laws of the state, is protected therein by R. S. secs. 2339, 2340, 7 Fed. Stat. Annot. 1090, 1096, and the jurisdiction of a federal court to determine the conflicting rights of parties is not affected by the fact that their lands, and their points of diversion of the water, are in different states. *Anderson v. Bassman*, (1905) 140 Fed. 14.

***Title to allotments to Indians.*** — State courts were not given jurisdiction of controversies necessarily involving a determination of the title, and incidentally of the right to the possession, of Indian allotments while the same were held in trust by the United



States, by the provision of Act of Aug. 15, 1894, ch. 290. 28 Stat. L. 286, delegating to the federal Circuit Courts the power to determine such questions, since the purpose of that Act to continue the exclusive federal control over disputes concerning allotments which, prior to that Act, could only have been decided by the secretary of the interior, is manifested by its provision that a judgment or decree in any such controversy shall be certified by the court to the secretary of the interior, and by the provision of Act of Feb. 6, 1901, ch. 217, 31 Stat. L. 760, that in such suits "the parties thereto shall be the claimant as plaintiff and the United States as party defendant." *McKay v. Kalyton*, (1907) 204 U. S. 458, 27 S. Ct. 340, 51 U. S. (L. ed.) 506, reversing (1904) 45 Ore. 116, 74 Pac. 491, 78 Pac. 332.

*The laws enacted by a territory subject to disapproval by Congress are not laws of the United States, and a suit arising under them, as where a corporation organized under them is a party to the suit, does not arise under the laws of the United States, and a federal court has no jurisdiction on that ground.* *Maxwell v. Federal Gold, etc., Co.*, (C. C. A. 1907) 155 Fed. 110.

*Suit under state laws.* — A suit by citizens and taxpayers of Kansas, under a state law, to enjoin the alleged illegal expenditure of public money by officers of the state, which will increase the burden of taxation, cannot be maintained in a federal court, where the alleged illegality does not arise under any law of the United States. *Larabee v. Dolley*, (1909) 175 Fed. 365.

*Division of state into congressional districts.* — While the power to fix the number of representatives in Congress and to apportion them among the several states is vested in Congress, the power to divide a state into congressional districts for the election of representatives resides in the legislature of the state, and the question whether a county is lawfully included in a congressional district, where it was placed by an act of the legislature, does not depend on the construction of any law of the United States, so as to give a federal court jurisdiction of a suit for its determination, but upon the validity of the act of the legislature, which is a question for determination by the state courts. *Anthony v. Burrow*, (1904) 129 Fed. 793.

*In a suit to enjoin the enforcement of city ordinances*, federal jurisdiction cannot be predicated on an allegation that in passing the ordinances the city exceeded its charter powers; such question being one for the determination of the state courts. *Glucose Refining Co. v. Chicago*, (1905) 138 Fed. 209.

*Suit against state judge.* — A statement of claim which seeks to recover damages for acts of defendant done in his capacity as judge of a state court does not raise a federal question, and, where there is no diversity of citizenship, a Circuit Court of the United States is without jurisdiction, and it is its duty, on motion therefor, to dismiss the suit. *Kimney v. Mitchell*, (1905) 138 Fed. 270.

*Action for false imprisonment.* — A complaint which alleges that defendants entered into a conspiracy by unlawful means to deprive plaintiff of his liberty and property, and that they unlawfully, forcibly, and without due process of law caused his arrest and confinement in a state insane asylum, states a cause of action for false imprisonment, not involving any federal question, and which it is the province of the state and not the federal courts to redress. *Marten v. Holbrook*, (1907) 157 Fed. 716.

*Suit against state — Generally.* — No suit can be maintained in the courts of the United States against the officers of a state, when the state, though not named in the pleadings, is the real party against whom the relief is asked, and against whom the judgment will operate. *Western Union Tel. Co. v. Andrews*, (1907) 154 Fed. 93.

Where a state statute provides that suits to recover penalties for its violation shall be brought in the name of the state by direction of the governor, the governor acts thereunder officially as executive officer of the state having a discretionary power, and a suit to enjoin him from exercising such power is one against the state, of which a federal court is without jurisdiction under the Eleventh Constitutional Amendment. *Central of Georgia R. Co. v. McLendon*, (1907) 157 Fed. 961.

No waiver by the state of its constitutional immunity from a suit in a federal court to set aside the title of the state to lands sold for unpaid taxes can be gathered from the provision of a statute which makes the auditor-general a party defendant to all actions or proceedings to set aside a sale for delinquent taxes on lands held as state tax lands, or which have been sold as such, or which have been sold at annual tax sales, since the statute makes such requirements with reference to procedure and costs as to indicate that the legislature had in mind only proceedings in the state courts. *Chandler v. Dix*, (1904) 194 U. S. 590, 24 S. Ct. 766, 48 U. S. (L. ed.) 1129.

A suit by a corporation to restrain the state attorney-general from instituting a suit in the name of the state to forfeit the corporation's charter is in effect a suit against the state, and is not, therefore, within the jurisdiction of the federal courts. *Morenci Copper Co. v. Freer*, (1903) 127 Fed. 199.

A state board of equalization which is required to "adjust and equalize the valuation of real and personal property among the several counties in the state," is a tribunal charged with duties as an agency of the state, in the performance of which judgment must be exercised by its members, and a suit against them to compel them to raise the valuation of the property in a county is one against the state, within the meaning of the Eleventh Constitutional Amendment, of which a federal court is without jurisdiction. *U. S. v. Hadley*, (1900) 171 Fed. 118.

Where the valuation of a corporation's franchise has been made by a state board, and the auditor has given final notice thereof before suit was brought against him in his official capacity to restrain the collection of

such tax, a bill is not maintainable as to the part of the tax due the state, since as to it the bill would be in effect against the state, which is not subject to suit without its consent. *Coulter v. Weir*, (1904) 127 Fed. 897, 62 C. C. A. 429.

A suit in equity against officers of a state to restrain them from instituting judicial proceedings in the courts of the state to enforce a statute alleged to be unconstitutional is in fact a suit against the state, which a federal court is prohibited from entertaining by the Eleventh Amendment to the Constitution. *Hutchinson v. Smith*, (1905) 140 Fed. 982.

The existing relation of debtor and creditor between the state of South Carolina and the vendors of liquor under the state dispensary Acts was not so altered by the winding-up Act of Feb. 16, 1907, providing for the appointment of a commission to close out the state dispensary business and turn over to the state treasury the surplus funds remaining after liquidating and paying claims out of the state assets, as to enable a federal Circuit Court to take jurisdiction of a bill filed by such vendors, which seeks to enjoin the commission from disposing of the fund until their claims are paid, and asks for the appointment of a receiver, on the theory that, by such statute, the assets of the dispensary were placed in the hands of the commission as a trust fund for the benefit of all creditors having valid claims against such fund, which they are entitled to enforce by judicial action against the commission, without the presence of the state as a necessary party. *Murray v. Wilson Distilling Co.*, (1909) 213 U. S. 151, 29 S. Ct. 458, 53 U. S. (L. ed.) 742, *reversing* (C. C. A. 1908) 164 Fed. 1.

But a municipal corporation is not an agency of the state in such sense that a suit against it is one against the state within the meaning of the Eleventh Constitutional Amendment, excluding such suits from federal jurisdiction. *Camden Interstate R. Co. v. Catlettsburg*, (1904) 129 Fed. 421.

A federal Circuit Court should not dismiss on its own motion, for want of jurisdiction, a suit against the dairy and food commissioner of a state, on the ground that such suit is one against the state, but such question should be raised by demurrer or other pleading. *Scully v. Bird*, (1908) 209 U. S. 481, 28 S. Ct. 597, 52 U. S. (L. ed.) 899.

*Suits involving validity of state law under Federal Constitution.* — A federal court may enjoin the attorney-general of a state, whose general duty is to enforce the state statutes, from proceeding to enforce against persons affected a state statute which violates the Federal Constitution. *Ex p. Young*, (1908) 209 U. S. 123, 28 S. Ct. 441, 52 U. S. (L. ed.) 714.

A suit against state officers, charged with the enforcement of a statute of the state, to enjoin the enforcement of such statute on the ground that it is in violation of the Constitution of the United States, is not a suit against the state within the meaning of the Eleventh Constitutional Amendment, and is within the jurisdiction of a federal court.

*Western Union Tel. Co. v. Julian*, (1909) 169 Fed. 166.

A suit is maintainable in the federal courts against a state officer, claiming under an unconstitutional state statute, where he holds possession or is about to take possession or commit a trespass on property belonging to or in plaintiff's possession. *Western Union Tel. Co. v. Andrews*, (1907) 154 Fed. 95; *Consolidated Gas Co. v. New York*, (1907) 157 Fed. 849; *St. Louis, etc., R. Co. v. Cross*, (1909) 171 Fed. 480; *Kansas Natural Gas Co. v. Haskell*, (1909) 172 Fed. 545.

A suit against an individual to prevent him from effecting the destruction of property or the impairment of property rights under color of an unconstitutional law is not a suit against the state. *Seaboard Air Line R. Co. v. Alabama R. Commission*, (1907) 155 Fed. 792; *Central of Georgia R. Co. v. Alabama R. Commission*, (1908) 161 Fed. 925.

The North Carolina corporation commission and the attorney-general being specially charged with the enforcement of certain laws, a suit against the attorney-general and the members of the commission to restrain the enforcement thereof, and other similar laws, because of alleged unconstitutionality, is not a suit against the state. *Southern R. Co. v. McNeill*, (1907) 155 Fed. 756.

A suit in a federal court to restrain the secretary of state from enforcing a statute which requires him to cancel the license of any foreign railroad corporation to do business in Missouri in case it removed an action brought against it to the federal court, and providing, in addition, a penalty for each offense, with disability to again do business within the state for five years, on the ground that such act was unconstitutional, is not a suit against the state. *Chicago, etc., R. Co. v. Swanger*, (1908) 157 Fed. 783.

But under a state law which provided that foreign corporations shall not do business in the state until they have complied with the Act, which requires the filing of a copy of the articles of incorporation, with the consent that service of process may be had on the secretary of state, and that it will not remove any action against it to any federal court without consent of the other party, requires payment of certain specified fees, and declares that any foreign corporation failing to comply and doing business in the state shall be subject to a fine of not less than \$1,000, to be recovered in suits to be brought in the name of the state by the prosecuting attorneys for the benefit of the county in which the suit is brought, and paid into the county's general revenue, one-fourth of the recovery to belong to the prosecuting attorney as a part of his compensation, it was held that a suit by a foreign telegraph company, having failed to comply with such Act, against the prosecuting attorneys of the judicial circuits of the state, to restrain them from instituting any proceeding to recover penalties against complainant for its refusal to comply with the Act on the ground that it was unconstitutional, was an action against the defendants merely in their capacity as attorneys for the state, and was in effect a

suit against the state. *Western Union Tel. Co. v. Andrews*, (1907) 154 Fed. 95.

A court of admiralty is not deprived of jurisdiction of a suit to recover possession of a vessel duly licensed and enrolled, under the navigation laws of the United States, by the appearance of officers of the state claiming to hold the vessel under process issued by a state court for violation of a state fishery law, where the constitutionality of such law is seriously attacked by the libellant, since such appearance does not render the suit one against the state, within the meaning of the Eleventh Constitutional Amendment, and the question is one which it is competent for the libellant to raise, and for the court to determine. *The W. J. Hingston*, (1906) 144 Fed. 560.

*Suits dealing with questions of taxation.*—

An action by a university, whose lands are exempt from taxation, against officers charged with the duty of levying and collecting taxes, to restrain such officers from enforcing taxes on improvements erected by lessees on such exempt lands, is not a suit against the state, so as to exclude the jurisdiction of the federal courts. *University of the South v. Jetton*, (1907) 155 Fed. 182.

Mandamus to compel county auditors and county treasurers to levy a tax to pay a judgment on township bonds is not a suit against the state, within the inhibition of the Federal Constitution, because such officers have been forbidden by the state legislature to exercise any such power. *Graham v. Folsom*, (1906) 200 U. S. 248, 26 S. Ct. 245, 50 U. S. (L. ed.) 464, *affirming* (1904) 131 Fed. 496.

*Interference with interstate commerce.*—

A suit against a state corporation commission to enjoin the enforcement of an order alleged to be void as an interference with interstate commerce in violation of the Federal Constitution and laws is not one against the state, and is within the jurisdiction of a federal court. *McNeill v. Southern R. Co.*, (1906) 202 U. S. 543, 26 S. Ct. 722, 50 U. S. (L. ed.) 1142, *affirming as modified* (1904) 134 Fed. 82.

A state constitutional provision which prohibits the bringing of a suit against a state by a citizen of another state, cannot be construed to nullify the power conferred on Congress to regulate the commerce among the several states, nor prevent an action to restrain a state railroad commission from enforcing an order injuriously affecting interstate commerce. *Mississippi R. Commission v. Illinois Cent. R. Co.*, (1906) 203 U. S. 335, 27 S. Ct. 90, 51 U. S. (L. ed.) 209, *affirming* (1905) 138 Fed. 327, 70 C. C. A. 617.

*Suit to enjoin enforcement of railroad rates.*—A suit against the attorney-general and board of railroad commissioners of a state to enjoin them from enforcing state statutes regulating railroad rates, on the ground that they are confiscatory and unconstitutional, is not one against the state of which a federal court is denied jurisdiction by the Eleventh Constitutional Amendment. *Louisiana R. Commission v. Texas, etc., R. Co.*, (1906) 144 Fed. 68, 75 C. C. A. 226; *Poor v. Iowa Cent. R. Co.*, (1907) 155 Fed.

226; *Perkins v. Northern Pac. R. Co.*, (1907) 155 Fed. 445; *Louisville, etc., R. Co. v. Alabama R. Commission*, (1907) 157 Fed. 944; *St. Louis, etc., R. Co. v. Hadley*, (1908) 161 Fed. 419; *St. Louis, etc., R. Co. v. Allen*, (1910) 181 Fed. 710.

Where, under the state constitution, any railroad company has the right to maintain proceedings in a state court against the state railroad commission to contest the validity of any decision, rule, or order of the commission, a company which is a citizen of another state may maintain a suit for the same purpose in a federal court, where the amount involved is sufficient to give the court jurisdiction. *Louisiana R. Commission v. Texas, etc., R. Co.*, (1906) 144 Fed. 68, 75 C. C. A. 226.

*Substantial dispute as to construction of constitution, law, or treaty essential.*—If it appears from a bill filed in a federal court that in any aspect which the case may assume the right to relief may depend upon the construction of a provision of the Constitution or laws of the United States, and that such claim is not merely colorable, but rests upon a reasonable foundation, the court has jurisdiction of the cause. *St. Louis, etc., R. Co. v. Davis*, (1904) 132 Fed. 629.

The assertion in a suit to enjoin municipal construction of an underground railway that complainants had a prior exclusive right to the use of the city streets for that purpose does not bring the cause within the jurisdiction of a federal Circuit Court as really and substantially involving a dispute or controversy respecting the Federal Constitution, where such contention is based upon the effect claimed for the filing of a map and profile of the proposed route and for the payment of an incorporation tax, and involves the unfounded assumption that the determination by the rapid transit board created by Laws N. Y. 1891, ch. 4, to construct an underground railway, together with the consent of the municipal authorities and abutting owners to the municipal construction of such road, was the equivalent of the requisite consent to the construction of complainant's proposed road, which had never been obtained. *Underground R. Co. v. New York*, (1904) 193 U. S. 416, 24 S. Ct. 494, 48 U. S. (L. ed.) 733, *affirming* (1902) 116 Fed. 952.

The averment in a bill that the property of a water company was taken without due process of law by a local statute enabling it to sell its property to a municipality to defeat municipal construction of a water supply system, because such statute was construed by the highest state court as not entitling the company to compensation for its franchise and other incorporated rights, and the averment that the obligation of the company's contract with the city to furnish water for fire protection was impaired by the failure to value future profits arising from such contract, are so devoid of merit, where the water company's charter was not exclusive, and was subject to repeal, alteration, and amendment, as to be insufficient to sustain the jurisdiction of a Circuit Court of the

United States on the theory that the case arose under the Federal Constitution. *Newburyport Water Co. v. Newburyport*, (1904) 193 U. S. 561, 24 S. Ct. 553, 48 U. S. (L. ed.) 795; *Gloucester Water Supply Co. v. Gloucester*, (1904) 193 U. S. 580, 24 S. Ct. 557, 48 U. S. (L. ed.) 801.

The assertion, in a bill filed by a water company against a municipality and its common council, that the obligation of the municipality's rental contract with the company was impaired by an ordinance which, while denying the validity of the contract, allowed a claim for rentals, is too clearly unfounded to present a case arising under the Constitution or laws of the United States, of which a federal Circuit Court has jurisdiction without regard to the diversity of citizenship. *Defiance Water Co. v. Defiance*, (1903) 191 U. S. 184, 24 S. Ct. 63, 48 U. S. (L. ed.) 140.

Where, in a suit by a private person against state judges of general jurisdiction, the statement of plaintiff's claim did not show diverse citizenship, or that the action involved a federal question, a mere allegation that defendants were liable under R. S. secs. 1979, 1980, 1 Fed. Stat. Annot. 795, 796, prohibiting the deprivation of rights, privileges, and immunities secured by the Constitution and laws, etc., was insufficient to establish federal jurisdiction, in the absence of an allegation of facts showing a substantial dispute as to the effect or construction of the Constitution, or of some law of the United States on the determination of which the recovery depended. *U. S. v. Bell*, (1905) 135 Fed. 336, 68 C. C. A. 144, *affirming* (1904) 127 Fed. 1002.

The claim that grazing cattle owned by a Jesuit society are exempt from state taxation, based either upon the theory that because the income of the society was devoted to the charitable work of improving and educating the Indians on the Flathead reservation, in Montana, the entire beneficial use or ownership of the property taxed was in tribal Indians, or upon the ground that the federal government, by permitting and approving the work of the society, and by aiding it from time to time by making appropriations in its behalf, had constituted it one of the agencies to carry out its obligation to the Indians, is too clearly lacking in merit to confer jurisdiction on a federal Circuit Court. *Montana Catholic Missions v. Missoula County*, (1906) 200 U. S. 118, 26 S. Ct. 197, 50 U. S. (L. ed.) 398.

**Must so appear from plaintiff's statement** — *Generally*. — When the jurisdiction of a federal court depends upon the case being one arising under the Constitution or laws of the United States, the facts necessary to make such a case must be plainly shown upon the record, and it is not enough that such question may arise. *Louisville v. Cumberland Telephone, etc., Co.*, (C. C. A. 1907) 155 Fed. 725, 12 Ann. Cas. 500; *American Nat. Bank v. Tappan*, (1909) 174 Fed. 431; *Larabee v. Dolley*, (1909) 175 Fed. 365; *Earnhart v. Switzler*, (C. C. A. 1910) 179 Fed. 832; *Hare v. Birkenfield*, (C. C. A. 1910) 181 Fed. 825;

*Seattle Electric Co. v. Seattle, etc., R. Co.*, (C. C. A. 1911) 185 Fed. 365.

To confer jurisdiction of a suit between citizens of the same state upon a federal court on the ground that legislation of a state which it is sought to have declared invalid impairs the obligation of a contract or deprives complainant of his property without due process of law, and that, therefore, the questions involved arise under the Constitution of the United States, it must appear from complainant's pleading that there is a legal contract subject to impairment, or that complainant has become vested with property rights in the particular thing of which he is alleged to have been deprived. *Underground R. Co. v. New York*, (1902) 116 Fed. 952, *affirmed* (1904) 193 U. S. 416, 24 S. Ct. 494, 48 U. S. (L. ed.) 733.

Where, in an action against an interstate carrier for death of a servant, the complaint alleged that defendant was engaged in transporting both freight and passengers, and of interstate and foreign commerce, such averment did not allege that defendant was engaged in the transportation of freight and passengers "in" interstate and foreign commerce, and must therefore be taken as an averment of the transportation of freight and passengers in both interstate and intrastate commerce. *Troxell v. Delaware, etc., R. Co.*, (1910) 180 Fed. 871.

A street railroad company which has acquired a franchise to construct its line has a property right therein of which it cannot be deprived without due process of law, and also contract rights which cannot be impaired by the state by subsequent legislation; but before it can invoke the provisions of the Constitution of the United States for the protection of such rights by a suit in a federal court, it must show that it has done all the things required under the laws of the state to vest it with the contract and property rights which it seeks to protect. *Underground R. Co. v. New York*, (1902) 116 Fed. 952, *affirmed* (1904) 193 U. S. 416, 24 S. Ct. 494, 48 U. S. (L. ed.) 733.

But it is not necessary to allege in pleading matters of which the court is bound to take judicial notice or matters which the law presumes, and a bill in a federal court which seeks to enjoin the enforcement of a city ordinance, and invokes the jurisdiction of the court on the ground that such enforcement will deprive complainant of its property without due process of law in violation of the Fourteenth Constitutional Amendment, need not allege that the ordinance was enacted under state authority where there is a statute of the state which confers authority on the city to enact such an ordinance, since the court is required to take judicial notice of such statute, and must presume that the city acted thereunder. *North American Cold Storage Co. v. Chicago*, (1907) 151 Fed. 120.

**Sufficient allegation.** — A substantial controversy respecting rights under the Federal Constitution, presented by the averments of the bill, is sufficient to support the jurisdiction of a federal Circuit Court, irrespective of the actual sufficiency of the facts alleged

to justify the relief sought, or of the facts as they may subsequently turn out. *Pacific Electric R. Co. v. Los Angeles*, (1904) 194 U. S. 112, 24 S. Ct. 586, 48 U. S. (L. ed.) 896, *affirming* (1902) 118 Fed. 746.

A Circuit Court has jurisdiction of a suit on the ground that it arises under the Constitution of the United States, where it appears from the allegations of the bill that the claim is made in good faith that an Act of the legislature under which defendants are proceeding to do the acts sought to be enjoined is in violation of the Federal Constitution, although other grounds of invalidity are also alleged, and where it is further alleged that complainant will sustain damages, direct and consequential, by reason of the threatened action, in excess of \$2,000. *Manigault v. Ward*, (1903) 123 Fed. 707, *affirmed* (1905) 190 U. S. 473, 26 S. Ct. 127, 50 U. S. (L. ed.) 274.

A federal court has jurisdiction of a suit to restrain the collection of taxes levied under provisions of the constitution and statutes of a state, which the bill, in good faith, alleges are repugnant to the Constitution of the United States, and where it is also alleged that the defendant, as a state officer, by his acts under said state constitution and statute, is about to deprive complainants of their property without due process of law. *Michigan R. Tax Cases*, (1905) 138 Fed. 223, *affirmed* (1906) 201 U. S. 245, 26 S. Ct. 460, 50 U. S. (L. ed.) 744.

An allegation in a bill that a municipal ordinance providing for the summary seizure and destruction of food in cold storage when unfit for human consumption violates Const. U. S. Amend. 14, because it provides neither for notice nor for an opportunity to be heard before such seizure and destruction, presents, although unfounded, a constitutional question within the original jurisdiction of the federal Circuit Court. *North American Cold Storage Co. v. Chicago*, (1908) 211 U. S. 306, 16 Ann. Cas. 276, 29 S. Ct. 101, 53 U. S. (L. ed.) 195.

Where a petition in an action against an interstate carrier for injuries to a brakeman is one of the territories of the United States alleged injury to plaintiff by the negligence of a carrier while plaintiff was in the performance of his duty, it sufficiently showed that the action was based on the federal Employers' Liability Act, though it did not so allege in terms. *Clark v. Southern Pac. Co.*, (1909) 175 Fed. 122.

**Insufficient allegation.** — An allegation in a complaint in ejectment that defendant is in possession of the property by direction of the United States, which is not required under the statute to state plaintiff's cause of action, is mere surplusage, and cannot give a federal court jurisdiction on the ground that the action is one arising under the Constitution of the United States, by making it appear that defendant holds under a law which plaintiff claims to be unconstitutional. *Filhiol v. Torney*, (1903) 119 Fed. 974, *affirmed* (1904) 194 U. S. 356, 24 S. Ct. 698, 48 U. S. (L. ed.) 1014.

An allegation in a complaint that full faith

and credit will not be given to the Public Acts of Minnesota if a New Jersey corporation organized for the purpose of acquiring the control of two competing interstate railway companies engaged in business in Minnesota is allowed to carry out the object of its incorporation, does not present a cause arising under the Federal Constitution, of which a Circuit Court of the United States can take jurisdiction. *Minnesota v. Northern Securities Co.*, (1904) 194 U. S. 48, 24 S. Ct. 598, 46 U. S. (L. ed.) 870, *reversing* (1903) 123 Fed. 692.

Averments in a complaint in ejectment, that defendant's possession rests upon an infraction by the United States of its treaty obligations, and upon a taking of private property for public use without just compensation, do not bring the case within the jurisdiction of a federal Circuit Court, where the averments respecting plaintiff's title disclose no case within the jurisdiction of that court. *Filhiol v. Torney*, (1904) 194 U. S. 356, 24 S. Ct. 698, 48 U. S. (L. ed.) 1014, *affirming* (1903) 119 Fed. 974.

A suit to compel the specific performance by a carrier of its agreement to issue free passes annually to the complainants is not brought within the original jurisdiction of a federal Circuit Court as one arising under the Constitution or laws of the United States, by allegations in the bill that the refusal to comply with the contract is based upon the provisions of Act Cong. June 29, 1906, 1903 Supp. Fed. Stat. Annot. 255, and that such Act does not prohibit the giving of passes under the circumstances of the case, and, if construed as having such effect, violates Const. Amend. 5, by denying due process of law. *Louisville, etc., R. Co. v. Mottley*, (1908) 211 U. S. 149, 29 S. Ct. 42, 53 U. S. (L. ed.) 126, *reversing* (1907) 150 Fed. 406.

A bill by a railroad company to enjoin suits at law for damages, or in equity to restrain its removal of a division point, on the ground, among others, that the enforcement of an alleged contract to maintain the railroad's shops, roundhouses, etc., at the point in question would interfere with interstate commerce, and prevent complainant's compliance with Act Cong. March 4, 1907, ch. 2939, 34 Stat. L. 1415, 1909 Supp. Fed. Stat. Annot. 581, known as the "Hours of Service Law," does not show federal jurisdiction as involving a federal question, under the rule that to give the federal Circuit Court jurisdiction for that reason the federal question must appear necessarily in the statement of the cause of action, and not as mere allegations of a defense pleaded. *Kansas City Southern R. Co. v. Quigley*, (1910) 181 Fed. 190.

An action by a shipper against a railroad company engaged in interstate commerce, to recover damages because of an alleged discrimination in exacting a charge from one class of shippers which is not required from another class, although the service is the same in both cases, is not within the jurisdiction of a federal court, as one arising under the interstate commerce law, where it is not alleged that the charge is not in accordance

with a schedule of rates duly published and filed with the interstate commerce commission, nor that any application has been made to the commission to correct such alleged discrimination. *Clement v. Louisville, etc., R. Co.*, (1907) 153 Fed. 979.

A suit against a city and certain of its officers to enjoin the commission of acts by them under the claimed authority of a city ordinance, which it is alleged will deprive complainant of its property without due process of law in violation of the Federal Constitution, does not involve any constitutional question which will give a federal court jurisdiction with respect to acts which it clearly appears are not authorized by the ordinance, set out in the bill, and which, if committed, will be without authority of law and mere private trespasses. *North American Cold Storage Co. v. Chicago*, (1907) 151 Fed. 120.

**Statement of defense.**—Jurisdiction of a federal court cannot be invoked by averments in plaintiff's pleadings anticipatory of the defense and allegations that such defense is based on the Constitution or laws of the United States. *People's U. S. Bank v. Goodwin*, (1908) 160 Fed. 727.

**Suits arising under Constitution involving due process of law.**—A suit to enjoin the enforcement of state enactments regulating railroad rates, on the ground that the same are confiscatory and would deprive the railroad companies of their property without due process of law and deny them the equal protection of the laws, in violation of the Fourteenth Constitutional Amendment, is one arising under the Constitution of the United States, of which a federal court has jurisdiction on that ground. *Ex p. Young*, (1908) 209 U. S. 123, 28 S. Ct. 441, 52 U. S. (L. ed.) 714; *St. Louis, etc., R. Co. v. Hadley*, (1907) 155 Fed. 220; *Perkins v. Northern Pac. R. Co.*, (1907) 155 Fed. 445.

Allegations in a bill to enjoin the enforcement, as in violation of Const. U. S. Amend. 14, of an order of a state railroad commission, that such commission was not vested with power to make that order, do not defeat the jurisdiction of a federal Circuit Court because, in such case, the action of the commission is not that of the state, where the bill sets up several entirely separate federal questions, some of which are directed to the invalidity, on various constitutional grounds, of the state statute under the supposed authority of which the order was made, and some of which are founded upon the terms of the order. *Siler v. Louisville, etc., R. Co.*, (1909) 213 U. S. 175, 29 S. Ct. 451, 53 U. S. (L. ed.) 753.

A bill by a telephone company to enjoin the enforcement of a city ordinance fixing maximum rates of charge for telephone service, which alleges that the ordinance was passed in the exercise of power to fix rates conferred upon the city by an act of the legislature, and that if enforced complainant cannot make any net earnings whatever on its large capital invested in the business, nor sufficient to pay its necessary expenses, and will be deprived of its property without due

process of law, states a cause of action arising under the Fourteenth Amendment to the Constitution of the United States, of which a federal court has jurisdiction, although it is further averred, as a legal conclusion, that the ordinance is also in violation of the state constitution, prohibiting the impairment of the freedom of contract. *Ozark-Bell Telephone Co. v. Springfield*, (1905) 140 Fed. 666.

Under the Federal Constitution, a municipal corporation, although having power to regulate the rates to be charged by a telephone company, may not reduce such rates below a rate which will pay operating expenses, maintain the plant, and pay a fair return on the capital actually invested, and a bill to restrain the enforcement of a rate alleged to be confiscatory presents a federal question and is within the jurisdiction of a federal court. *Owensboro v. Cumberland Telephone, etc., Co.*, (C. C. A. 1909) 174 Fed. 739.

The question whether rates fixed by a municipal body to be charged by a water company are just and reasonable, or confiscatory and unconstitutional, is a judicial one, for the determination of which the company has the right to invoke the jurisdiction of a federal court. *Spring Valley Water Co. v. San Francisco*, (1908) 165 Fed. 667.

A suit by a domestic corporation to restrain the collection of taxes imposed by the state on personal property alleged in the bill to have its situs for purposes of taxation in another state involves a federal question and is within the jurisdiction of a federal court, since the taxation by a state of property without its jurisdiction amounts to a taking of the property of the owner without due process of law. *Central of Georgia R. Co. v. Wright*, (1908) 166 Fed. 153.

A suit to enjoin the enforcement of an ordinance requiring a street railroad company to carry without pay passengers holding transfers from other car lines is cognizable in equity on the ground of preventing a multiplicity of suits and is within the jurisdiction of a federal court, where the invalidity of the ordinance is alleged on the ground that it deprives the company of its property without due process of law in violation of the Federal Constitution. *Chicago City R. Co. v. Chicago*, (1905) 142 Fed. 844.

Where a municipal corporation without statutory authority was attempting to take a portion of complainant's right of way for a street, and to deprive complainant of its property without due process of law, a federal court had jurisdiction of a suit to restrain such action. *Portland R., etc., Co. v. Portland*, (1910) 181 Fed. 632.

The owners of property fronting on a street may maintain a suit in equity in a federal court against the city and a street railroad company, both of which are corporations of the state, to enjoin the laying of tracks in the street under a void enactment by the city council purporting to authorize such act, where irreparable injury will result to their property, as a taking of property under color of authority from the state with-

out due process of law. *Savannah v. Holst*, (1904) 132 Fed. 901, 65 C. C. A. 449, *reversing* 131 Fed. 931.

A suit to enjoin officers or agents of a state from exercising powers conferred on them by a state statute, on the ground that their action is in violation of the property rights of complainant under the Constitution of the United States, is within the jurisdiction of a federal court, without regard to the citizenship of the parties, where the requisite amount is involved. *Douglas Park Jockey Club v. Grainger*, (1906) 146 Fed. 414.

A city given by the state the power to contract for a supply of water for extinguishment of fires, and to tax property in the city to pay therefor, made and continued a contract which was unreasonable, and provided for an excessive compensation to the water company. The state itself had not approved or sanctioned the contract by its legislative, executive, or judicial authority. It was held that any illegal act of the city under the contract was done without the authority of or contrary to the state law, and persons who had paid the taxes could not seek equitable relief in the federal court, on the ground of deprivation of property without due process of law. *Risley v. Utica*, (1910) 179 Fed. 875.

The exercise by a city council of the taxing power delegated to it by the legislature is the act of the state, within the Fourteenth Constitutional Amendment, and a person who is thereby deprived of property without due process of law may invoke the jurisdiction of a federal court on the ground of a violation of such amendment; but, where such action is without the authority of or contrary to state law, no question arises under the Constitution which gives such court jurisdiction. *Risley v. Utica*, (1909) 173 Fed. 502.

A state statute which asserts the ownership by the state of the beds and shores of all navigable waters therein, but expressly provides that it shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state, is not in violation of the Federal Constitution, as depriving riparian owners under previous grants from the United States of their property without due process of law, nor does a suit by such owners to enjoin officers of the state from selling shore lands under a statute enacted pursuant to such provision involve any constitutional question which gives a federal court jurisdiction thereof. *McGilvra v. Ross*, (C. C. A. 1908) 164 Fed. 604, *affirming* (1907) 161 Fed. 398.

The averment in a bill to enjoin the construction of a rapid transit railroad tunnel under a city street that, by such construction, complainant, as an abutting owner, is deprived of his property without due process of law, does not bring the case within the jurisdiction of a federal Circuit Court, where the bill, on its face, proceeds on the theory that the action sought to be enjoined was not only unauthorized, but was forbidden by state legislation. *Barney v. New York*, (1904) 193 U. S. 430, 24 S. Ct. 502, 48 U. S. (L. ed.) 737; *Huntington v. New York*,

(1904) 193 U. S. 441, 24 S. Ct. 505, 48 U. S. (L. ed.) 741.

A municipal ordinance not passed in accordance with legislative authority is not a law of the state within the meaning of the prohibitions of the Constitution of the United States, and a suit to enjoin the enforcement of an ordinance alleged to have been passed in violation of the requirements of the state law presents no question arising under the Constitution, which confers jurisdiction on a federal court, on the ground that the enforcement of the ordinance will deprive complainants of property without due process of law. *Savannah v. Holst*, (1904) 132 Fed. 901, 65 C. C. A. 449, *reversing* 131 Fed. 931.

A suit to enjoin the diversion or intended diversion by a municipality of certain funds which, under legislative sanction, it had collected from taxpayers for a specific public object, but which were not applied to that object, on the theory that such failure of duty on the part of the municipality may ultimately cause increased taxation, and thereby deprive the taxpayers of their property without the due process of law guaranteed by Const. U. S. Amend. 14, if the full amount originally intended to be applied to the particular object named by the legislature is to be collected, is not one arising under the Constitution of the United States, of which a federal Circuit Court has original jurisdiction without regard to the citizenship of the parties. *Owensboro Waterworks Co. v. Owensboro*, (1906) 200 U. S. 38, 26 S. Ct. 249, 50 U. S. (L. ed.) 361.

The averment that if a temporary injunction granted by an inferior state court, restraining the future payment of rentals accruing under the alleged contract of a municipality with a water company because of the invalidity of the contract, should ultimately be made perpetual, such company would thereby be deprived of its property without due process of law, does not justify a federal Circuit Court in assuming jurisdiction of a suit by the water company to restrain the municipality from attempting to annul the rental contract, as being a case arising under the Federal Constitution or laws. *Defiance Water Co. v. Defiance*, (1903) 191 U. S. 184, 24 S. Ct. 63, 48 U. S. (L. ed.) 140.

The contention that a state court, in admitting a nuncupative will to probate without giving the statutory notice to the next of kin, violated the due process of law clause of Const. U. S. Amend. 14, is too lacking in merit to afford a basis for the jurisdiction of a federal Circuit Court of a suit to set aside the probate, even assuming that such notice is essential to the preliminary probate, where the bill proceeds on the theory, which finds support in the law of the state, that, despite the mere preliminary admission to probate, there remained a right to assail the existence of the will and its probate, which was not lost by the failure to give notice. *O'Callaghan v. O'Brien*, (1905) 199 U. S. 89, 25 S. Ct. 727, 50 U. S. (L. ed.) 101, *affirming* (1903) 125 Fed. 657, 60 C. C. A. 347, and *reversing* (1902) 116 Fed. 934.

Since the only statute recognizing the right of an entryman to settle on unsurveyed lands of the United States is Act May 14, 1880, ch. 89, 21 Stat. L. 140, 6 Fed. Stat. Annot. 300, 301, providing that a homestead settler, on public land surveyed or unsurveyed shall be allowed the same time to file his application and perfect his original entry as is allowed to settlers under the pre-emption laws, a suit by a homestead settler on unsurveyed public land to protect his possessory right as against an adverse claimant does not involve a construction of the Constitution of the United States so as to sustain federal jurisdiction on that ground. *Earnhart v. Switzler*, (C. C. A. 1910) 179 Fed. 832.

Where the validity of a city ordinance regulating the sale of nonintoxicating beverages depends wholly on state statutes, no federal question can be injected into a prosecution for violating the ordinance unless it be that accused is being held contrary to the inhibition of the Fourteenth Amendment of the Federal Constitution. *Kroschel v. Munkers*, (1910) 179 Fed. 961.

A suit to enjoin the enforcement of a municipal ordinance is not within the jurisdiction of a federal court as involving the construction of the Federal Constitution, where the ordinance, if in violation of the Constitution, is equally in violation of the constitution of the state. *Seattle Electric Co. v. Seattle, etc., R. Co.*, (C. C. A. 1911) 185 Fed. 366.

A case arising under the Federal Constitution and laws, of which a federal Circuit Court has jurisdiction without diversity of citizenship, is not presented by a bill which asserts the invalidity, under the Federal Constitution, of certain statutes and ordinances alleged to constitute a cloud on title, which the bill seeks to remove. *Devine v. Los Angeles*, (1906) 202 U. S. 313, 28 S. Ct. 652, 50 U. S. (L. ed.) 1046.

In a suit in a federal court by a nonresident of a state to enjoin the enforcement of an ordinance, adopted in a local option district of such state, prohibiting the sale of liquors therein except for certain purposes, the only questions which can be considered are those affecting the rights of complainant under the Constitution and laws of the United States. In questions relating to the validity and effect of the law, or the regularity of the election, complainant has no legal interest, except as they may affect such rights. *Busch v. Webb*, (1903) 122 Fed. 655.

An objection that local legislation prohibiting the manufacture and sale of intoxicating liquors, etc., and making a violation thereof a misdemeanor, was violative of complainants' rights guaranteed by the Federal Constitution, is available as a defense to a prosecution in the state courts for violation of the Act, which could finally be determined by the United States Supreme Court on writ of error from the highest court of the state, and therefore is not ground of federal jurisdiction to restrain the enforcement of the Act. *Christian Moerlein Brewing Co. v. Hill*, (1908) 166 Fed. 140.

**Impairing obligation of contracts.** — Where jurisdiction of a federal court is predicated on the ground that the obligation of a contract has been impaired by a state, the questions to be considered are (1) the existence or not of the contract, (2) the obligation arising under it, and (3) whether there has been state legislation impairing the contract obligation. *American Telephone, etc., Co. v. New Decatur*, (1910) 176 Fed. 133.

It is not essential to the jurisdiction of a federal court of a suit based on an alleged impairment of a contract by a state in violation of section 10 of article 1 of the Constitution, that there should be a valid contract, or that the impairment complained of should in fact be effected, but it is sufficient, for jurisdictional purposes, if the plaintiff claims the existence of such contract, and its impairment, in good faith. *Riverside, etc., R. Co. v. Riverside*, (1902) 118 Fed. 736; *Pacific Electric Co. v. Los Angeles*, (1902) 118 Fed. 746, *affirmed* (1904) 194 U. S. 112, 24 S. Ct. 586, 48 U. S. (L. ed.) 896.

That a state constitution contains a provision prohibiting the passage of any law impairing the obligation of contracts does not deprive a litigant of the right to invoke the similar provision of the Federal Constitution in a suit which involves the question of its violation. *Des Moines City R. Co. v. Des Moines*, (1907) 151 Fed. 854.

A federal court of equity may grant relief by injunction against a city ordinance which impairs the contract rights of complainant, or deprives him of his property without due process of law. *Cleveland City R. Co. v. Cleveland*, (1899) 94 Fed. 385, *affirmed* *Cleveland v. Cleveland City R. Co.*, (1904) 194 U. S. 517, 24 S. Ct. 756, 48 U. S. (L. ed.) 1102.

A suit to restrain the passage of a municipal ordinance repealing a prior ordinance granting a franchise to a street railroad company, which had been accepted by the company, is one involving the question of the impairment of the obligation of a contract in violation of the constitutional rights of the company, and is within the jurisdiction of a federal court, regardless of the citizenship of the parties. *Missouri, etc., R. Co. v. Olathe*, (1907) 156 Fed. 624.

The formal repudiation by a municipality of its contract with a waterworks company, and its refusal to perform its obligations under it, cannot give rise to a suit under the Federal Constitution, of which a Federal Circuit Court can take jurisdiction without reference to the citizenship of the parties. *Dawson v. Columbia Ave. Sav. Fund, etc., Co.*, (1905) 197 U. S. 178, 25 S. Ct. 420, 49 U. S. (L. ed.) 713.

Jurisdiction of a federal Circuit Court of a suit to enjoin the enforcement of a municipal ordinance reducing street railway rates cannot be defeated on the theory that a lack of delegated power to adopt the ordinance withdrew from the case any question as to the impairment of contract obligations, where the municipality's defense is that certain other ordinances asserted as contracts did not deprive it of its continued power to ex-



ert authority over such rates, because the state law prevented it from abrogating, by subsequent contracts, the right of regulation expressly reserved in a prior ordinance. *Cleveland v. Cleveland City R. Co.*, (1904) 194 U. S. 517, 24 S. Ct. 756, 48 U. S. (L. ed.) 1102; *Cleveland v. Cleveland Electric R. Co.*, (1904) 194 U. S. 538, 24 S. Ct. 764, 48 U. S. (L. ed.) 1109.

A case arising under the Constitution of the United States, of which a federal Circuit Court has original jurisdiction without regard to the citizenship of the parties, is made by a bill filed by a water company to restrain the municipal construction of a waterworks system on the ground that it had a contract with the municipality giving it exclusive privileges, the obligations of which, it insists, would be impaired by the establishment of municipal waterworks under the authority of subsequent legislation. *Knoxville Water Co. v. Knoxville*, (1906) 200 U. S. 22, 26 S. Ct. 224, 50 U. S. (L. ed.) 353.

A municipal ordinance legislative in character, in the exercise of delegated authority to make laws which the legislature might have made, has the force of a state law within the contract clause of the constitution, and, where such ordinance impairs the obligation of a prior contract made by the city, a suit to enjoin its enforcement involves a question arising under the Constitution of the United States, of which the federal courts have jurisdiction, where the requisite amount is involved, without regard to the citizenship of the parties. *Nelson v. Murfreesboro*, (1909) 179 Fed. 905.

A suit to enjoin municipal officers from violating its contract with a drainage company presents no federal question as to impairment of contract obligations or taking of property without due process of law. *Shawnee Sewerage, etc., Co. v. Stearns*, (1911) 220 U. S. 402, 31 S. Ct. 482, 55 U. S. (L. ed.) 544.

A resolution of a city council, ordering a railroad company to open and put in condition for public travel a street through its station yards, previously vacated by an ordinance which constituted a contract with the company, where disobedience of such order subjected the railroad company to a penalty under the laws of the state, is a legislative act which impairs the obligation of the contract and entitles the company to relief by injunction in a federal court of equity. *Atchison, etc., R. Co. v. Shawnee*, (C. C. A. 1910) 183 Fed. 85.

A federal court is without jurisdiction of a suit to enjoin the enforcement of a municipal ordinance, on the ground that it impairs the obligation of a contract or deprives complainant of property without due process of law, in violation of the Constitution of the United States, when the bill alleges that no power had been granted to the municipality by the constitution or legislature of the state to pass such ordinance; the prohibition of the Federal Constitution being against state action only. *Louisville v. Cumberland Telephone, etc., Co.* (C. C. A. 1907) 155 Fed. 725, 12 Ann. Cas. 500.

A federal court has jurisdiction of a suit by a landowner to restrain revenue officers of a state from prosecuting proceedings expressly based on a state statute to enforce the collection of taxes against such lands, on the ground that such statute as applied to complainant's lands impairs the obligation of a contract with the state exempting such lands from taxation. *University of the South v. Jetton*, (1907) 155 Fed. 182.

A case arising under the Federal Constitution, of which a federal Circuit Court has jurisdiction without diversity of citizenship, is presented by a bill which alleges a contract exemption from taxation which the state is, by subsequent legislation, attempting to destroy. *Jetton v. University of the South*, (1908) 208 U. S. 489, 28 S. Ct. 375, 52 U. S. (L. ed.) 584.

A bill by a stockholder in a banking corporation to enjoin the acceptance by the bank of the provisions of the state bank guaranty law, on the ground that such Act is unconstitutional, as impairing the obligation of the contracts of complainant and others as stockholders, by taking their property for the payment of debts which neither they nor the bank have contracted, presents a controversy arising under the constitution, which is within the jurisdiction of a federal court, regardless of the citizenship of the parties. *Larabee v. Dolley*, (1909) 175 Fed. 365.

A controversy arising under the Federal Constitution, of which a federal Circuit Court has original jurisdiction without regard to the citizenship of the parties, is presented by a bill which asserts that the obligation of a contract for the exclusive privilege of supplying water to a city and its inhabitants is impaired by a subsequent municipal ordinance and a legislative enactment under which the municipality is proceeding to issue and market its bonds for the purpose of constructing its own waterworks system. *Mercantile Trust, etc., Co. v. Columbus*, (1906) 203 U. S. 311, 27 S. Ct. 83, 51 U. S. (L. ed.) 198.

The trustee in a mortgage given by a corporation to secure its bonds may maintain a suit in a federal court to protect rights arising out of contracts pledged by the mortgage from impairment by legislation of the state or by its authority regardless of the citizenship of the mortgagor. *Denver v. New York Trust Co.*, (C. C. A. 1911) 187 Fed. 890.

A suit by a street railway company claiming in good faith to have a contract with a city giving it a perpetual right to operate its cars in the streets of the city, to enjoin the city from impairing such contract by enforcing an enactment of its council treating the company as a trespasser and requiring the removal of its tracks from the streets, is a suit arising under the Constitution of the United States, of which a federal court has jurisdiction regardless of the citizenship of the parties. *Des Moines City R. Co. v. Des Moines*, (1907) 151 Fed. 854.

A bill alleging that complainant leased a certain oyster bed from the state for a term of years pursuant to a state law, and planted the same, but that by a subsequent act of

the legislature the state undertook to transfer the property in such beds to the owners of the adjacent land, and that defendant, claiming under such law, has excluded complainant from said leased property, and which seeks injunctive relief, states a case which presents a constitutional question of the impairment of a contract by the state, and is within the jurisdiction of a federal court. *Green v. Oemler*, (1907) 161 Fed. 936.

A federal Circuit Court has jurisdiction to compel an interstate carrier to specifically perform a contract to issue free passes to complainants during their natural lives, which the carrier had refused to do because of the provisions of the Act of June 29, 1906, 34 Stat. L. 584, ch. 3591, 1909 Supp. Fed. Stat. Annot. 255, prohibiting a carrier from issuing free interstate transportation, complainants having alleged that the value to each of them of the right sought to be enforced exceeded \$2,000, exclusive of interest and costs. *Mottley v. Louisville, etc., R. Co.*, (1907) 150 Fed. 406.

Where two canal companies constructed irrigation ditches appropriating water from the Arkansas river, and the second to commence the work first recorded its plat, in compliance with a local statute, which, under said Act, gave it priority of right; but in subsequent litigation between the parties the Supreme Court of the state held such Act to be unconstitutional and void, it was held that the compliance with said Act by the second company, while it was recognized as the law of the state, did not give such company any contract rights with the state, or under the laws of the United States, which entitled it or the owner of a water right thereunder to invoke the jurisdiction of a federal court on the ground that it had a vested contract right to priority in the use of the water of the river, which was impaired by the state decision. *Mohl v. Lamar Canal Co.*, (1904) 128 Fed. 776.

**Equal protection of law.**—The provisions of the Fourteenth Constitutional Amendment, securing personal rights, are directed against the states and their agencies, and not against the acts of private individuals, which give no right of action in the federal courts on the ground that a constitutional question is involved. *Marten v. Holbrook*, (1907) 157 Fed. 716.

The assessment by a state board of the property of a railroad company at a higher percentage of its actual value than property of other leases is assessed, in violation of a provision of the state constitution requiring uniform taxation of all classes of property, without statutory authority and contrary to the law of the state as declared by its Supreme Court, is not an act of the state within the meaning of the provision of the Fourteenth Constitutional Amendment, prohibiting a state from denying to any person the equal protection of the laws; and the jurisdiction of a federal court cannot be invoked for redress on the ground that the action of the board is a violation of such provision, the remedy of the company being in the state

courts. *St. Louis, etc., R. Co. v. Davis*, (1904) 132 Fed. 629.

Inequality in valuation for taxation of a franchise, as compared with other taxable property, must be systematic and intentional in order to justify a federal court in enjoining the apportionment and certification of the tax to the several counties, where the assessment does not appear to have been made on such a different scale of values from that adopted elsewhere as to deny the equal protection of the laws guaranteed by Const. U. S. Amend. 14, which was the only ground invoked to sustain the federal jurisdiction. *Coulter v. Louisville, etc., R. Co.*, (1905) 196 U. S. 590, 25 S. Ct. 342, 49 U. S. (L. ed.) 615, reversing (1903) 131 Fed. 232.

Where the jurisdiction of a federal court has been properly invoked for relief against assessments as discriminating against complainant, and depriving it of the equal protection of the laws, in violation of the Fourteenth Constitutional Amendment, although such federal question is determined against complainant, the bill may be retained for the decision of other questions arising on the record. *Michigan R. Tax Cases*, (1905) 138 Fed. 223, affirmed (1906) 201 U. S. 245, 26 S. Ct. 459, 50 U. S. (L. ed.) 744.

A state constitution which makes the governor the commander-in-chief of the militia of the state, and authorizes him to call out the militia to execute the laws, suppress insurrection, and repel invasion, and a statute of the same state, which provides more in detail for the exercise of such power, are not in conflict with the Fourteenth Amendment to the Federal Constitution, as authorizing any action in violation of personal rights, but are clearly within the powers of the state; and to give a federal court jurisdiction of an action against officers of the state to recover damages for acts done as claimed under authority of such provisions, as in violation of constitutional rights, defendants must be alleged to have been guilty of a wanton abuse of the power thereby conferred. *Moyer v. Peabody*, (1906) 148 Fed. 870.

The Fourteenth and Fifteenth Amendments of the Federal Constitution are limitations on the states and do not confer primary rights enforceable by a person of color in the first instance in the federal courts. *Brawner v. Irvin*, (1909) 169 Fed. 964.

**Suit against federal receiver.**—It is well settled by authority that a suit against a receiver does not arise under the laws of the United States merely from the fact that such receiver was appointed by a federal court. *Wrightsville Hardware Co. v. Hardware, etc., Mfg. Co.*, (1910) 180 Fed. 586, 588. See also *Rural Home Telephone Co. v. Powers*, (1910) 176 Fed. 986.

A petition against a railroad company in the possession of a receiver appointed by the federal court, to quiet plaintiff's title or to declare a forfeiture in his favor to certain realty, color of title to which is vested in the railroad company, and the legal custody of which without any other title or interest is held by the receiver, presents no federal question for the reason that, in such case,

the title was in the railroad company if not forfeited, and in plaintiff if it was forfeited, and was not in the receiver. *Monnett v. Columbus, etc., R. Co.*, (1904) 26 Ohio Cir. Ct. Rep. 469.

A petition against a railroad company in the possession of a receiver under appointment of a federal court, for the cancellation of certain writings alleged to have been fraudulently obtained from plaintiff by the receiver, involves no federal question. *Monnett v. Columbus, etc., R. Co.*, (1904) 26 Ohio Cir. Ct. Rep. 469.

**Suits relating to copyright.**—Where, in a suit in the federal courts to restrain the sale of complainants' copyrighted publications at less than regular prices, there was neither diversity of citizenship nor claim for damages in the sum of \$2,000, questions not arising out of the copyright law cannot be considered. *Scribner v. Straus*, (1906) 147 Fed. 28, 78 C. C. A. 122, *affirmed* (1905) 139 Fed. 193.

But a suit, the primary object of which is to enforce a right secured by the copyright laws which is being infringed by defendant, is a suit under those laws and within the jurisdiction of the federal Circuit Court, though it incidentally draws in question the validity and effect of the contract through which complainant derives title. *Wooster v. Crane*, (1906) 147 Fed. 515, 77 C. C. A. 211. And see also the title *COPYRIGHT*, *ante*, p. 932.

**Suits relating to trademarks.**—In a suit between citizens of the same state for infringement of a trademark, the federal court has no jurisdiction of an issue of alleged unfair competition; its jurisdiction being confined to the trademark as registered. *A. Leachen, etc., Rope Co. v. Broderick, etc., Rope Co.*, (1904) 134 Fed. 571, 67 C. C. A. 418, *affirmed* (1906) 201 U. S. 166, 26 S. Ct. 425, 50 U. S. (L. ed.) 710; *Thaddeus Davids Co. v. Davids*, (1908) 165 Fed. 792; *National Casket Co. v. New York, etc., Casket Co.*, (1911) 185 Fed. 533. See also the title *TRADEMARKS*, *post*.

But a bill may be maintained in the federal Circuit Court to restrain the infringement of a common-law trademark where other jurisdictional facts are present. *Capewell Horse Nail Co. v. Mooney*, (C. C. A. 1909) 172 Fed. 326, *affirming* 167 Fed. 575.

A federal court has jurisdiction of a suit between citizens of different states to enjoin infringement of a trademark, though the actual value of the trademark is not alleged, and it is not averred that it will be destroyed by defendant's unlawful use. *Griggs v. Erie Preserving Co.*, (1904) 131 Fed. 359.

Where, owing to noncompliance with Act March 3, 1881, ch. 138, 21 Stat. L. 502, 7 Fed. Stat. Annot. 329, the registration of a valid trademark is void, the trademark is not thereby nullified, but still retains the properties of a common-law trademark, and for its infringement suit may be brought in the federal court, if the requisite diversity of citizenship exists and the requisite judicial amount is involved. *Edison v. Thomas A. Edison, Jr. Chemical Co.*, (1904) 128 Fed. 1013. See also *A. B. Andrews Co. v. Punc-*

*ture Proof Footwear Co.*, (1909) 168 Fed. 762.

Unfair competition in trade is not a federal question, and a suit therefor is not within the jurisdiction of a federal court, where the parties are citizens of the same state, nor is that issue drawn within such jurisdiction because the bill also alleges infringement of a patent growing out of the same acts of defendant. *Mecky v. Grabowski*, (1910) 177 Fed. 591.

**National banks.**—As to suits by or against national banks, see the title *NATIONAL BANKS*, *post*.

**Interstate commerce.**—Jurisdiction of all actions brought under the remedial sections of the Interstate Commerce Act to enforce its provisions lies exclusively in the federal courts. *Pittsburgh, etc., R. Co. v. Wood*, (Ind. 1908) 84 N. E. 1009. And see the title *INTERSTATE COMMERCE*, *ante*, p. 1172.

**Suit on government contractor's bond.**—An action by the United States on relation of a materialman against a government contractor and a surety, to recover on the contractor's bond to the government for materials furnished to enable him to perform the contract, constituted a case arising under the Constitution or laws of the United States, and was therefore within the jurisdiction of the federal courts. *U. S. v. Axman*, (1906) 152 Fed. 816.

**Suits relating to federal elections.**—An action to recover damages from state election officers for their asserted wrongful refusal to permit the plaintiff to vote for a member of the House of Representatives, at a national election held in the district where he resided, is one arising under the Constitution of the United States, of which a Circuit Court of the United States has jurisdiction. *Knight v. Shelton*, (1905) 134 Fed. 423; *Brickhouse v. Brooks*, (1908) 165 Fed. 534.

**Suits relating to rights in navigable waters.**—Where a river within a state was navigable for some distance from its mouth, and was actually navigated by small steamboats and river craft for the purpose of carrying up groceries, supplies, clothing, loggers' tools, etc., to the head of navigation, and returning with farmers' products, a bill was maintainable in the federal courts to restrain a boom company from maintaining a boom in the river in such a manner as to be an obstruction to navigation, though the river was chiefly valuable for floating logs, and there was no proof of actual carriage of goods on the river in interstate commerce. *U. S. v. Wishkah Boom Co.*, (1905) 136 Fed. 42, 68 C. C. A. 592.

**Claims under land grants and mining claims.**—Where complainant, a Washington railroad company, had complied with all the provisions of Act Cong. March 3, 1875, ch. 152, sec. 1, 18 Stat. L. 482, 6 Fed. Stat. Annot. 501, conferring on railroad companies duly organized, etc., a right of way over the public lands of the United States, sought to restrain defendant railroad company, also incorporated under the laws of Washington, from trespassing on complainant's alleged right of way over public lands along the

north bank of the Columbia river, on which complainant alleged it intended to construct its railroad in the future, the jurisdiction of the federal court was sustainable on the ground that the case involved the construction of such federal statute. *Wallula Pac. R. Co. v. Portland, etc., R. Co.*, (1906) 154 Fed. 902.

The contention that rights below the high-water mark of navigable nontidal waters can be asserted by the patentees from the United States as appurtenant to the uplands conveyed to them, as against the title of the state when subsequently admitted into the Union, is too clearly unfounded, in view of the prior decisions of the federal Supreme Court, to raise a federal question within the original jurisdiction of a federal Circuit Court. *McGilvra v. Ross*, (1909) 215 U. S. 70, 30 S. Ct. 27, 54 U. S. (L. ed.) 95.

Averments that patentees from the United States, whose titles were derived from Spain and Mexico by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners, were deprived of their property without due process of law, and allegations that their contract obligations were impaired, by certain enumerated California statutes and charters of the city of Los Angeles, which conferred upon the city only such rights in respect to the waters of a river as may have been vested in the state, afford no proper basis for the jurisdiction of the federal Circuit Court, as of a case arising under the Federal Constitution. *Devine v. Los Angeles*, (1906) 202 U. S. 313, 26 S. Ct. 652, 50 U. S. (L. ed.) 1046.

The petition in an action of ejectment does not present a case arising under the laws of the United States of which a federal Circuit Court has jurisdiction without diversity of citizenship because it states that there is a dispute between the parties over the construction of the patent from the United States and several Acts of Congress set out as the source of plaintiff's title, where its averments show that the real controversy is over the claim of plaintiff that he is entitled to the land formed by accretion, since the patent was issued, and after the statutes were passed. *Joy v. St. Louis*, (1906) 201 U. S. 332, 26 S. Ct. 478, 50 U. S. (L. ed.) 776.

Since the only statute recognizing the right of an entryman to settle on unsurveyed lands of the United States is Act May 14, 1880, ch. 89, 21 Stat. L. 140, 6 Fed. Stat. Annot. 300, 301, providing that a homestead settler on public land surveyed or unsurveyed shall be allowed the same time to file his application and perfect his original entry as is allowed to settlers under the pre-emption laws, a suit by a homestead settler on unsurveyed public land to protect his possessory right as against an adverse claimant does not involve a construction of the laws of the United States so as to sustain federal jurisdiction on that ground. *Earnhart v. Switzler*, (C. C. A. 1910) 179 Fed. 832. See also *Hare v. Birkenfield*, (C. C. A. 1910) 181 Fed. 825.

A suit brought under R. S. sec. 2326, 5 Fed. Stat. Annot. 35, in support of an ad-

verse claim to mining ground, is not necessarily one of federal cognizance, but the jurisdiction of a federal court is dependent on diversity of citizenship. *Willitt v. Baker*, (1904) 133 Fed. 937.

**Suit arising under treaty.**—Allegations in a bill to quiet title, framed under Code Civ. Proc. Cal., sec. 738, that defendant's adverse claims are based upon an erroneous construction of Treaty of Guadalupe Hidalgo (9 Stat. L. 922), and Act Cong. March 3, 1851, ch. 41, 9 Stat. L. 631, and upon certain enumerated acts of the California legislature, and ordinances and charters of the city of Los Angeles, adopted and approved in pursuance of such construction, do not present a case arising under the Federal Constitution, laws, or treaties, of which a federal Circuit Court has jurisdiction without diversity of citizenship. *Devine v. Los Angeles*, (1906) 202 U. S. 313, 26 S. Ct. 652, 50 U. S. (L. ed.) 1046.

An action in ejectment to recover land claimed under a Spanish grant, protected by the Louisiana Purchase treaty and subsequent confirmatory Acts of Congress, does not involve the effect or validity of a treaty or law of the United States to confer jurisdiction on a federal court on that ground, where it appears from the petition that plaintiff's rights depend solely upon questions of fact as to whether the land in suit was within the boundaries of the original grant, or was occupied by his grantors at the time necessary to bring it within the provisions of the confirmatory acts. *Joy v. St. Louis*, (1903) 122 Fed. 524.

#### V. SUITS BY UNITED STATES.

A Circuit Court of the United States has jurisdiction of any suit in which the United States properly appears as plaintiff. *U. S. v. Allen*, (1909) 171 Fed. 907; *U. S. v. Comet Oil, etc., Co.*, (1911) 187 Fed. 674.

The United States is the real, and not merely nominal, plaintiff, so as to sustain the original jurisdiction of a federal Circuit Court without regard to the amount in dispute, in a suit authorized by the Act of Aug. 13, 1894, 28 Stat. L. 279, sec. 5, ch. 282, 6 Fed. Stat. Annot. 125, to be brought in its name, for the use and benefit of a materialman, upon the bond of a contractor for a public work, which the statute requires shall contain the specific special obligation directly to the United States that the contractor will promptly make payments to all persons supplying him labor and materials in the prosecution of the work. *U. S. Fidelity, etc., Co. v. U. S.*, (1907) 204 U. S. 349, 27 S. Ct. 381, 51 U. S. (L. ed.) 516, *affirming* (1904) 132 Fed. 82, and apparently overruling *U. S. v. Henderlong*, (1900) 102 Fed. 2; *U. S. v. Sheridan*, (1902) 119 Fed. 236; *U. S. v. Barrett*, (1905) 135 Fed. 189; *Burrell v. U. S.*, (1906) 147 Fed. 44, 77 C. C. A. 308.

#### VI. DIVERSE CITIZENSHIP.

**In general.**—A federal court has no jurisdiction of a suit between two citizens of the same state on a cause of action arising within the state and under its laws, *Shohoney*

*v. Quincy, etc., R. Co.,* (1909) 223 Mo. 649, 122 S. W. 1025.

Whenever the citizens of a state can secure trial of their controversies by its courts of general jurisdiction, the citizens of different states may obtain the trial of like controversies between them by appropriate action in the federal courts. *Barber Asphalt Paving Co. v. Morris,* (1904) 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761.

The motive with which a creditor invokes the jurisdiction of a federal Circuit Court is immaterial if he has a justifiable demand and the requisite diversity of citizenship exists. *Blair v. Chicago,* (1906) 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. ed.) 801, reversing (1904) 132 Fed. 848.

Where a mortgage was given to secure a prior indebtedness from the mortgagor to the mortgagee, who were citizens of different states, the jurisdiction of a federal court of a suit to foreclose the mortgage is not affected by the fact that it also secured other indebtedness owing by the mortgagor to a third person, who was a citizen of the same state, which had been assigned to the mortgagee. *Peacock, etc., Co. v. Thaggard,* (1904) 128 Fed. 1005, affirmed 129 Fed. 1005, 64 C. C. A. 490.

**State citizenship — Generally.** — While a domicile once acquired by intention and acts may be held by intention alone, so far as relates to citizenship necessary to support the jurisdiction of a federal court, to constitute a change of domicile which will confer such jurisdiction, the intention must be supported by such acts as are consistent with the change, and not contradictory of it. *Davis v. Dixon,* (1910) 184 Fed. 509. See also *Howe v. Howe, etc., Ball Bearing Co.,* (1907) 154 Fed. 820, 83 C. C. A. 536; *Hill v. Walker,* (C. C. A. 1909) 167 Fed. 241; *Laws v. Fleming,* (1910) 177 Fed. 450.

A plaintiff who had for many years been a resident of a city in Pennsylvania became, some two years before the commencement of his suit, the superintendent of a company engaged in drilling oil wells, which required his presence the greater part of the time at the place where the company was at work. A year later, the most of the wells on which it was then engaged being in the vicinity of a town across the river in Ohio, sixteen miles from his residence, he established his headquarters there, hiring a room in a hotel, where he stayed through the week. His family, consisting of a wife and son, remained in Pennsylvania, where his wife built a residence, and he usually spent Sundays there. He was in the directory there as a resident, paid taxes there, and voted there when he last voted. It was held that notwithstanding his testimony that he was a resident of Ohio and although he might have intended to remove to the Ohio town, he was in fact still a resident and citizen of Pennsylvania, and could not maintain a suit in a federal court against another citizen of that state. *Harton v. Howley,* (1907) 155 Fed. 491.

Affidavits presented to a federal court on a motion to dismiss a suit for want of jurisdiction were considered, and the facts shown

held insufficient to sustain the burden resting upon the complainant to prove his alleged citizenship of the state of Washington, where it was shown that he left that state some two and one-half years prior to the commencement of the suit, and thereafter resided continuously in South Dakota, where the suit was brought, and that at about the time of its commencement he described himself in conveyances as a resident of the latter state; his own testimony being that he was unmarried, that he owned a house in Washington, and that at all times since leaving he claimed his residence there, and intended to return there after the conclusion of certain litigation and the disposal of property owned by him in South Dakota. *Jones v. Subera,* (1907) 150 Fed. 462.

The testimony of a plaintiff that he was at "home" in a certain town and that he lived there is sufficient proof of his citizenship in the state in which such town is situated to sustain the jurisdiction of a federal court in a suit against a corporation of another state, although the averment of citizenship in his declaration is defective. *Baltimore, etc., R. Co. v. Davis,* (1906) 149 Fed. 191, 79 C. C. A. 139.

Where plaintiff brought suit in a federal court sitting in Nevada, against citizens of that state, and alleged that he was a resident of California, and testified that he had left California and gone to Nevada for his health, but intended to return, and considered California as his home, it was held that such testimony was sufficient to establish diverse citizenship in the absence of proof to the contrary. *Eisele v. Oddie,* (1904) 128 Fed. 941.

**Stockholders.** — The presumption that the stockholders of a corporation are citizens of the state which created it does not preclude them from asserting their actual citizenship to sustain the jurisdiction of a federal Circuit Court of a suit brought by them as such stockholders. *Doctor v. Harrington,* (1905) 196 U. S. 579, 25 S. Ct. 355, 49 U. S. (L. ed.) 606.

Where the question is as to the citizenship of an individual as determining his right to maintain an action in a federal court, the fact that he is president of a corporation creates no legal presumption that he is a citizen of the same state as the corporation, the presumption that the members of a corporation are citizens of the state in which it is incorporated being indulged only for the purpose of fixing the status of the corporation as a litigant in such courts. *Utah-Nevada Co. v. De Lamar,* (1904) 133 Fed. 113, 66 C. C. A. 179.

**Domicile of married woman.** — Where, in a suit in the federal courts, one of the plaintiffs was a married woman whose husband, for more than three years prior to the institution of the action and at the time thereof, was a resident and citizen of the state of Nevada, it was held that the wife's domicile for the purpose of jurisdiction was also there, though she in fact resided during such time in another state. *Thompson v. Stalman,* (1905) 139 Fed. 93.

**Citizens of territories.**—Diversity of citizenship between citizens of different states is indispensable to the jurisdiction of a federal court on that ground, and a controversy between a citizen of a state and a citizen of a territory will not confer jurisdiction. *McClelland v. McKane*, (1907) 154 Fed. 164; *Maxwell v. Federal Gold, etc., Co.*, (C. C. A. 1907) 155 Fed. 110; *Clark v. Southern Pac. Co.*, (1909) 175 Fed. 122.

**Citizenship of corporation.**—A corporation cannot be considered a citizen, inhabitant, or resident of a state in which it has not been incorporated for the purpose of determining federal jurisdiction. *Fribourg v. Pullman Co.*, (1910) 176 Fed. 981.

It is settled law that for purposes of the jurisdiction of a federal court a corporation is a citizen only of the state in which it is incorporated; and, where it is doing business and has an established office in another state, such fact does not affect its citizenship, but it may be there sued in such court by a citizen of the state residing in the district. *Haight, etc., Co. v. Weiss*, (C. C. A. 1907) 156 Fed. 328.

Incorporators under a charter which declares that they "are hereby created a body politic and corporate" become a corporation under the laws of Mississippi for the purpose of suing and being sued in the federal courts as a citizen of that state upon the approval of such charter by the governor, and the certification of such approval by the secretary of state, under the great seal of the state, although there has been no compliance with the subsequent provision of the charter conferring the power to commence business when a certain proportion of the capital stock shall be subscribed and paid for. *W. L. Wells Co. v. Gastonia Cotton Mfg. Co.*, (1905) 198 U. S. 177, 25 S. Ct. 640, 49 U. S. (L. ed.) 1003.

A corporation incorporated in several states, including the one in which suit is brought against it, must be regarded as a citizen of the latter state for the purpose of determining the jurisdiction of a federal court. *Lake Shore, etc., R. Co. v. Eder*, (C. C. A. 1909) 174 Fed. 944.

The Boston & Maine Railroad, a corporation originally chartered in New Hampshire, but subsequently, by consolidation, also made a corporation of both Massachusetts and Maine, is a citizen of New Hampshire in such sense that the Circuit Court of the United States in that state is without jurisdiction of an action against it by another citizen of New Hampshire on the ground of diversity of citizenship. *Goodwin v. Boston, etc., R. Co.*, (1904) 127 Fed. 986.

But it has been held that a railroad corporation of Virginia which owned and operated railroads in that and other states, including South Carolina, by taking out a charter in the latter state, as required by its laws, did not thereby become a citizen of South Carolina for the purposes of the jurisdiction of federal courts, but remained for such purposes a corporation and citizen of Virginia. *Atlantic Coast Line R. Co. v. Dunning*, (C. C. A. 1908) 166 Fed. 850.

**Incorporation for purposes of conferring jurisdiction.**—Incorporation in Nevada by direction of a California corporation, for the sole purpose of having the matters in dispute between such California corporation and another corporation of that state determined in a federal rather than in the state court, where they were pending and undetermined, must be regarded as an attempt collusively to make a party plaintiff simply for the purpose of creating a case cognizable by the federal court, which, under the Act of March 3, 1875 (18 Stat. L. 470, 472, ch. 137, sec. 5), requires the dismissal of the suit, where the new corporation assumes to be the owner of the property rights which the old company has asserted only that it may have a standing in the federal court as a litigant in respect of those rights, and the old corporation can control the conduct of the suit brought by the new corporation at any time up to the date of the decree, and can require the new corporation, in the event of a decree in its favor, to transfer the benefit of such decree to the old corporation without any new or valuable consideration. *Miller v. East Side Canal, etc., Co.*, (1908) 211 U. S. 293, 29 S. Ct. 111, 53 U. S. (L. ed.) 189.

In *Percy Summer Club v. Astle*, (C. C. A. 1908) 163 Fed. 1, it was held that the formation of a corporation under the laws of New Jersey to take over property in New Hampshire from a corporation of that state having the same name and composed largely of the same persons was not so clearly for the purpose of enabling it to invoke the jurisdiction of the federal courts as to defeat such jurisdiction on the ground of fraud.

A foreign corporation does not become a citizen of another state so far as to affect the jurisdiction of the federal courts upon the question of diverse citizenship, by complying with the local laws thereof which declare that such a corporation becomes a domestic corporation by filing with the secretary of state duly authenticated copies of its charter and by-laws. *Southern R. Co. v. Allison*, (1903) 190 U. S. 326, 23 S. Ct. 713, 47 U. S. (L. ed.) 1078; *St. Louis, etc., R. Co. v. Cross*, (1909) 171 Fed. 480.

**Change of domicile.**—A change of citizenship, although for the purpose of acquiring a right to sue in a federal court, is not unlawful and does not deprive the court of jurisdiction if there is an actual *bona fide* change with the intention of remaining in the new domicile. *Wiener v. Louisville Water Co.*, (1903) 180 Fed. 244; *Davis v. Dixon*, (1910) 184 Fed. 509. And see cases cited under catchline *State Citizenship*, p. 1251, *supra*.

**Transfer of interest in subject-matter as conformity of citizenship.**—Where, pending a suit in a federal court, the jurisdiction of which depended on diversity of citizenship, complainant transferred his interest in the subject-matter to a corporation of the same citizenship as the defendant, the federal court no longer had jurisdiction, and could not proceed to a decree. *Pittsburgh, etc., R. Co. v. Fiske*, (C. C. A. 1910) 178 Fed. 66.

**Nature of suit.**—Where several policies of insurance were assigned after loss, and the

assignee brought separate suits in the state court against all of the insurers, who were all citizens of states other than that in which the assignee resided, and some of the suits were removed to the federal court, but others were not removable, by reason of the insufficiency of the amount involved, whereupon one of the insurers filed a bill to restrain the suits at law, and to compel an adjustment of the liability of the various insurers in equity, it was held that the controversy alleged in such bill was between the various insurance companies and the assignee of the policies; and hence the bill was maintainable as an original bill. *Rochester German Ins. Co. v. Schmidt*, (1904) 126 Fed. 908.

Where the defendant was sued on account of a patent sold by defendant to complainant but wrongfully assigned by defendant to a co-defendant, having been a director and a salaried officer of complainant at the time he assigned the patent, he was also chargeable as trustee regardless of the written assignment; and, diverse citizenship appearing, it was held that the suit was maintainable in a federal court to require an accounting and to compel a transfer of the patent. *Prest-O-Lite Co. v. Avery Portable Lighting Co.*, (1908) 164 Fed. 60.

If a cross-bill in a federal court assumes the character of an original bill, it will be dismissed for want of jurisdiction, where the parties to the controversy presented thereby are citizens of the same state. *Patton v. Marshall*, (C. C. A. 1909) 173 Fed. 350.

Where federal jurisdiction in a suit by a stockholder was sustainable on the theory that it involved a controversy between citizens of different states, the bill is not demurrable because the controversy was not one arising under the Constitution or laws of the United States. *Howard v. National Telephone Co.*, (1910) 182 Fed. 215.

**Arrangement of parties as to adverse interests.**—Prior to the Judiciary Act of 1875, in determining the question of jurisdiction, based on diversity of citizenship, the rights of the parties with respect to jurisdiction based upon a diversity of citizenship were determined solely according to the position they occupied as complainants or defendants on the face of the pleadings. Under the new law, the mere form of the pleadings may be put aside, and the parties placed upon different sides of the matter in dispute, according to the facts. *Stephens v. Smartt*, (1909) 172 Fed. 466; *Stewart v. Mitchell*, (1909) 172 Fed. 905, 909.

In determining the question of federal jurisdiction, where it depends solely on adverse citizenship, it is the duty of the court to arrange the parties on the one side or the other according to their interests or the facts, regardless of the places they occupy in the pleadings as plaintiffs or defendants. *Gage v. Riverside Trust Co.*, (1906) 156 Fed. 1002; *Mann v. Gaddie*, (C. C. A. 1907) 158 Fed. 42; *Stephens v. Smartt*, (1909) 172 Fed. 466; *Stewart v. Mitchell*, (1909) 172 Fed. 905, 909; *Allen-West Commission Co. v. Brashear*, (1910) 176 Fed. 119; *Federal Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co.*, (1909) 187 Fed. 474.

If such arrangement defeats the jurisdiction, the bill will be dismissed. *Mann v. Gaddie*, (C. C. A. 1907) 158 Fed. 42; *Allen-West Commission Co. v. Brashear*, (1910) 176 Fed. 119.

A controversy between two factions in a local church, each having a pastor and a governing board of elders all of whom are citizens of the same state, and each claiming the exclusive right to control and use the church building and property, cannot be brought by members of one faction who are citizens of other states against the pastor and elders of both factions but asking relief against one side only by injunction to restrain them from interfering with their co-defendants in the use and occupation of the property. In such case, the defendants who belong to the same faction as complainants are not merely formal parties, but the real controversy is between them and their co-defendants and requires that they be considered as complainants for the purpose of determining the court's jurisdiction. *Stewart v. Mitchell*, (1909) 172 Fed. 905.

In a suit in equity instituted by a stockholder in his own name, but upon a right of action in his corporation, such corporation is an indispensable party, and, for the purpose of determining the jurisdiction of a federal court, will be aligned with the defendants whenever the officers or persons controlling it are shown to be opposed to the object sought by the complaining stockholder, and when such opposition does not appear it will be aligned with the complainant. *Groel v. United Electric Co.*, (1904) 132 Fed. 252; *Kelly v. Mississippi River Coaling Co.*, (1909) 175 Fed. 482. See also *Waller v. Coler*, (1903) 125 Fed. 821.

But the fact that the ultimate interest of a corporate defendant may be the same as that of the complaining stockholders does not require, in arranging the parties to a cause for the purpose of determining the jurisdiction of a federal Circuit Court, invoked on the ground of diversity of citizenship, that such corporation be grouped on the side of complainants, where the bill alleges that the corporation is under a control antagonistic to complainants, and is made to act in a way detrimental to their rights. *Doctor v. Harrington*, (1905) 196 U. S. 579, 25 S. Ct. 355, 49 U. S. (L. ed.) 606; *Howard v. National Telephone Co.*, (1910) 182 Fed. 215.

The corporate defendant and the complaining stockholder will not be aligned on the same side of the controversy for the purpose of determining the jurisdiction of a federal Circuit Court, invoked on the ground of diverse citizenship, because it may be for the financial interests of the corporation that the suit shall succeed, where the corporation unites with the other defendant in resisting the claim of illegality and fraud, and both are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. *Venner v. Great Northern R. Co.*, (1908) 209 U. S. 24, 28 S. Ct. 328, 52 U. S. (L. ed.) 666.

Equity rule 94, prescribing the requisites of a bill by a stockholder to enforce rights

of the corporation, was adopted for the purpose of preventing collusive suits in the federal courts of which they would not otherwise have jurisdiction, and, except in the requirement that the bill be verified by oath, such rule adds nothing to what was previously substantially required by correct pleading. It in no way affects the rule that, in determining federal jurisdiction in such suits, the corporation is to be aligned with the complainant or the defendants, according to the facts. *Groel v. United Electric Co.*, (1904) 132 Fed. 252.

In a stockholders' suit in a federal court to remove an alleged fraudulent lien from the property of the corporation, where the complainant has not complied with equity rule 94, the corporation will be aligned on the side of the complainant. *Gage v. Riverside Trust Co.*, (1906) 156 Fed. 1002.

In a suit by a stockholder of a corporation of the same state against such corporation and a foreign corporation to charge the latter as trustee because of acts which as majority stockholder it caused the former to do in fraud of its other stockholders, the domestic corporation is not a party in the same interest as complainant, and cannot be aligned with him for the purpose of giving a federal court jurisdiction on the ground of diversity of citizenship. *Redfield v. Baltimore, etc., R. Co.*, (1903) 124 Fed. 929.

A federal court is without jurisdiction on the ground of diversity of citizenship of a suit for an accounting under a written contract, where the defendants are all citizens of the same state, and one of them is a party to the contract on the same side as complainants, made a defendant only because he refused to join as a complainant. *Menefee v. Frost*, (1903) 123 Fed. 633.

A federal court is without jurisdiction of a suit for the specific performance of a contract in which the complainant owns only a part interest, when the owner of the remaining interest, who is joined as a defendant, is a citizen of the same state as his codefendants, the other parties to the contract. In such case he must be arranged by the court on the side of the complainant in the controversy. *Joseph Dry Goods Co. v. Hecht*, (1903) 120 Fed. 760, 57 C. C. A. 64.

Where there is no controversy between one of the joint vendors in a contract for the sale of lands and the purchaser, but there is a dispute between her and the other vendors as to her share of the purchase money and the amount she should contribute toward clearing the title, and also between such other vendors and the purchaser with respect to taxes, interest, and other matters affecting the amount due under the contract which resulted in a suit by them for specific performance, the said vendor, who refused to join in such suit, was properly made a defendant, and cannot be aligned as a complainant in interest to defeat the jurisdiction of a federal court therein because of the fact that she was a citizen of the same state as the purchaser, although she was necessarily given a decree against him for the share of the purchase money to which the court deter-

mined she was entitled. *Wood v. Deskins*, (1905) 141 Fed. 500, 72 C. C. A. 558.

Where the bill of plaintiff corporation alleged that it was engaged in the business of selling coal and coke; that it had contracts with defendant coal companies by which it was to take and pay for all their product at the mines, to furnish transportation, and to sell the same at prices fixed by the companies, receiving a stipulated sum per ton for its services; that by the terms of such contracts defendant companies were not liable for damages for failing to furnish coal or coke to plaintiff where such failure was caused by strikes; that in reliance on such contracts plaintiff had made contracts for the sale of large quantities of coal and coke, which could only be supplied from the mines of defendant companies; that the latter were prevented from furnishing the same by the wrongful and illegal acts of individual defendants, who were conducting a strike among the miners, and who, by intimidation and threats, prevented others from working in the mines, it was held that the bill showed such an interest in plaintiff as entitled it to maintain the suit in its own right for its protection independently of the coal companies, which, while properly made defendants, could not be aligned with the plaintiff to defeat the jurisdiction of a federal court, their interests, while perhaps not adverse, being based on different rights. *Carroll v. Chesapeake, etc., Coal Agency Co.*, (1903) 124 Fed. 305, 61 C. C. A. 49.

**Actual and nominal parties.**—For purposes of jurisdiction, the federal courts regard the real rather than the nominal party. *Hollenbach v. Elmore, etc., Contracting Co.*, (1909) 174 Fed. 845.

Where plaintiff in a suit in a federal Circuit Court was not the real party in interest, and the declaration did not show the real party's interest or contain proper averments concerning his citizenship, permission will be granted to amend in such respects within ten days. *Klein v. Title Guaranty, etc., Co.*, (1909) 166 Fed. 365.

An objection that plaintiff in a suit in the federal courts was only a nominal party, and that it did not appear that the real party in interest possessed the requisite citizenship to give the court jurisdiction, is a defect which may be remedied by amendment after a trial on the merits by amending the record so as to make it recite that the suit was by plaintiff to the use of the real party in interest, and by inserting proper averments concerning his citizenship. *Baglin v. Title Guaranty, etc., Co.*, (1909) 166 Fed. 356.

Where the real controversy in a suit in a federal court is between citizens of different states who are in court, inability to make service upon another party named by the complainant as a defendant, whose interest is merely ministerial, will not deprive the court of jurisdiction. *Slater Trust Co. v. Randolph-Macon Coal Co.*, (1908) 166 Fed. 171.

Where an action in the name of the United States on a public contractor's bond was brought by a banking corporation having its



banking house in the state of Washington, and the contractor sued was a resident of California, and his surety a corporation organized under the laws of Connecticut, and the amount involved exceeded the sum of \$2,000, the federal jurisdiction existed because of diverse citizenship. *Burrell v. U. S.*, (1906) 147 Fed. 44, 77 C. C. A. 308.

A note made payable to the cashier of a bank as trustee, the consideration for which was furnished by the bank, which was the real owner, may be sued on by the bank in its own name, or by its receiver, without indorsement or assignment, under the statute of Utah, and the citizenship of the cashier is immaterial to affect the jurisdiction of a federal court in that state of an action thereon. *Franklin v. Conrad-Stanford Co.*, (1905) 137 Fed. 737, 70 C. C. A. 171.

The jurisdiction of a federal court will not be permitted to be defeated by either the non-joinder or joinder of mere formal parties against whom no relief is sought, and, if necessary to sustain such jurisdiction, parties who are not indispensable should not be impleaded, and if made defendants they should be dismissed. *Jackson v. Jackson*, (C. C. A. 1909) 175 Fed. 710.

Plaintiff, as widow, brought an action in the state court to recover for the wrongful death of her husband under the California statute, by which she was the only person entitled to receive the proceeds of any recovery. Defendant removed the cause on the ground of diversity of citizenship, and afterward demurred to the complaint on the ground that it did not show that all of the heirs of deceased were parties as required by Code Civ. Pro. Cal., sec. 377. The demurrer was sustained, and plaintiff amended by joining the parents of deceased as defendants, on an allegation that they refused to join as plaintiffs and that they had no interest in the action. They were served with process, but made default. It was held that they were merely formal parties without interest, and that the fact that they were citizens of the same state as plaintiff did not defeat the jurisdiction of the court. *Atchison, etc., R. Co. v. Phillips*, (C. C. A. 1910) 176 Fed. 663.

To a bill in a federal court seeking to establish a trust in favor of complainant corporation in money alleged, in effect, to have been embezzled from it by one of its officers, and deposited by him with defendants, by whom it was still held, such officer is not an indispensable party, but, if joined, is only a formal party, whose presence will not defeat the jurisdiction of the court, although he is a citizen of the same state as complainant; the requisite diversity of citizenship being shown between complainant and the other defendants. *White Swan Mines Co. v. Balliet*, (1905) 134 Fed. 1004.

**Indispensable parties.**—For jurisdictional purposes, federal courts divide parties into formal, necessary, and indispensable parties; indispensable parties being those having an interest in the controversy of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final de-

termination may be wholly inconsistent with equity and good conscience. *Caylor v. Cooper*, (1908) 165 Fed. 757.

All persons who have such an interest in the subject-matter of a suit in a federal court as to render their presence necessary in order to make the final decree effectual are indispensable parties, and must be joined, although their citizenship is such as will oust the jurisdiction of the court. *South Penn Oil Co. v. Miller*, (C. C. A. 1909) 175 Fed. 729.

The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. This rule, however, is subject to the following qualifications: (1) When a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. (2) Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him, if he can be reached. (3) Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant. In a determination of the jurisdiction of the United States Circuit Courts, indispensable parties only should be considered, because all others may be dismissed or disregarded if their presence will oust or restrict the jurisdiction or the right. Where the real controversy is between citizens of different states, or a citizen and an alien, and the complainant is by some rule of law compelled to use the name of another party as defendant, such party will not deprive the federal courts of jurisdiction, although such party be a citizen of a territory or a citizen of the same state as the complainant. *Kuchler v. Greene*, (1908) 163 Fed. 91.

To a suit by a stockholder in a domestic corporation to charge a foreign corporation as trustee on the ground that as the owner of a majority of the stock of the domestic corporation it caused such corporation to do acts which were in fraud of its other stockholders, the domestic corporation is an indispensable party, and a federal court is without jurisdiction of such suit where complainant and such corporation are citizens of the same state. *Redfield v. Baltimore, etc., R. Co.*, (1903) 124 Fed. 929.

Under a state law which provides that, when proceedings are commenced by a landowner for the assessment of damages where land is taken for public use, a mortgagee may join as a petitioner, and if he does not he must be served with notice and permitted to join, and that the interest of the mortgagee shall be first satisfied before any part of the damages is paid to the mortgagor, a mortgagee is an "indispensable party" petitioner in such a proceeding in a federal court, and

where he is a citizen of the same state as defendant the court is without jurisdiction. *Adams v. Woburn*, (1909) 174 Fed. 192.

Trustees of a mortgage with power of sale are indispensable parties on foreclosure, and, their interest being antagonistic to those of the mortgagors, they must be treated as plaintiffs, and determine the question of diversity of citizenship, though for refusal to act they are properly made parties defendant by the beneficiary. *Allen-West Commission Co. v. Brashear*, (1910) 176 Fed. 119.

Where a bill alleged that the complainant directed C. to buy certain stock on the New York Stock Exchange; that the order was transmitted by C. to the defendant, or to some other person; that the stock was bought and the certificate came into the defendant's hands with knowledge that the stock belonged to the complainant; that the complainant, having paid C. in full, demanded the stock both of C. and of the defendant, but failed to obtain it; that if the defendant sold the stock, as the complainant was informed, its proceeds were in the defendant's hands free from lien; and that the defendant had been paid in full on account of the transaction, it was held that C. was a necessary party to the bill. *Jemey v. Hayden*, (1909) 171 Fed. 898.

The rule that all persons interested in a suit in a federal court must be made parties does not apply where the bringing in of a dispensable party will oust the jurisdiction of the court. *Federal Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co.*, (1909) 187 Fed. 474.

A state statute giving a tenant under a lease for more than ten years the right to maintain an action in his own name to remove a cloud upon title will be given effect by a federal court, and under such statute the lessor is not an indispensable party to a suit by a lessee for ninety-nine years, obligated by the terms of the lease to pay all taxes and assessments against the property, to set aside an assessment for local improvements on the ground of its invalidity. *New York, etc., R. Co. v. New York*, (1905) 145 Fed. 661.

The requisite diversity of citizenship exists where the plaintiff, a citizen of Iowa, sues a citizen of New York and two citizens of Colorado in the federal Circuit Court of the latter state. The right to object that the citizen of New York is being sued in Colorado is a privilege personal to him and cannot be made by his codefendants; nor is jurisdiction over the defendants, who are citizens of Colorado, affected by the fact that service is not had upon nor appearance made by the citizen of New York, the latter not being an indispensable party. *Schiffer v. Anderson*, (1906) 146 Fed. 457, 76 C. C. A. 667.

*Dismissal as to certain parties.* — Where a federal court has jurisdiction of the subject-matter and the necessary parties, a bill can be dismissed as to any defendant who was not an indispensable party to the suit, and whose presence would oust or restrict the jurisdiction, or the right, and be retained as to the other defendants. *North Carolina Min. Co. v. Westfeldt*, (1907) 151 Fed. 290.

A bill in the federal Circuit Court to enjoin interference with an employer's business may be dismissed as to a voluntary unincorporated labor union and its members generally, for want of jurisdiction of them, and stand as to the remaining individual defendants. *Irving v. Joint Dist. Council of United Brotherhood of Carpenters, etc.*, (1910) 180 Fed. 896.

The dismissal without prejudice of a suit in a federal court as to one of several defendants who might be sued either separately or jointly, either on his objection to the local jurisdiction on the ground that neither he nor plaintiff is a resident of the district, or on the ground that he and plaintiff are both residents of the same state, where he is not an indispensable party, does not necessitate a dismissal as to other defendants properly before the court. *Ladew v. Tennessee Copper Co.*, (1910) 179 Fed. 245.

*Unnecessary parties.* — In an action by two of three trustees against a corporation residing in another state, the fact that one of the trustees, who refused to join as plaintiff in the suit, and was made a defendant, resided in the same state as the corporation, did not deprive the federal court of jurisdiction, on the ground that the trustee residing in the same state with defendant was a necessary party plaintiff, since that trustee was not really a party to the controversy, but only made such in order that the rights of all interested parties might be determined in one proceeding. *Einstein v. Georgia Southern, etc., R. Co.*, (1903) 120 Fed. 1008.

Where plaintiff, a citizen of New York, and M., a citizen of Indiana, were trustees under a mortgage executed by an Indiana corporation to secure bonds, in which water hydrant rentals due from defendant, a city of Indiana, were pledged as security, but the mortgage provided that the corporation should receive such rentals until default in the payment of interest on the bonds, the ordinance, however, under which the franchise to the corporation was granted, providing that the rentals in question should be paid to a trustee as the grantee or his assigns might elect, and plaintiff was appointed such trustee, it was held that the trust created by the ordinance was separate from that created by the mortgage, and hence plaintiff was entitled to sue therefor in the federal courts sitting in Indiana, without joining the cotrustee mentioned in the mortgage. *Seymour v. Farmers' L. & T. Co.*, (1903) 128 Fed. 907, 63 C. C. A. 633.

Where, in a suit in the federal courts for an injunction against strikers, the court's jurisdiction depends on the residence of the parties, a party interested in the subject-matter need not be made a party to the suit where his joinder would oust the court of jurisdiction, provided a final decree against the parties before the court, consistent with equity and good conscience, can be made. *Es v. Haggerty*, (1902) 124 Fed. 441.

Where, in a suit to restrain defendants from selling liquor on certain land under a contract with a lumber company which held a timber contract from complainant's grant-

ors, no relief was sought by or against the lumber company, it was not a necessary party, and hence it was not material that it was improperly joined as a defendant, and its joinder as a complainant would have defeated federal jurisdiction because of its citizenship. *Paint Creek Co. v. Gallego Coal, etc., Co.*, (C. C. A. 1908) 166 Fed. 62.

**Representative parties.**—Where the plaintiff is a minor suing by his guardian, the question of the jurisdiction of a federal court is determined by his own citizenship, and not that of his guardian, which is immaterial. *Toledo Traction Co. v. Cameron*, (1905) 137 Fed. 48, 69 C. C. A. 28.

A Circuit Court of the United States has jurisdiction of a suit by the guardian of the person and estate of an incompetent, the guardian residing in North Dakota, where she was appointed, to compel an accounting by a guardian first appointed, residing in Minnesota, where the amount involved is over \$2,000. *Pulver v. Leonard*, (1909) 176 Fed. 586.

Where a nonresident citizen who was a co-executor of an estate was entitled to sue in the federal courts for the benefit of the estate, the fact that another executor qualified in the state of the situs of the estate does not preclude the nonresident executor from resorting to the federal courts. *Monmouth Invest. Co. v. Means*, (1906) 151 Fed. 159, 80 C. C. A. 527.

A state statute providing that a nonresident cannot act as administrator does not make an administrator appointed therein a citizen of the state for the purpose of the jurisdiction of a federal court, which is determined by his actual citizenship. *McDuffie v. Montgomery*, (1904) 128 Fed. 105.

A federal court has jurisdiction of a suit by a legatee, who is a citizen of another state, against an executor to establish and enforce rights under the will. *Higgins v. Eaton*, (C. C. A. 1910) 183 Fed. 388, *reversing* 178 Fed. 153.

A citizen of one state, who holds the title to property in trust for others, may maintain an action for damages to it against the citizens of another state in the proper federal court, without regard to the citizenship of the beneficiary. *Johnson v. St. Louis*, (C. C. A. 1909) 172 Fed. 31.

Under a local statute which empowers the court in a creditor's suit against an insolvent corporation to adjudge the amount payable by each stockholder under the double liability provided for by the statute, and to appoint a receiver to collect the same with authority to maintain suits therefor against stockholders in other jurisdictions, such a receiver is in the position of a *quasi* assignee, representing all of the creditors, and may maintain an action in a federal court in another state, and his own citizenship, and not that of the creditors, affords the test of jurisdiction. *Irvine v. Bankard*, (1910) 181 Fed. 206.

**Interveners and substituted parties.**—Where a federal court has taken possession of the property of a railroad company by its receiver, appointed in a suit of which it had jurisdiction, it does not lose its exclusive

jurisdiction to administer the property because other parties interested therein intervene to enforce particular rights, as for the foreclosure of a mortgage, even though they may be citizens of the same state as the defendant or others adversely interested. *Kreider v. Cole*, (1907) 149 Fed. 647, 79 C. C. A. 339, *reversing* (1905) 140 Fed. 944.

Where ejectment was brought in a federal court in which the requisite diversity of citizenship appeared, and, after judgment against a tenant of a part of the tract, his landlord, who was not a party to the suit, appeared and sought to have the judgment opened, the fact that such landlord is of the same citizenship as plaintiff will not oust the court of jurisdiction. *King v. Davis*, (1903) 137 Fed. 198, *affirmed* (C. C. A. 1907) 157 Fed. 676.

But where, after a foreign receiver, appointed by a state court, had brought suit in the Circuit Court of the United States sitting in Louisiana against a city of that state, his authority to prosecute the suit was annulled by the Supreme Court of the state, the Circuit Court had no jurisdiction to permit the continuance of such suit by a citizen of Louisiana, appointed as such receiver's successor after his death. *Hubert v. New Orleans*, (1904) 130 Fed. 21, 64 C. C. A. 389.

**Partnerships, joint-stock companies, and unincorporated associations.**—Limited partnerships and partnership associations in which the capital subscribed is alone responsible for the debt of the association, but which are not declared by statute to be corporations, are not citizens of the state in which they are domiciled for the purposes of federal jurisdiction, independent of the individuals composing them. *Fred Macey Co. v. Macey*, (1905) 135 Fed. 725, 66 C. C. A. 363.

A voluntary unincorporated association is not a citizen of any state, and hence the federal Circuit Court has no jurisdiction of a labor union constituting such association, nor of its members generally, on a bill against them to enjoin interference with an employer's business. *Irving v. Joint Dist. Council of United Brotherhood of Carpenters, etc.*, (1910) 180 Fed. 896.

In a suit to restrain a boycott instituted by certain labor associations which were not corporations, such associations were properly designated as parties for the purpose of locating the citizenship of their members, also made defendants, in order to determine the requisite diversity of citizenship to establish federal jurisdiction. *Seattle Brewing, etc., Co. v. Hansen*, (1905) 144 Fed. 1011.

Under a local law which provided that on a cause of action against a joint-stock association organized under the laws of the state an action may be brought against its president or treasurer, any judgment therein, however, to bind only the property of the association, and that such an action may be brought against all of the members of the association, it was held that such statute did not affect the jurisdiction of a federal court in another state, and that, in an action therein against the president of such an association on a cause of action against the

association, such president is not a real party to the controversy, within the meaning of the Constitution and laws of the United States, but merely a nominal party, and his citizenship is unavailable to confer jurisdiction on the court; the citizenship of the other members of the association not appearing. *Taylor v. Weir*, (C. C. A. 1909) 171 Fed. 636, reversing (1908) 162 Fed. 585.

Diverse citizenship is not available to sustain the jurisdiction of a federal Circuit Court of a suit to enjoin a sale of railway stock by a firm of bankers acting on behalf of the stockholders unless a sum shall first be deposited out of the proceeds of the sale sufficient to satisfy any judgment which may be recovered by complainant in a suit to foreclose a mortgage on the property of the railway company, where some of the members of such firm are citizens of the same state with complainant. *Raphael v. Trask*, (1904) 194 U. S. 272, 24 S. Ct. 647, 48 U. S. (L. ed.) 973, affirming (1902) 118 Fed. 777.

**Several parties plaintiff or defendant.** — If there are several coplaintiffs, each must be competent to sue, or if there are several defendants, each must be liable to be sued, in a federal court, to give that court jurisdiction. *Anderson v. Bassman*, (1905) 140 Fed. 10; *Mirabile Corp. v. Purvis*, (1906) 143 Fed. 920; *Blunt v. Southern R. Co.*, (1907) 155 Fed. 499; *Gage v. Riverside Trust Co.*, (1906) 156 Fed. 1002.

A federal court has jurisdiction on the ground of diversity of citizenship where the parties designated in the bill as plaintiffs and defendants are respectively citizens of different states, and nothing appears from the bill which requires their rearrangement. *Loose v. Hartford Pulp Plaster Corp.*, (1908) 159 Fed. 318.

Where federal jurisdiction rests on diversity of citizenship, it is no objection that citizens of different states, other than the state in which the suit is instituted, are combined as cocomplainants. *Schultz v. Highland Gold Mines Co.*, (1907) 158 Fed. 337.

The bringing in of a new party in a suit in a federal court by cross-bill or otherwise, when the presence of such party as an original defendant would have defeated federal jurisdiction, violates both the constitutional and statutory requirement as to diverse citizenship, and the court is without jurisdiction to entertain a cross-bill by an intervener who could not have been made a party to the original bill, unless such intervener represents an interest already before the court or claims an interest in property of which the court holds possession. *Newton v. Gage*, (1907) 155 Fed. 508.

Where a creditor's bill in a federal court to enforce a state judgment sought to establish the existence of a partnership only for the purpose of subjecting the interest of the surviving partner in the partnership funds to the payment of complainant's judgment, it was held that the bill was not demurrable on the ground that complainant sought thereby to compel defendants, who were both residents of the state, to litigate in the Circuit Court a demand which one had against the

other. *Feidler v. Bartleson*, (C. C. A. 1908) 161 Fed. 30, affirming (1906) 149 Fed. 299.

Where one partner has committed acts which render the continuation of the partnership impossible, all of the other partners are not required to join as complainants in a suit for dissolution; but such suit may be maintained by one, joining the others as defendants, and the facts that the interest of others may be similar to his own, and that they are citizens of the same state as the offending partner, will not defeat the jurisdiction of a federal court, where the complainant is a citizen of another state. *Gaddie v. Mann*, (1906) 147 Fed. 960.

The fact that a Delaware corporation plaintiff owned all the stock of an Oregon corporation has been held not to require the latter to be brought into a suit against defendant Oregon corporation as a plaintiff, but to permit its being a defendant. *Federal Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co.*, (1909) 187 Fed. 474.

A federal court is not ousted of jurisdiction in a suit by creditors of an insolvent corporation to enforce the double liability of stockholders for the benefit of all creditors because some of the creditors were citizens of the same state as defendants. *Alsop v. Conway*, (C. C. A. 1911) 188 Fed. 568.

Where a minority stockholders' bill was brought by citizens of three states against citizens of two other states, in a state where part of the defendants resided, but was not local in character, it was held that jurisdiction on the ground of diversity of citizenship attached as to all the complainants and as to all the defendants who were citizens of the state in which the suit was instituted, but not as to the defendants who were citizens of another state. *Schultz v. Highland Gold Mines Co.*, (1907) 158 Fed. 337.

The Circuit Court has no jurisdiction over an action brought against both a domestic and a foreign corporation where there is any right of action, or any reasonable ground to claim a right of action, against the domestic corporation, and where no separable controversy is claimed to exist. *Keller v. Kansas City, etc., R. Co.*, (1903) 135 Fed. 202.

A Circuit Court of the United States is without jurisdiction of a suit against a number of defendants to enjoin the diversion of water from a stream by means of certain irrigation ditches, in some one of which each of the defendants is alleged to own an interest, where any one of the defendants is a citizen of the same state as complainant. *Anderson v. Bassman*, (1905) 140 Fed. 10.

Where one or more of several joint complainants are of the same citizenship as defendant, federal jurisdiction on the ground of diverse citizenship does not exist. *Key West Cigar Manufacturers' Assoc. v. Rosenbloom*, (1909) 171 Fed. 296.

Where the complainant and defendant C. were joint trustees under a certain deed of trust, complainant being a citizen of Illinois, while C. and the other defendants were citizens of New York, it was held that in the absence of an allegation that C. was requested to join complainant in a suit for instructions

as to the disposition of the trust funds, and refused, there was a nonjoinder of parties complainant, and since if C. was made a complainant, it would defeat federal jurisdiction, such jurisdiction was not shown. *Caylor v. Cooper*, (1908) 165 Fed. 757.

Where the complainant, a nonresident distributee of the estate of a deceased partner, the administration of which was pending in the probate court of the state of his decease, filed a bill in the federal Circuit Court to compel the executors of the deceased partner, one of whom was the surviving partner, to account, and prayed judgment directing an account between the two executors other than the surviving partner, and such surviving partner, together with an accounting concerning the partnership affairs between such surviving partner and the estate, it was held that the accounting concerning the partnership affairs was the principal object of the bill; and, there being no diversity of citizenship between such executors, and no federal question involved, the court was without jurisdiction. *Moore v. Fidelity Trust Co.*, (1905) 134 Fed. 489, *affirmed* 138 Fed. 1, 70 C. C. A. 663.

In a suit by a stockholder against a corporation and others founded in rights which may properly be asserted by the corporation, such corporation is an indispensable party, and a federal court is without jurisdiction of the suit on the ground of diversity of citizenship where the complainant is a citizen of a state and the corporation of a territory, although the requisite diversity exists as between complainant and other defendants. *McClelland v. McKane*, (1907) 154 Fed. 164.

Where complainants filed a bill in a federal court against a corporation of the same state, as owner of a patent, and the patentee, who was a citizen of another state, alleging that such patentee obtained a decree against complainants in the same court adjudging the validity of the patent and enjoining its infringement; that complainants thereafter entered into a license contract with defendant corporation, giving them the right to manufacture and sell under the patent for a fixed term, with privilege of renewal, subject to the reservation of the right to such defendant to give notice by a time stated that it did not desire to renew, which notice the defendant had given; and that when the contract was signed, complainants were "orally assured" that no advantage would be taken of the reservation — the bill praying that the decree in the infringement suit be set aside or suspended, that complainants' right to a renewal of the license contract be established, and that in the meantime defendants be enjoined from proceeding under the decree or bringing suit against complainants for infringement, and no facts being alleged which would sustain a bill of review in the patent suit, it was held that the court was without jurisdiction on the ground of diversity of citizenship; the patentee being neither a necessary nor a proper party to such controversy. *Lefkowitz v. Foster Hose Supporter Co.*, (1908) 161 Fed. 367.

**Dismissal as to certain parties.** — Where a bill maintainable in the federal court only because of diverse citizenship did not show that all the parties on one side of the controversy were entitled by diverse citizenship to sue all the parties on the other side, but could be made sustainable if certain defendants of the same citizenship as some of the complainants were dismissed, and it did not appear that they were necessary parties, they not having entered their appearance, the court was authorized by equity rule 47 to dismiss the case as to them. *Barnes v. Berry*, (1907) 156 Fed. 72.

But the power of a federal court of equity to allow the amendment of a bill by changing the parties to give the court jurisdiction, and the propriety of exercising such power if it exists, should only be determined on a formal application and due notice and hearing. *Riggs v. Brown*, (1909) 172 Fed. 637.

**Averment of citizenship — Generally.** — To sustain the jurisdiction of a Circuit Court of the United States on the ground of diversity of citizenship, that fact must be positively and unequivocally averred at the outset in the pleadings of the party invoking the jurisdiction, or it must appear affirmatively and with equal distinctness elsewhere in the record. *Taylor v. Weir*, (1909) 171 Fed. 636, *reversing* (1908) 162 Fed. 585.

The failure of an amended bill filed in a federal court to allege the citizenship of the parties at the time the suit was commenced, as well as at the time the amended bill was filed, is fatal to the jurisdiction of the court where that is dependent on diversity of citizenship. *Cochran v. Pittsburg, etc., R. Co.*, (1907) 150 Fed. 682; *International Bank, etc., Co. v. Scott*, (C. C. A. 1908) 159 Fed. 58; *Atchison, etc., R. Co. v. Frederickson*, (C. C. A. 1910) 177 Fed. 206.

An averment of residence is not equivalent to one of citizenship for the purpose of invoking the jurisdiction of a federal court. *Thomas v. D. O. Mills Nat. Bank*, (1901) 106 Fed. 438, 45 C. C. A. 407; *Gale v. Southern Bldg., etc., Assoc.*, (1902) 117 Fed. 732; *Yocum v. Parker*, (1904) 130 Fed. 770, 66 C. C. A. 80; *Stockwell v. Boston, etc., R. Co.*, (1904) 131 Fed. 152; *Mohican Tp. v. Johnson*, (1904) 133 Fed. 524, 66 C. C. A. 592; *Sanbo v. Union Pac. Coal Co.*, (1905) 140 Fed. 713, 72 C. C. A. 24.

Jurisdictional allegations in the complaint in federal courts are not made as a basis for proof at the trial, but to found jurisdiction thereon. *Per Amidon*, District Judge, in *Hill v. Walker*, (C. C. A. 1909) 167 Fed. 241.

As far as diversity of citizenship is requisite, the jurisdiction of a federal court may not be renounced or avoided where the facts requisite to confer it appear either directly or by just inference from any part of the record. *Howe v. Howe, etc., Ball Bearing Co.*, (1907) 154 Fed. 820, 822, 83 C. C. A. 536, 538; *Adams Express Co. v. Adams*, (C. C. A. 1908) 159 Fed. 62.

**Sufficient averment.** — That the bill merely recites facts showing diversity of citizenship of the parties, instead of making distinct traversable averments thereof, is not ground

for denying relief, where the affidavits of the defendant do not in any way dispute the diversity of citizenship. *Gorham Mfg. Co. v. Weintraub*, (1910) 170 Fed. 927.

An allegation of a complaint admitted by answer, that "defendant is a domestic corporation duly organized and existing under the laws of New York, having its principal office for the transaction of business in the Northern District of New York," sufficiently avers that the corporation is a citizen of New York, for the purpose of giving jurisdiction to a federal Circuit Court. *Sun Printing, etc., Assoc. v. Edwards*, (1904) 194 U. S. 377, 84 S. Ct. 696, 48 U. S. (L. ed.) 1027.

The jurisdiction of a federal Circuit Court on the ground of diverse citizenship over a suit between a citizen of Michigan and the board of trustees of the Ohio State University will sufficiently appear, so far as the pleadings are concerned, without bringing the several persons constituting the board before the court as defendants, where it is averred that the board was created by and exists as an organized body under the laws of Ohio, with power to sue and be sued by its collective name, if it is also alleged that each individual trustee is a citizen of that state. *Thomas v. Ohio State University*, (1904) 195 U. S. 207, 25 S. Ct. 24, 49 U. S. (L. ed.) 160.

Where a petition in an action in the federal court sitting in Ohio, for injuries to a servant, alleged that plaintiff was a citizen of Ohio, and that defendant was a citizen of Maryland, such allegations were held to be sufficient to sustain the jurisdiction of the federal court, without an allegation that either party resided in the district where the suit was brought. *Baltimore, etc., R. Co. v. Doty*, (1904) 133 Fed. 866, 67 C. C. A. 38.

An allegation in a petition that plaintiff is a citizen "of said county of Monroe, in the said state of Michigan," while inexact as an averment of citizenship of the state of Michigan for the purpose of showing jurisdiction in a federal court, will be treated as sufficient, especially in an appellate court, when it has been so construed and treated by both court and counsel in the trial court, which made a finding of the fact in accordance therewith. *Toledo Traction Co. v. Cameron*, (1905) 187 Fed. 48, 69 C. C. A. 28.

Where a declaration by a partnership alleged that plaintiff was a partnership, having its principal place of business in K., and authorized to sue and be sued in the name of Y. Company, Limited, and that each and every member and partner of such association was a citizen of Michigan, such allegation sufficiently charged the citizenship of the parties comprising the firm to confer jurisdiction; such associations being, under the local law, *quasi*-corporations. *Derk P. Yonkerman Co. v. Charles H. Fuller's Advertising Agency*, (1905) 135 Fed. 613.

An averment that plaintiff is a resident of the state of Delaware will be regarded by an appellate court as a sufficient averment of citizenship in that state, for the purpose of giving jurisdiction to a federal Circuit Court, where the uncontradicted testimony shows a legal domicile therein, and that any absence

from the state was without intention to abandon such domicile. *Sun Printing, etc., Assoc. v. Edwards*, (1904) 194 U. S. 377, 24 S. Ct. 696, 48 U. S. (L. ed.) 1027.

*Insufficient averment.*—A mere averment that a party is a resident or inhabitant of a certain state is not an averment of his citizenship in that state, for the purpose of showing the jurisdiction of a federal court. *Atchison, etc., R. Co. v. Fredericksen*, (C. C. A. 1910) 177 Fed. 206.

Where, in an action in which federal jurisdiction depended solely on diversity of citizenship, there was nothing in the record to show that either plaintiff or defendant was a citizen of any state, but the complaint alleged that plaintiffs were residents and inhabitants of Kentucky, but did not state the residence of the defendants, and there was nothing to show the domicile of the parties, as distinguished from residence, jurisdiction was not shown. *Newcomb v. Burbank*, (C. C. A. 1910) 181 Fed. 324.

The allegation that a party was a "resident" of a certain town and county in another state is not an averment of citizenship, necessary to show jurisdiction of a federal court based on diversity of citizenship. *Mayer v. Cohrs*, (1911) 188 Fed. 443.

An allegation in a complaint that plaintiff is a "*bona fide* resident" of a certain state is not equivalent to alleging his citizenship in such state, and is not sufficient to give a federal court jurisdiction on the ground of diversity of citizenship. *Koike v. Atchison, etc., R. Co.*, (1907) 157 Fed. 623.

Where a bill for an injunction in the federal court was sustainable only on the ground of diverse citizenship, and it failed to show that all the parties on one side of the controversy were entitled because of diverse citizenship to sue all the parties on the other side, it did not present a case of federal jurisdiction. *Barnes v. Berry*, (1907) 166 Fed. 72.

The allegation, as to a corporation, for the purpose of showing a federal Circuit Court's jurisdiction on the ground of diverse citizenship, that it is a citizen of a certain state, is not enough. It should be shown it was created by the laws of that state. *Knight v. Lucher, etc., Lumber Co.*, (1905) 186 Fed. 404, 69 C. C. A. 248, *rehearing denied* 139 Fed. 1007, 71 C. C. A. 684; *Forayth Mfg. Co. v. Putnam*, (1905) 139 Fed. 1007, 71 C. C. A. 684.

A pleading averring that plaintiff's assignor was a corporation, with its principal office in Florida, and that defendant resided in Alabama, insufficiently shows the citizenship of the assignor and of defendant, and hence is insufficient to show jurisdiction in the federal Circuit Court on the ground of diverse citizenship. *J. J. McCaskill Co. v. Dickson*, (C. C. A. 1908) 159 Fed. 704.

A declaration alleging that defendant was a corporation organized under the laws of Pennsylvania, and that letters of administration had been taken out by plaintiff in New Jersey, was held to be insufficient to confer federal jurisdiction on the ground of diverse citizenship. *Yeandle v. Pennsylvania R. Co.*, (C. C. A. 1909) 169 Fed. 938.

The citizenship of the individual members of the board of trustees of the Ohio State University does not sufficiently appear for the purpose of conferring jurisdiction on a federal Circuit Court of a suit against such board, from averments that show that the board, while not an Ohio corporation, was created by and exists as an organized body under the laws of that state, although, under the Ohio constitution, no person can be elected or appointed to any office in the state unless he possesses the qualifications of an elector, and an elector must be a citizen of the state. *Thomas v. Ohio State University*, (1904) 195 U. S. 207, 25 S. Ct. 24, 49 U. S. (L. ed.) 160.

Where the plaintiff's declaration alleged that he was a resident of the city of Dickson, Tennessee, and that defendant was a corporation organized under the laws of New Jersey, it was held that while such averment sufficiently alleged defendant's citizenship to sustain the jurisdiction of the federal court, the allegation of plaintiff's residence was not a sufficient allegation of citizenship. *Crosby v. Cuba R. Co.*, (1908) 158 Fed. 144.

**Amendment.**—Where a demurrer to a declaration in a federal court was sustained because of an insufficient averment of diversity of citizenship on which jurisdiction depended, it was held that the plaintiff was entitled to amend the writ to show diversity of citizenship according to the fact. *Stockwell v. Boston, etc., R. Co.*, (1904) 131 Fed. 153.

Resort may be had to the entire record for the purpose of curing a defective averment of citizenship, where the jurisdiction of the lower federal court is asserted to depend upon diversity of citizenship. *Sun Printing, etc., Assoc. v. Edwards*, (1904) 194 U. S. 377, 24 S. Ct. 696, 48 U. S. (L. ed.) 1027.

Where the original petition in an action contains the requisite averments to give a federal court jurisdiction, such jurisdiction is not lost because an amended petition alleged plaintiff's citizenship in the present tense only. *Toledo Traction Co. v. Cameron*, (1905) 137 Fed. 48, 60 C. C. A. 28; *Campbell v. Johnson*, (C. C. A. 1909) 167 Fed. 102.

But where the complaint in an action in a federal court, in which jurisdiction depended on diversity of citizenship, failed to allege the plaintiff's citizenship, an amendment to cure the defect and show jurisdiction must allege the requisite citizenship, not only at the time it is filed, but at the time the action was commenced. *Sanbo v. Union Pac. Coal Co.*, (1906) 146 Fed. 80.

**Cross-bill.**—The dismissal of a bill to quiet title to a mining claim does not carry with it a cross-bill filed by defendant seeking to have the title to the same claim quieted in him and which alleges facts not alleged in the original bill; nor is it necessary to the retaining of a suit for trial on the cross-bill, where it is in a federal court, that the cross-bill should contain the jurisdictional allegations as to the citizenship of the parties, which was shown by the original bill. *Badger Gold Min., etc., Co. v. Stockton Gold, etc., Min. Co.*, (1906) 139 Fed. 838.

As to challenge and determination of jurisdiction, see notes to section 5 of this Act, *infra*, p. 1309, this Supplement.

## VII. SUITS BETWEEN CITIZENS AND ALIENS.

**Suits by aliens.**—An alien may sue a citizen in the Circuit Courts of the United States. *Katalla Co. v. Rones*, (C. C. A. 1911) 186 Fed. 30, *affirming* (1910) 182 Fed. 946.

A suit for \$10,000 brought by citizens and residents of France against an Illinois corporation is within the jurisdiction of the federal Circuit Court. *Fribourg v. Pullman Co.*, (1910) 176 Fed. 981.

Where certain of the members of a limited partnership, organized under the laws of New York, were aliens, and such partnership was joined with a foreign corporation as a plaintiff in an action in the federal court in New York against a firm composed of citizens of New York, it was held that such limited partnership should not be treated, for the purpose of determining jurisdiction, as if it were a corporation located in New York, but that the members thereof retained their individual rights as aliens which entitle them to sue in the federal courts. *Jewish Colonization Assoc. v. Solomon*, (1903) 125 Fed. 994.

**Suit by foreign state.**—A suit in equity to set aside an award of arbitrators may be maintained in a court of the United States by a foreign state against a corporation of the state in which the suit is brought. *Colombia v. Cauca Co.*, (1903) 190 U. S. 524, 23 S. Ct. 704, 47 U. S. (L. ed.) 1159, *reversing* (1902) 113 Fed. 1020, 51 C. C. A. 604.

A federal Circuit Court, whose action was invoked by the Republic of Colombia to set aside an award made against it in arbitration proceedings, has the same power to decree the payment of interest from the date fixed for payment by the award as in an ordinary case. *Ex p. Colombia*, (1904) 195 U. S. 604, 25 S. Ct. 107, 49 U. S. (L. ed.) 338.

A suit brought by a citizen of one state against a citizen of another state and an alien, as defendants, involving the requisite jurisdictional amount, is within the jurisdiction of a Circuit Court of the United States. *Ladew v. Tennessee Copper Co.*, (1911) 179 Fed. 245.

**Pleading.**—The alienage of the plaintiff is sufficiently alleged to sustain the jurisdiction of a federal Circuit Court by an averment in the complaint that "the plaintiff now is, and for more than one year last past has been, a resident of Washington and a citizen of Sweden," although, at the time the action was brought, Sweden was under a monarchical form of government, since the designation "citizen of Sweden" could only have been intended as a statement of the nationality of the plaintiff, viz., the country to which he bore allegiance. *C. H. Nichols Lumber Co. v. Franson*, (1906) 203 U. S. 278, 27 S. Ct. 102, 51 U. S. (L. ed.) 181.

An allegation that plaintiff is a citizen of the British Empire is not a sufficient allegation that he is an alien, and a citizen or subject of some one foreign state, for the pur-

pose of conferring jurisdiction on a federal court in a suit against a citizen of a state. *Von Voight v. Michigan Cent. R. Co.*, (1904) 130 Fed. 398.

Where federal jurisdiction of an action by the liquidating committee of a bank depended on diverse citizenship, and plaintiff's petition only alleged that all of such committee resided in the Republic of Mexico, but there was no averment that they were citizens of the Republic of Mexico, it was held that jurisdiction was not shown, and that the defect was not cured by a recital in a motion for rehearing of a motion to dismiss that it appeared on the face of defendant's pleading that the "plaintiff" is a resident citizen of the Republic of Mexico. the plaintiff referred to being the liquidating committee of the bank, and not the individuals who were the real plaintiffs. *International Bank, etc., Co. v. Scott*, (1908) 159 Fed. 58.

#### VIII. SUITS BETWEEN ALIENS.

The federal courts are without jurisdiction of a suit between aliens, where no federal question is involved. *Gage v. Riverside Trust Co.*, (1906) 156 Fed. 1002.

Where the United States Circuit Court had jurisdiction of a suit by plaintiffs against the R. & M. Co., in which a claim owing to the latter by defendant was attached, and would have had jurisdiction of such a suit by the plaintiffs against the defendant, it was held that the fact that the R. & M. Co. could not have sued the defendant in the United States Circuit Court, because both were aliens, did not deprive such court of the power to attach the debt owing from the defendant to the R. & M. Co., such company being entitled to sue the defendant in the state court. *Brandenstein v. Helvetia Swiss F. Ins. Co.*, (1908) 159 Fed. 589.

#### IX. ANCILLARY PROCEEDINGS.

When ancillary relief may be had generally. — A bill in equity dependent upon a former action of which the federal court had jurisdiction may be maintained in a national court, in the absence of diversity of citizenship and of a federal question: (1) To aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; or (3) to enforce or obtain an adjudication of liens upon or claims to property in the custody of the court in the original suit. *Bloomington v. Watson*, (1904) 128 Fed. 268, 62 C. C. A. 600; *Campbell v. Golden Cycle Min. Co.*, (1905) 141 Fed. 610, 73 C. C. A. 260; *Brun v. Mann*, (1906) 151 Fed. 145, 80 C. C. A. 513; *Loy v. Alston*, (C. C. A. 1909) 172 Fed. 90; *Preston v. Calloway*, (C. C. A. 1910) 183 Fed. 19.

The jurisdiction of a federal court over the subject-matter of, and the parties to, a judgment, includes the power to enforce it, continues until it is satisfied, and may not be destroyed or impaired by the legislation of the states. *Collin County Nat. Bank v. Hughes*, (1907) 152 Fed. 414, 81 C. C. A. 556, *rehearing denied* (C. C. A.) 155 Fed. 389.

The federal courts have jurisdiction of controversies arising during the pendency of the administration of estates of decedents in the state courts which condition the enforcement of their judgments or decrees, or the rights of aliens, citizens of other states, or other parties, who might invoke their actions, and their decisions prevail over the statutes of the states and the decisions of their courts. *Brun v. Mann*, (1906) 151 Fed. 145, 80 C. C. A. 513.

Where a decree of a federal court had been allowed as the only claim against the estate of a decedent in a state County Court, and the only property of decedent consisted of lands and appurtenant water rights, and the statutes of the state imposed the duty on the administratrix to appeal either to a County or District Court to sell the unexempt real estate, and she claimed that the real estate was exempt and refused to bring proceedings, the federal court in which the decree was rendered had jurisdiction to entertain suit by complainant in that decree and to render a decree for the sale of the land notwithstanding the pendency of administration in the County Court. *Brun v. Mann*, (1906) 151 Fed. 145, 80 C. C. A. 513.

But an action by the owner of a judgment recovered against a corporation for infringement of a patent, to charge directors of such corporation with payment of the judgment on the ground that they were joint trespassers with the corporation, is not within the jurisdiction of the federal court as ancillary to the former suit. *H. C. Cook Co. v. Beecher*, (1909) 172 Fed. 166.

*Necessity of dependent cause of action.* — In order that the federal court may have jurisdiction of a dependent suit, a dependent cause of action is indispensable, although after jurisdiction is acquired by means of such a cause, the court may determine in a proper case the entire controversy between the parties relating to its subject-matter. *Campbell v. Golden Cycle Min. Co.*, (1905) 141 Fed. 610, 73 C. C. A. 260.

*Modify or correct decree.* — A federal court has jurisdiction of a suit the purpose of which is to modify and correct one of its own decrees, without regard to the citizenship of the parties, and as incidental to such relief to grant an injunction to restrain a party from acting upon the decree as originally entered. *Thompson v. Schenectady R. Co.*, (1903) 124 Fed. 274.

*Determining right to proceeds of judgment.* — A federal court has jurisdiction to determine the right to the proceeds of a judgment rendered therein which has been paid into court, as between different claimants who appear and assert their claims, regardless of their citizenship. *Myers v. Luzerne County*, (1903) 124 Fed. 436.

*Suit to set aside judgment of dismissal.* — A suit in equity commenced in a federal court, the purpose of which is to set aside a judgment of dismissal entered by the same court in an action at law, is ancillary to such action and within the jurisdiction of the court without regard to the citizenship of the parties, and where the defendants named in



the bill were parties to the original action, or are in privity with such parties, service may be made upon them, although they reside beyond the limits of the district. *O'Connor v. O'Connor*, (1906) 146 Fed. 994.

**Suit to set aside award of arbitrators.**—Where an action is brought in a federal court on an arbitrator's award, a suit by the defendant therein to set aside the award for fraud is ancillary, but such fact does not give the court jurisdiction to bring in another party who is a citizen of the same state as the complainant to impeach an award in its favor made at the same arbitration, but which is separate and distinct from that between the other parties. *Hecht v. Youghioghney, etc., Coal Co.*, (1908) 162 Fed. 812.

**Appointment of receiver.**—Where a receiver appointed by a federal court, by reason of the character of his appointment, or because of local policy or the rights of local creditors, is not permitted to sue in a jurisdiction other than the one in which he was appointed, a bill may be filed in another federal court for the appointment of an ancillary receiver, and, the ultimate object of such proceeding being to aid the purpose of the original suit, it is in that sense ancillary, and jurisdiction thereof does not depend on diversity of citizenship of the parties. *Bluefields Steamship Co. v. Steele*, (C. C. A. 1911) 184 Fed. 584.

**Suit to recover assets.**—Where a federal court has appointed a receiver for an insolvent corporation, a suit brought by such receiver for the collection of an assessment made by the court on stockholders of the corporation to pay its debts is ancillary to the main suit, and is cognizable by a federal court, regardless of the citizenship of the parties or the amount in controversy. *Brown v. Allebach*, (1907) 156 Fed. 697. See also *Alexander v. Southern Home Bldg., etc., Assoc.*, (1903) 120 Fed. 963.

The law, as recognized in the Circuit Courts of the United States, is that, when a federal court at the domicile of a corporation appoints a receiver, or makes a decree winding up the corporation and disposing of its assets, or a decree of foreclosure, or any other decree looking to a disposition of its property, having proper jurisdiction in equity therefor, the Circuit Courts in other districts will ordinarily exercise ancillary jurisdiction, and assist in carrying out the purpose of the court at the place of domicile. *Conklin v. U. S. Shipbuilding Co.*, (1903) 123 Fed. 913.

A Circuit Court of the United States, which has appointed a receiver for an insolvent building and loan association in a suit to wind up its affairs, has jurisdiction of a suit brought by him to collect from a borrowing stockholder and to foreclose a mortgage securing the loan, regardless of the citizenship or residence of the defendants, or the fact that the mortgaged property is situated in another district. *Bottom v. National R. Bldg., etc., Assoc.*, (1901) 123 Fed. 744; *Gunby v. Armstrong*, (1904) 133 Fed. 417, 66 C. C. A. 627.

But jurisdiction of a bill which seeks to reach and distribute, to the persons found en-

titled thereto, the proceeds of a sale of lands to the United States cannot be entertained by a federal Circuit Court on the theory that the cause is ancillary to an action at law to recover the lands from the United States, as occupied without right, in which the rival claimants had united in procuring final judgment in favor of two of their number, leaving their respective interests to be settled by arbitration. *Stillman v. Combe*, (1905) 197 U. S. 436, 25 S. Ct. 480, 49 U. S. (L. ed.) 822.

**A suit to restrain private persons from selling the stock of a railroad company is not ancillary to one to foreclose a mortgage on property of such company, to which the stockholders are not parties.** *Raphael v. Trask*, (1902) 118 Fed. 777, *affirmed* (1904) 194 U. S. 272, 24 S. Ct. 647, 48 U. S. (L. ed.) 973.

**Suit to prevent destruction of property.**—Where a federal court has acquired jurisdiction of the assets of a street railway company operating the same through a receiver for the benefit of creditors, it has ancillary jurisdiction of a petition by the receiver to restrain a competing street railway company from maintaining gates across a certain highway, the effect of which would be to practically destroy the value of the property in the hands of the receiver, without regard to the citizenship of the parties. *Hampton Roads R., etc., Co. v. Newport News, etc., R., etc., Co.*, (1904) 131 Fed. 534.

**Suit for accounting and foreclosure.**—Where a federal court had jurisdiction of proceedings for the dissolution of a building and loan association, it had jurisdiction of an ancillary suit by the association's receiver for an accounting and foreclosure of a deed made to secure a loan to a borrowing member, though the amount due was less than \$2,000. *Cooper v. Newton*, (1908) 160 Fed. 190.

**To set aside fraudulent conveyances.**—A federal court rendering a judgment has ancillary jurisdiction of a creditor's bill by the judgment creditor to set aside fraudulent conveyances by the judgment debtor without regard to the citizenship of the parties. *Hobbs Mfg. Co. v. Gooding*, (1908) 164 Fed. 91.

**Suit to enforce lien.**—Where an attorney who has recovered a judgment in favor of his client in a federal court, and entered notice of a lien on such judgment on the docket in conformity to the state statute, brings a suit in equity in such court against the parties to the judgment to enforce his lien, such suit is ancillary to the original suit and within the jurisdiction of the court without regard to the amount involved or the citizenship of the parties. *Brown v. Morgan*, (1908) 163 Fed. 395.

A suit in equity in a federal court to enforce an attachment lien obtained in a former action in the same court, and to subject the attached property or its proceeds to the satisfaction of the judgment recovered therein, is not an original suit, but is ancillary and supplementary to the former action, and may be maintained as an incident to the jurisdiction already vested, without regard to the citizenship of the parties; and it is immaterial, so far as the ancillary character of the suit is

concerned, that the proceeds of the attached property are not in the actual custody of the federal court; the effect of the removal having been to bring the property potentially within the jurisdiction and custody of that court. *Hatcher v. Hendrie, etc., Mfg., etc., Co.*, (1904) 133 Fed. 267, 68 C. C. A. 19.

A suit in equity in a federal court to enjoin the further prosecution of actions pending in said court, of which it has jurisdiction by reason of diversity of citizenship of the parties, and to enable the complainant to make his defense to such actions, is ancillary thereto and within the jurisdiction of the court, without regard to the citizenship of parties joined as defendants. *South Penn Oil Co. v. Calk Creek Oil, etc., Co.*, (1905) 140 Fed. 507.

Where several insurers were liable, if at all, proportionately to the amount the insurance of each bore to the amount of the loss, and suits against some of them had been removed to the federal court, and the same defenses had been interposed on behalf of all, a bill in the federal court to restrain the suits at law and to adjust the liability of the various insurers was held to be an ancillary, and not an original, bill; and hence the jurisdiction of the federal court did not depend on the citizenship of the parties or the amount involved. *Rochester German Ins. Co. v. Schmidt*, (1904) 126 Fed. 998.

Where an action at law was pending in the federal Circuit Court, such court had ancillary jurisdiction before judgment to entertain a bill to restrain the further prosecution of such action on equitable grounds not available as a defense to the action at law, without regard to the citizenship of the parties. *Leigh v. Kewanee Mfg. Co.*, 127 Fed. 990.

The states of Georgia and Alabama each chartered a corporation having the same name and the same incorporators, conferring thereon certain riparian rights on the Chattahoochee river. The business was conducted as that of a single corporation, having one set of officers, and a dam and manufacturing plant were built on the river, partly in each state. Thereafter a mortgage was executed on the property in the name of the corporation, it not being stated of which state it was a corporation, and subsequently the property was sold, subject to the mortgage, to a second corporation of Alabama. Later a suit to foreclose was brought against the mortgagor and its successor in interest in the federal court for Georgia by the trustee, who was a citizen of Alabama, it being alleged that defendants were citizens of Georgia. Answers were filed admitting such allegation, and the cause proceeded to a decree and sale, a third corporation being the purchaser of the property. It was held that since neither of the Alabama corporations could be parties defendant to the foreclosure suit without ousting the jurisdiction of the court, and neither they nor their property rights in Alabama were affected by the decree and sale, a bill by the purchaser to restrain them from maintaining a suit in Alabama in relation to such rights was not within the jurisdiction of the federal court in Georgia as ancillary

to the foreclosure suit. *Riverdale Cotton Mills v. Alabama, etc., Mfg. Co.*, (1905) 198 U. S. 188, 25 S. Ct. 629, 49 U. S. (L. ed.) 1008, reversing (1904) 127 Fed. 497, 62 C. C. A. 295.

Ancillary relief by way of cross-bill. — A resident of the District of Columbia, although not a citizen of a state within the constitutional provision giving the federal courts cognizance of suits between citizens of different states, may maintain a cross-bill in a suit in such a court for relief which is ancillary to that sought in the original suit; the citizenship of the parties in such case being immaterial. *Ulman v. Jaeger*, (1907) 155 Fed. 1011.

In a suit in a federal court of equity to establish and protect rights in the waters of a stream against other separate appropriators of water from the same stream, all of whom are citizens of different states from complainant, the court may entertain cross-bills by any or all of the several defendants setting up priority of right as against complainant or their codefendants, since they relate to the subject of the original suit, which is the water of the stream, and, being ancillary to the original suit, the court has jurisdiction to determine the issues raised thereby without regard to the citizenship of the parties thereto. *Rickey Land, etc., Co. v. Miller*, (1907) 152 Fed. 11.

Relief by injunction. — Ancillary relief in a federal Circuit Court by way of an injunction in aid of a decree in a suit over the validity of state taxation, in which jurisdiction as to the state and its officers had been acquired as the result of the voluntary action of the state in submitting its rights to judicial determination, is not forbidden by Const. U. S., Amend. 11, as a suit against the state. *Gunter v. Atlantic Coast Line R. Co.*, (1906) 200 U. S. 273, 26 S. Ct. 252, 50 U. S. (L. ed.) 477.

#### X. CRIMES AND OFFENSES.

Perjury, committed by false swearing before a United States commissioner, has been held not to be subject to the jurisdiction of a state court under a state statute broad enough in its terms to embrace a case of false swearing in any tribunal, either state or federal. *Com. v. Kitchen*, (1911) 141 Ky. 655, 133 S. W. 586.

Perjury in state court. — Under the Federal Constitution providing that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may ordain and establish, and that the judges shall hold office during good behavior, and shall receive a compensation which shall not be diminished during their continuance in office, it has been held that state courts acting in the naturalization of aliens pursuant to the authority given by Congress remain state tribunals, and do not become in any degree courts of the United States; and hence a perjury committed in such proceedings is an offense against the state, and not the federal sovereignty, and, in the absence of statute confer-

ring jurisdiction on the federal courts, is exclusively a matter of state cognizance. *U. S. v. Severino*, (1903) 125 Fed. 949.

#### XI. PLACE OF BRINGING SUIT.

**To what suits applicable.**—Where an action is within the general jurisdiction of the federal courts, both on the ground of diversity of citizenship and because founded on a law of the United States, such action can be brought only in the district of which defendant is an inhabitant. *Whittaker v. Illinois Cent. R. Co.*, (1910) 176 Fed. 130.

But this inhibition is ineffective and inapplicable in instances in which exclusive jurisdiction over particular cases or classes of cases has been conferred upon the federal courts by special Acts of Congress. *U. S. v. Standard Oil Co.*, (1907) 152 Fed. 200; *Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co.*, (1910) 181 Fed. 974.

Where the jurisdiction of the Circuit Court is based solely on diversity of citizenship, the suit may be maintained in the district in which either plaintiff or defendant resides. *Wolff v. Choctaw, etc., R. Co.*, (1904) 133 Fed. 601; *U. S. Fidelity, etc., Co. v. Woodson County*, (1906) 145 Fed. 144, 76 C. C. A. 114; *Schultz v. Highland Gold Mines Co.*, (1907) 158 Fed. 337.

Service on a defendant does not give a federal court jurisdiction, where it is founded only on diversity of citizenship and neither party is a resident of the state, if seasonable objection is made. *Slater Trust Co. v. Randolph-Macon Coal Co.*, (1908) 166 Fed. 170.

A suit by a shipper against a carrier to require it to receive and transport property tendered for shipment involves a question of general law, and where a diversity of citizenship exists between the parties a federal court acquires jurisdiction on that ground alone, and the suit may be brought in the district of which either complainant or defendant is an inhabitant. *Daneiger v. Wells*, (1907) 154 Fed. 379.

A bill filed on the equity side of a federal court to enjoin the further prosecution of an action at law therein, by the defendant in such action, who is a nonresident of the state, against the plaintiff therein and a nonresident corporation, which is not a party to the law action, is not ancillary in such sense as to give the court jurisdiction over the corporation defendant by service on its attorneys within the district, or on such defendant outside of the district, but is an original suit, within the meaning of this section. *Manning v. Berdan*, (1904) 132 Fed. 382.

Where an action for injuries to a servant is brought under the federal Employer's Liability Act, federal jurisdiction does not depend solely on diverse citizenship, but is also sustainable as depending on the construction of such Act, and hence the suit cannot be maintained over defendant's objection in a district other than that in which defendant is an inhabitant. *Smith v. Detroit, etc., R. Co.*, (1909) 175 Fed. 506.

A suit brought in the name of the United States on the bond of a public contractor, for the benefit of a person furnishing materials

and labor for the construction of a public work, is governed by this section. *Davidson Bros. Marble Co. v. U. S.*, (1909) 213 U. S. 10, 29 S. Ct. 324, 53 U. S. (L. ed.) 675; *U. S. v. O'Brien*, (1903) 120 Fed. 446.

As to suits of a local nature, see section 8 of the Act of March 3, 1876, 4 Fed. Stat. Annot. 380, and the corresponding annotation in this Supplement.

As to suits not of a local nature in states containing several districts, see *R. S.* sec. 740, 4 Fed. Stat. Annot. 554, and the corresponding place, *infra*, this Supplement.

As to suits to enjoin railroad companies from establishing and enforcing rates in violation of the Interstate Commerce Act, see Act of Feb. 4, 1887, ch. 104, sec. 0, 24 Stat. L. 382, 3 Fed. Stat. Annot. 833, and note thereto, *infra*, this Supplement.

**Amendment ousting jurisdiction.**—Where after suit brought March 5, 1910, in the federal Circuit Court sitting in Pennsylvania, by a citizen of Pennsylvania against a Maryland corporation, to recover damages for injuries resulting from defendant's negligence, in which federal jurisdiction rested exclusively on diverse citizenship, plaintiff so amended his original statement as to allege a cause of action for injuries to a servant while engaged in interstate commerce, under the federal Employer's Liability Act, so that jurisdiction did not depend solely on diversity of citizenship, the court was thereby deprived of jurisdiction; the suit not having been brought in the district of defendant's residence. *Newell v. Baltimore, etc., R. Co.*, (1910) 181 Fed. 698.

**Suits in admiralty.**—In a suit in admiralty, where two or more defendants are citizens of different districts of the state, the suit may be brought in either district, under Act March 3, 1881, ch. 144, sec. 2, 21 Stat. L. 507, 4 Fed. Stat. Annot. 641. *Downs v. Wall*, (1910) 176 Fed. 657, 100 C. C. A. 209.

**Suit by assignee.**—Where the assignor of a cause of action before the assignment could have prosecuted the action in a federal Circuit Court, the assignee, if the requisite diversity of citizenship exists, can prosecute the action in such court in the district of which he is a resident or in that of the defendant, and in the former case it is not required that the assignor should have also been a resident of the same district so that he might have brought suit therein. *Stimson v. United Wrapping Mach. Co.*, (1907) 156 Fed. 298.

Where the plaintiff, a citizen of New York, brought an action in the Circuit Court of the Southern District of New York, as assignee of a British corporation, against defendant corporation, a citizen of New Jersey, it was held that the court had no jurisdiction to entertain the suit over defendant's protest. *Consolidated Rubber Tire Co. v. Ferguson*, (C. C. A. 1910) 183 Fed. 756.

A suit to enforce rights given by the Interstate Commerce Act may be brought in any federal district where the defendant can be found. *Kalispell Lumber Co. v. Great Northern R. Co.*, (1907) 157 Fed. 845.

An action by certain shippers to restrain an interstate carrier from enforcing a re-

consignment charge of five dollars per car, as unreasonable, though maintainable at common law, is nevertheless a suit within the Interstate Commerce Act, so that federal jurisdiction is not alone dependent on diverse citizenship, and hence can be brought only in the district of which the defendant is an inhabitant. *Sunderland v. Chicago, etc., R. Co.*, (1908) 158 Fed. 877.

**Suit by or against aliens.**—An alien, although resident in a state, can maintain a suit against a citizen of the United States only in the district of defendant's residence. *Miller v. New York Cent., etc., R. Co.*, (1906) 147 Fed. 771; *Barlow v. Chicago, etc., R. Co.*, (1909) 172 Fed. 513; *McAulay v. Moody*, (1911) 185 Fed. 144.

A suit by a citizen of the United States against an alien can only be maintained in a federal court in a district in which valid service can be made on the defendant. *Tierney v. Helvetia Swiss F. Ins. Co.*, (1908) 163 Fed. 82.

The facts that an alien corporation is authorized to do business in a state, and that under the state law service of process in any suit against such corporation may be made on an officer of the state, do not give a federal court within the state jurisdiction of a suit against such corporation, where it does not appear that service was made, or could have been made, within the district of such court, and the fact that defendant is authorized to do business in the district is not sufficient to authorize service to be made therein, unless it is actually so doing business. *Tierney v. Helvetia Swiss F. Ins. Co.*, (1908) 163 Fed. 82.

A suit between citizens of France and an Illinois corporation, where federal jurisdiction depended on diversity of citizenship, cannot be brought over defendant's protest in the federal Circuit Court for the district of North Carolina, where neither plaintiff nor defendant resides. *Fribourg v. Pullman Co.*, (1910) 176 Fed. 981.

Where a defendant, who was a nonresident of, and not subject to suit in, the district, was an indispensable party to a suit between plaintiffs, who were citizens of a foreign country, and the other defendants, citizens of the state and district, federal jurisdiction does not obtain under R. S. sec. 737, 4 Fed. Stat. Annot. 552. *McAulay v. Moody*, (1911) 185 Fed. 144.

An alien corporation, operating an Atlantic steamship line, could be sued for injuries to a passenger, who was a citizen of New Jersey, in a federal Circuit Court sitting in New York. *Jarowski v. Hamburg-American Packet Co.*, (C. C. A. 1910) 182 Fed. 320.

**Suit against federal corporation.**—A corporation created by an Act of Congress, which, having designated Dallas, Texas, where its senior vice-president lives, as its general office, maintains an office in Dallas county, and has all the acts of its board of directors taken in New York city affirmed by a meeting of the board at Dallas before they are considered effective, is suable in the Northern District of Texas, as being a resident of and doing business in that district, and having an

agent there upon whom service can properly be made. *In re Dunn*, (1909) 212 U. S. 374. 29 S. Ct. 299, 53 U. S. (L. ed.) 558.

An action against a corporation created by an Act of Congress is one arising under the laws of the United States, and can only be brought in a federal court of the district in which it has its principal offices, regardless of the residence of plaintiff. *Wolff v. Choc-taw, etc., R. Co.*, (1904) 133 Fed. 601.

**Suits by and against domestic corporations.**—A suit against a railroad company based on the Interstate Commerce Act, and within the jurisdiction of a federal court for that reason, can only be brought in the state in which the defendant is incorporated. *Memphis Cotton Oil Co. v. Illinois Cent. R. Co.*, (1908) 164 Fed. 290; *Imperial Colliery Co. v. Chesapeake, etc., R. Co.*, (1909) 171 Fed. 589.

Where a corporation was organized under the laws of Delaware, the fact that its principal place of business was within the middle federal district of Pennsylvania does not give the corporation a domicile there for the purpose of determining the jurisdiction of the federal courts. *Peake v. Marian Coal Co.*, (1909) 172 Fed. 639.

A federal court of equity will not entertain jurisdiction of a suit to wind up a corporation or appoint a general receiver therefor, where neither the domicile nor property of the corporation is within the state or district, and the residence of the stockholders is immaterial. *Kirwin v. Boston, etc., Min. Co.*, (1908) 171 Fed. 900.

An action against a corporation in a federal court for a common-law tort can be maintained only in the district of plaintiff's residence, or that in which defendant is incorporated, and such requirement cannot be avoided by joining in the same complaint another count stating an entirely separate cause of action of which the court has jurisdiction, nor by stating a joint cause of action against such defendant and another which is an inhabitant of the district and may be there sued; the cause of action being several as well as joint. *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, (1910) 178 Fed. 117.

Where a state contains more than one federal judicial district, a corporation of the state, for the purpose of bringing suit or being sued in a federal court, is at least *prima facie* a resident and inhabitant of the district in which it has its principal office, as designated in its certificate or articles of incorporation in accordance with the requirement of the state law. *Firestone Tire, etc., Co. v. Vehicle Equipment Co.*, (1907) 155 Fed. 676.

A federal court of a district of which the complainants are inhabitants has jurisdiction of a suit to enjoin several railroad companies, who are members of an association, but not citizens of the state, from putting into effect an unlawful rate on all food commodities shipped in interstate commerce within the territory in which such district is situated, where they operate roads in the state and district, and are found and served therein. *Macon Grocery Co. v. Atlantic Coast Line R. Co.*, (1908) 163 Fed. 736.

Where service is made upon an officer or agent of a foreign corporation temporarily within the state or district of suit, in order to give a federal court jurisdiction to render a personal judgment against the corporation, it must appear that it was actually and substantially engaged in business in such state or district, its business must have been transacted by some agent or manager representing the corporation, and it must also appear that the local statute provides for suit against such foreign corporation which has been permitted to transact business within the state. A corporation of another state, which has no place of business within the state of suit, but merely solicits and obtains orders for goods therein by correspondence by agent, is not within the rule. *Buffalo Glass Co. v. Manufacturers' Glass Co.*, (1905) 142 Fed. 273.

A corporation which is a citizen of New York and carries on its business through an agent in the Southern District of Georgia may be sued there by a citizen of Georgia who resides in the district. *Barnes v. Western Union Tel. Co.*, (1903) 120 Fed. 550.

A federal court does not acquire jurisdiction of a corporation of another state by service of process on an officer or agent of the corporation within the state where the court is held unless it appears from some part of the record or by the return that the corporation is doing business in such state. *Green v. Chicago, etc., R. Co.*, (1906) 147 Fed. 767, *modified* (1907) 205 U. S. 530, 27 S. Ct. 595, 51 U. S. (L. ed.) 916.

The presence of an officer of a corporation in another state than that of its domicile, for the purpose of discussing a proposed adjustment of a single controversy, does not constitute a doing of business within the state by the corporation such as to subject it to the jurisdiction of a federal court therein by service of process on such officer. *Wilkins v. Queen City Sav. Bank, etc., Co.*, (1907) 154 Fed. 173.

A foreign corporation which, under the constitution and statutes of the state, can be sued in the state courts only in counties in which it does business, is not suable in a federal court in the state unless it does business in some one of the counties within the territorial jurisdiction of such court. *Kibbler v. St. Louis, etc., R. Co.*, (1906) 147 Fed. 879.

A Pennsylvania corporation which has filed with the auditor-general of the state a certificate designating its office and place of business, pursuant to a local statute, must be deemed a resident of the federal district within which such place is situated, and cannot be sued in another district of the state, although its operations may extend into such district. *Weed v. Centre, etc., St. R. Co.*, (1904) 132 Fed. 151.

But an action by a citizen of Pennsylvania may be properly brought against a foreign corporation doing business in Pennsylvania in the federal district of plaintiff's residence. *Hagstoz v. Mutual L. Ins. Co.*, (1910) 179 Fed. 569.

Where a railroad company, incorporated in Illinois, filed the statement required by law

to entitle it to do business in Pennsylvania, designating its agent in that state, and subsequently such company leased its lines to defendant, an Iowa corporation, which thereafter operated the same, the designated agent of the lessor in Pennsylvania testifying that he thereafter performed the same services for the lessee that he had previously for the lessor, it was held that in the absence of proof of the terms of the lease, it did not appear that defendant was doing business in Pennsylvania under the registration of its lessor or was in any way bound or affected by it, and that a federal court in that state did not acquire jurisdiction of defendant by service of process on such designated agent of the lessor, it not appearing that defendant was in fact doing business in the state. *Green v. Chicago, etc., R. Co.*, (1906) 147 Fed. 767, *modified* (1907) 205 U. S. 530, 27 S. Ct. 595, 51 U. S. (L. ed.) 916.

**Inhabitant and resident.**—For jurisdictional purposes a corporation is an "inhabitant" only of the state under which it was incorporated, and is not suable elsewhere without its consent. *U. S. v. Northern Pac. R. Co.*, (1905) 134 Fed. 715, 87 C. C. A. 269, *reversing* (1903) 120 Fed. 546.

A corporation is an inhabitant of the state or district in which its principal offices are and its corporate business is transacted, and the fact that it is doing business in a state or district other than that in which it has its residence does not make it an inhabitant of such state or district. *Wolff v. Choctaw, etc., R. Co.*, (1904) 133 Fed. 601.

**Several parties plaintiff and defendant.**—In a suit in a federal court against numerous defendants on a contract binding them jointly and severally, the jurisdiction of the court is not defeated because some of the defendants are not inhabitants of nor served within the district, but the case may proceed against those who have been served. *Richmond Cedar Works v. Buckner*, (1910) 181 Fed. 424.

Two citizens of different states may maintain an action against a citizen of a third state in the federal Circuit Court for the district of the latter's residence. *Sweeney v. Carter Oil Co.*, (1905) 199 U. S. 252, 26 S. Ct. 55, 50 U. S. (L. ed.) 178.

An action cannot be maintained in a federal court against a defendant who is a non-resident of the district, over his objection, where the plaintiff is also a nonresident, and jurisdiction is founded only on the fact of diversity of citizenship, although the court has jurisdiction of the action by reason of the residence within the district of other defendants. *Tice v. Hurley*, (1906) 145 Fed. 391.

Where a citizen of Iowa sued a citizen of New York and two citizens of Colorado in the federal Circuit Court of Colorado, the right to object that the citizen of New York was not suable in Colorado, being a privilege personal to him, cannot be made by his codefendants. *Schiffer v. Anderson*, (1906) 146 Fed. 457, 76 C. C. A. 667.

Suit by United States under Anti-Trust Act of July 2, 1890, ch. 647, sec. 4, 26 Stat.

L. 209, 7 Fed. Stat. Annot. 344, see *Standard Oil Co. v. U. S.*, (1911) 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619, *affirming* (1909) 173 Fed. 177.

Special provision for suits against several defendants residing in different districts in Illinois, see Act of March 2, 1887, ch. 315, sec. 4, 24 Stat. L. 442, 4 Fed. Stat. Annot. 636, and *Petri v. F. E. Creelman Lumber Co.*, (1905) 199 U. S. 487, 26 S. Ct. 133, 50 U. S. (L. ed.) 281.

**Objection to jurisdiction.**—The question whether a suit in a federal court is maintainable in the district where brought, under the statute, may be raised either by motion to set aside the service of process or by special demurrer, where a special appearance is made for that purpose only, and before pleading to the merits. *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, (1910) 178 Fed. 117.

The objection of a defendant to the maintenance of an action against him in a federal court on the ground that neither he nor plaintiff is a resident of the district may be taken by demurrer under the Kentucky practice, where the facts appear on the face of the petition. *Tice v. Hurley*, (1906) 145 Fed. 391.

**Waiver of objections.**—As stated in the original annotation, 4 Fed. Stat. Annot. 305, the provision as to the particular district in which the action shall be brought does not affect the general jurisdiction of the court over the cause, but is a personal privilege which the defendant may insist upon or may waive, at his election. It has been frequently held that an objection that suit is not brought in the proper district is waived by a general appearance, pleading to the merits, or removing the cause without raising the objection. *Ingersoll v. Coram*, (1908) 211 U. S. 335, 29 S. Ct. 92, 53 U. S. (L. ed.) 208, *reversing* (1906) 148 Fed. 169, 78 C. C. A. 303; *Occidental Consol. Min. Co. v. Comstock Tunnel Co.*, (1903) 120 Fed. 518; *Pepper v. Rogers*, (1904) 128 Fed. 987; *Von Voigt v. Michigan Cent. R. Co.*, (1904) 130 Fed. 398; *Baltimore, etc., R. Co. v. Doty*, (1904) 133 Fed. 866, 67 C. C. A. 38; *Lebensberger v. Scofield*, (1905) 139 Fed. 380, 71 C. C. A. 476; *Mahr v. Union Pac. R. Co.*, (1905) 140 Fed. 921; *Iowa Lilloet Gold Min. Co. v. Bliss*, (1906) 144 Fed. 446; *U. S. Fidelity, etc., Co. v. Woodson County*, (1906) 145 Fed. 144, 76 C. C. A. 114; *U. S. v. California Bridge, etc., Co.*, (1907) 152 Fed. 559; *Midland Contracting Co. v. Toledo Foundry, etc., Co.*, (1907) 154 Fed. 707, 83 C. C. A. 489; *Dulles v. H. D. Crippen Mfg. Co.*, (1907) 156 Fed. 706; *McPhee, etc., Co. v. Union Pac. R. Co.*, (C. C. A. 1907) 158 Fed. 5; *International Bank, etc., Co. v. Scott*, (C. C. A. 1908) 159 Fed. 58; *Campbell v. Johnson*, (1909) 167 Fed. 102; *Peale v. Marian Coal Co.*, (1909) 172 Fed. 639; *Clark v. Southern Pac. Co.*, (1909) 175 Fed. 122; *Hubbard v. Chicago, etc., R. Co.*, (1910) 176 Fed. 904; *Howland Pulp, etc., Co. v. Alfreds*, (C. C. A. 1910) 179 Fed. 482; *Irving v. Joint Dist. Council of United Brotherhood of Carpenters, etc.*, (1910) 180 Fed. 896; *U. S. v. Schofield*

*Co.*, (1910) 182 Fed. 240; *Gearlds v. Johnson*, (1911) 183 Fed. 611; *U. S. Gypsum Co. v. Shliwenska*, (C. C. A. 1910) 183 Fed. 688; *Bluefields Steamship Co. v. Steele*, (C. C. A. 1911) 184 Fed. 584; *Title Guaranty, etc., Co. v. U. S.*, (C. C. A. 1911) 187 Fed. 98, *affirming* (1910) 182 Fed. 240.

The Circuit Courts of the United States having full jurisdiction of patent cases, the limitation in respect to the district of residence of a defendant or of place of business and acts of infringement may be waived, and the objection cannot be made after the case has proceeded beyond the pleadings and into the taking of testimony. *General Electric Co. v. Wagner Electric Mfg. Co.*, (1903) 123 Fed. 101, *affirmed* (1904) 130 Fed. 772, 66 C. C. A. 82.

Where a defendant corporation, sued in a federal court in a district of which neither complainant nor any defendant is an inhabitant, waives any objection to the place of suit by appearing and joining in complainant's prayer for a receiver, such waiver is conclusive upon third persons not parties, who cannot claim that the appointment of the receiver was without jurisdiction, there being the requisite diversity of citizenship to confer constitutional jurisdiction on the court. *Horn v. Pere Marquette R. Co.*, (1907) 151 Fed. 626.

Where a federal court in which suit was brought was without jurisdiction, because neither plaintiff nor defendant resided in the state or district, and such want of jurisdiction was raised by demurrer, it was held that the defendant did not waive the objection either by appearing at the taking of the depositions and cross-examining witness without declaring its intent to insist on its objection to the jurisdiction, or by stipulating during the taking of such depositions that copies of letters and telegrams might be used by either party in lieu of the originals. *Stonega Coal, etc., Co. v. Louisville, etc., R. Co.*, (1905) 139 Fed. 271.

A foreign corporation, by appointing a registered agent on whom summons could be served in Pennsylvania, does not thereby waive its privilege to be free from suit in a federal Circuit Court of Pennsylvania, except where the plaintiff is a citizen and resident of that state. *Hagstoz v. Mutual L. Ins. Co.*, (1910) 179 Fed. 569.

## XII. SUITS BY ASSIGNEES.

**General construction.**—Where, under the terms of a town vote granting aid to a railroad company, no cause of action ever accrued to the railroad corporation, but did accrue to its receiver or the assignee of his successor who furnished funds to complete the road under an assignment of the subscription, the fact that the corporation could not have maintained an action in the federal courts to recover such subscription because it was of the same citizenship as the town did not deprive such assignee of the right to sue in the federal courts. *Paige v. Rochester*, (1905) 137 Fed. 663.

The original beneficial owner may sue in a

federal court on a note, although the nominal payee by reason of his citizenship would not have such right. *Kirven v. Virginia-Carolina Chemical Co.*, (1906) 145 Fed. 288, 76 C. C. A. 172.

That a cause of action was transferred for the purpose of enabling the transferee to sue thereon in the federal courts does not deprive such courts of jurisdiction, where the transfer was real and absolute. *Ashley v. Presque Isle County*, (1897) 83 Fed. 534, 27 C. C. A. 585, *certiorari denied* (1898) 169 U. S. 736, 18 S. Ct. 940, 42 U. S. (L. ed.) 1216; *Kreider v. Cole*, (1907) 149 Fed. 647, 79 C. C. A. 339.

Where a sale and conveyance of a mining claim are real, and not merely simulated, the motive of the sale is immaterial, so far as affecting the right of the grantee to maintain a suit for its possession in a federal court on the ground of diversity of citizenship. *Willitt v. Baker*, (1904) 133 Fed. 937.

A New York corporation may bring suit in a federal Circuit Court on the notes of an Illinois corporation, although the treasurer of the latter corporation, to whose order the notes were made payable, and by whom they were, before delivery, indorsed to the New York corporation, which loaned the money for which they were given, may be a citizen of Illinois. *Blair v. Chicago*, (1906) 201 U. S. 400, 26 S. Ct. 427, 50 U. S. (L. ed.) 801, *reversing* (1904) 132 Fed. 848.

Where one of complainant's contracts is clearly within the jurisdiction of a federal court, it draws to that court jurisdiction to determine the entire controversy, although others of the contracts, as to which the issues are the same, were acquired by complainant through assignments from persons who could not have sued in such court. *Howe, etc., Co. v. Haugan*, (1904) 140 Fed. 182.

**Instruments made by corporation.**—Where a note between parties of the same citizenship is made by a corporation payable to bearer, a suit thereon brought by the holder of different citizenship from the maker against it is maintainable in the federal courts, since the paper passes by delivery and requires no assignment. *Denison State Nat. Bank v. Eureka Springs Water Co.*, (1909) 174 Fed. 827.

**County warrants payable to bearer are choses in action made by a corporation, and a holder thereof who is a citizen of another state may maintain an action against the county to recover thereon in a federal court, regardless of the citizenship of the original holders.** *Kearny County v. Irvine*, (1903) 126 Fed. 689, 61 C. C. A. 607.

**Payable to order.**—Where there is no diversity of citizenship between the maker and payee of certain notes payable to the payee's order, suit cannot be brought thereon by an indorsee, whose citizenship was diverse, in the federal court. *Denison State Nat. Bank v. Eureka Springs Water Co.*, (1909) 174 Fed. 827.

**Payable to bearer.**—Notes of a city payable to bearer are excepted from the operation of this section, whether the notes were first negotiated to a citizen of a state other

than that of the maker or not. *Citizens' Sav. Bank v. Newburyport*, (C. C. A. 1909) 169 Fed. 760.

**Suits by administratrix.**—A suit to declare and enforce a lien on certain interests in distributive shares of the property of a decedent in the hands of an ancillary administrator is not within this section because plaintiff's right is derived from an heir whose citizenship is the same as that of such administrator, where the plaintiff, who sues as administratrix, and who is a citizen of a different state from the defendant administrator, is suing primarily on the obligation of such heir to her intestate, to secure which a lien was given upon such heir's distributive share. *Ingersoll v. Coram*, (1908) 211 U. S. 335, 29 S. Ct. 92, 53 U. S. (L. ed.) 208.

A suit to recover the contents of a chose in action can only be maintained in a federal court where the assignor could have sued in that court if no assignment had been made. *Kolze v. Hoadley*, (1906) 200 U. S. 76, 20 S. Ct. 220, 50 U. S. (L. ed.) 377; *Tierney v. Helvetia Swiss F. Ins. Co.*, (1908) 163 Fed. 82; *Farr v. Hobe-Peters Land Co.*, (C. C. A. 1910) 188 Fed. 10.

"In construing this clause the decisions of this court have settled the following propositions," said the court in *Kolze v. Hoadley*, (1906) 200 U. S. 76, 26 S. Ct. 220, 50 U. S. (L. ed.) 377: "1. That a suit to recover the contents of a promissory note or other chose in action is a suit to recover the amount due upon such note, or the amount claimed to be due upon an account, personal contract, or other chose in action. *Sere v. Pitot*, (1810) 6 Cranch (U. S.) 332; *Deshler v. Dodge*, (1853) 16 How. 622, 631; *Bushnell v. Kennedy*, (1869) 9 Wall. 387; *Shoecraft v. Bloxham*, (1888) 124 U. S. 730. . . . 2. That a suit to foreclose a mortgage is within the inhibition of the Act, and can only be maintained where the assignor was competent to file the bill. *Sheldon v. Sill*, (1850) 8 How. 441; *Blacklock v. Small*, (1888) 127 U. S. 96. 3. That the bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if no assignment had been made. *Turner v. Bank of North America*, (1799) 4 Dall. (U. S.) 8; *Mollan v. Torrance*, (1824) 9 Wheat. 537; *Bradley v. Rhines*, (1869) 8 Wall. 393; *Anderson v. Watt*, (1891) 138 U. S. 694, 702; *Robertson v. Cease*, (1878) 97 U. S. 646, 649; *Brock v. Northwestern Fuel Co.*, (1889) 130 U. S. 341. 4. That a suit may be maintained between the immediate parties to a promissory note as indorser and indorsee, provided the requisite diversity of citizenship appears as between them, or upon a new contract arising subsequently to the execution of the original, notwithstanding a suit could not have been maintained upon the original contract. In such case the original contract may be considered to ascertain the amount of the damages. *Young v. Bryan*, (1821) 6 Wheat. 146; *U. S. Bank v. Moss*, (1848) 6 How. 31; *Superior v. Ripley*, (1891) 138 U. S. 93; *Mollan v. Torrance*, (1824) 9 Wheat. 537; *Marine, etc., Phosphate Min., etc., Co. v. Bradley*, (1881) 105 U. S. 175."

Where separate assignees of two vendor's lien notes brought suit thereon in a federal court, and it did not appear that the notes were foreign bills of exchange or that suit might have been brought in the federal court by the assignor, it was held that federal jurisdiction was not shown. *Troy Bank v. Whitehead*, (1910) 184 Fed. 932.

A suit by the assignee of an oral contract to recover a sum of money due thereon is one to recover contents of a chose in action, and a federal court is without jurisdiction of such suit unless it could have been maintained by the assignor. *Utah-Nevada Co. v. De Lamar*, (1904) 133 Fed. 113, 66 C. C. A. 179.

A pledgee of stock cannot, on account of the diverse citizenship existing between himself and the corporation, sue the corporation in the federal court for the appointment of a receiver where his pledgor is a resident of the state of which the corporation is a citizen. *Gorman-Wright Co. v. Wright*, (1904) 134 Fed. 363, 67 C. C. A. 345.

A federal court is without jurisdiction of a suit on a cause of action existing in favor of a partnership brought by one partner in his own right and as assignee of the interest of his copartner, unless the bill shows that the citizenship of the assignor is such that the suit might have been maintained in that court by the firm. *Ban v. Columbia Southern R. Co.*, (C. C. A. 1902) 117 Fed. 21.

In an action against two railroad companies, the complaint alleged the delivery of goods to one, which it accepted as a common carrier, and agreed and undertook to carry and safely deliver to the second; that it failed to take proper care of such goods, whereby they became damaged and injured in transit; that it delivered the same to the second company, which accepted them as a common carrier, and agreed and undertook to carry them and safely deliver them to a third company, but, in violation of its agreement and duty, diverted and unreasonably delayed the shipment; and that the goods were finally sold by both defendants without notice to plaintiff; and it was held that the action was one for breach of duty as a carrier, arising by operation of law or by express contract, and in either case was in tort, and not to recover on a chose in action, and might, therefore, be brought in a federal court by an assignee without reference to the citizenship of his assignor. *Muller v. Chicago, etc., R. Co.*, (1906) 149 Fed. 939.

This section does not apply to a bill by a nonresident stockholder of a corporation, who acquired his stock by assignment from a resident of the state where the corporation was domiciled, to restrain the latter's directors and trustees from using the corporate assets for an alleged *ultra vires* business, affecting complainant's interest only in common with all other stockholders. *Consumers' Gas Trust Co. v. Quinby*, (1905) 137 Fed. 882, 70 C. C. A. 220.

A bill by a corporation alleged that one of the defendants, who had made an invention and applied for a patent therefor, by a written instrument assigned a two-thirds interest therein and in the right to the patent

therefor to two other persons; that the three organized complainant corporation, and thereupon sold their rights to the corporation, receiving in payment its capital stock; that complainant, under the management of such three persons, engaged in the manufacture of the invention, but that defendant subsequently sold his stock therein, and on the issuance of the patent caused the same to be assigned to another corporation, which was made defendant, and which had engaged in the manufacture of the patented article; that the two other persons had assigned their equitable interest in the invention and patent to complainant. The bill prayed for an accounting of profits, an injunction to restrain defendants from manufacturing the patented article, and that they be required to assign the patent to complainant. It was held that the purpose of the bill was not the specific enforcement of the written assignment made by defendant, but to charge him as trustee *ex maleficio* on the ground of fraud, and that the case was not, therefore, within the statutory provisions relating to suits by assignees. *Prest-o-Lite Co. v. Avery Portable Lighting Co.*, (1908) 164 Fed. 60.

Where a city ordinance, under which a water franchise was granted, provided that hydrant rentals should be paid to plaintiff, a nonresident corporation, as trustee, the fact that the original ordinance granting the franchise was not to the water company, but to M. and his assigns, who assigned the same to the water company, and that both M. and the company were citizens of the same state, does not preclude the trustee from bringing an action to recover such rents in the federal court. *Seymour v. Farmers' L. & T. Co.*, (1903) 128 Fed. 907, 63 C. C. A. 633.

Where plaintiff alleged a cause of action for damages for a conspiracy charged to have been committed by defendants against plaintiff after he became the owner of a contract for the sale of real estate by assignment, it was held that the citizenship of plaintiff's assignor of the contract was immaterial to the jurisdiction of the federal Circuit Court, the cause of action alleged never having existed in his favor. *Noyes v. Crawford*, (1904) 133 Fed. 796.

Where, under the terms of a town vote granting aid to a railroad company, no cause of action ever accrued to the railroad corporation, but did accrue to its receiver or the assignee of his successor, who furnished funds to complete the road under an assignment of the subscription, it was held that the fact that the corporation could not have maintained an action in the federal courts to recover such subscription because it was of the same citizenship as the town did not deprive such assignee of the right to sue in the federal courts. *Paige v. Rochester*, (1905) 137 Fed. 663.

**Merger by judgment.**—Where the assignee of a cause of action has reduced the same to judgment, in a subsequent action on the judgment in a federal court the citizenship of the original assignor is wholly immaterial to the question of the jurisdiction of such court. *Hultberg v. Anderson*, (1909) 170 Fed. 657.



**Judgment creditor of an insolvent corporation** may maintain a suit in a federal court to enforce a trust against a third party in property alleged to belong to the corporation, and to have been acquired by defendant in fraud of their rights, where diversity of citizenship appears, and the requisite amount is involved, although complainants' judgments were recovered in a state court in suits on assigned notes, of which the federal court would not have had jurisdiction. *Stanwood v. Wishard*, (1905) 134 Fed. 959.

**To what assignment or transfer applicable.**—Where the receiver of a railroad corporation completed the road, and thereby became entitled to a town subscription, it was held that the receiver's successor was not an assignee, within the meaning of the statute. *Paige v. Rochester*, (1905) 137 Fed. 663.

Where a mortgage was given to secure a prior indebtedness from the mortgagor to the mortgagee, who were citizens of different states, the jurisdiction of a federal court of a suit to foreclose the mortgage is not affected by the fact that it also secured other indebtedness owing by the mortgagor to a third person, who was a citizen of the same state, which had been assigned to the mortgagee. *Peacock, etc., Co. v. Thaggard*, (1904) 128 Fed. 1005, *affirmed* 129 Fed. 1005, 64 C. C. 490.

**Suit to recover possession of mortgaged property.**—An action of replevin by the assignee of a promissory note, secured by a chattel mortgage, to recover possession of the mortgaged property from a stranger to the contract, for the purpose of ultimately subjecting it to the mortgage, is not a suit to recover the contents of a chose in action. *Buckingham v. Dake*, (1901) 112 Fed. 258, 50 C. C. A. 492.

**Reassignment.**—Where the original owner of a chose in action, who might have sued thereon in a federal court, assigned the same, he is entitled to sue in such court on again becoming the owner by a reassignment from his assignee, without regard to the citizenship of the latter. *Moore Bros. Glass Co. v. Drevet Mfg. Co.*, (1897) 154 Fed. 737.

**Intermediate assignees.**—The limitation imposed by this section on suits in the federal courts by assignees does not extend to intermediate assignees. *Farr v. Hobe-Peters Land Co.*, (C. C. A. 1910) 188 Fed. 10, *reversing* (1908) 170 Fed. 644.

**Suit by assignee of national bank.**—Under the federal Judiciary Act (Act of March 3, 1887, ch. 373, sec. 4, 24 Stat. L. 554, 5 Fed. Stat. Annot. 193, which makes national banks citizens of the state in which they are located for the purposes of the jurisdiction of a federal court, it has been held that the assignment of a chose in action by such a bank does not vest the assignee with the right to maintain an action thereon in a federal court against a citizen of the state in which the bank is located. *Sullivan v. Ayer*, (1909) 174 Fed. 199.

Where a national bank executed a non-negotiable note to another national bank, both being citizens of Nebraska, which note was assigned to a citizen of another state, an

action by him thereon against the maker and other defendants, the most of whom were also citizens of Nebraska, cannot be maintained in the federal courts on the ground of diversity of citizenship. *George v. Wallace*, (1904) 135 Fed. 286, 68 C. C. A. 40, *affirmed* (1906) 201 U. S. 230, 26 S. Ct. 495, 50 U. S. (L. ed.) 738.

In *Sullivan v. Ayer*, (1909) 174 Fed. 199, it appears that a national bank located in Pennsylvania recovered a judgment in the Supreme Court of New York against a New York corporation and issued an execution thereon, which was returned unsatisfied. The bank then assigned the judgment, with all its rights, to the plaintiff, a citizen of New York, who brought suit thereon in a federal court in Pennsylvania against a citizen of that state to enforce his statutory liability under the laws of New York as a stockholder of the judgment defendant, and it was held that such suit was one to recover the contents of the judgment, which was a chose in action, and, since it could not have been maintained by the bank in such court, could not be by plaintiff, as its assignee.

**Citizenship at time suit commenced.**—In an action by an assignee of a chose in action to recover the contents thereof, the jurisdiction of the federal Circuit Court depends on whether the action might have been brought by the assignor when it was commenced, if he had made no assignment thereof; and hence, where there was a diversity of citizenship at that time between both the assignor and the assignee and defendants, it was immaterial that at the time of the assignment the defendants and the assignor were citizens of the same state. *Noyes v. Crawford*, (1904) 133 Fed. 796.

**Assignment merely changing venue.**—The right to maintain a suit in the Circuit Court of the United States, where the original parties to the controversy were citizens of different states, is not lost by an assignment of the cause of action to one who is also a citizen of a different state from the defendant, although the effect of the assignment is to change the venue of the action to the district of the assignee's residence. *Bolles v. Lehigh Valley R. Co.*, (1904) 127 Fed. 884.

**Pleading citizenship of original parties.**—Where the right of a plaintiff to maintain an action in a federal court on an assigned claim, which depended on the citizenship of his assignor, was not questioned in the trial court, it is sufficient to sustain the jurisdiction that it appears in the record that the assignor had a domicile and resided in a state other than that of which the defendant was a citizen. *Canyon First Nat. Bank v. Crowley*, (C. C. A. 1910) 183 Fed. 578.

**Objection to jurisdiction.**—An objection to the jurisdiction of a federal court on the ground that the action is based on a contract assigned to plaintiff, and it does not appear that it could have been maintained in that court by the assignor, is one which cannot be waived, and may be raised at any time, or considered by the court on its own motion, and it need not, therefore, be presented by an assignment of error in the appellate court.

Utah-Nevada Co. v. De Lamar, (C. C. A. 1904) 133 Fed. 113, *certiorari denied* (1905) 199 U. S. 605, 26 S. Ct. 746, 50 U. S. (L. ed.) 330.

### XIII. SERVICE OF PROCESS.

**Running of process.**—In the absence of express statutory authority, there is no power in a court to order actual personal service of process upon a defendant beyond its territorial jurisdiction. *Jennings v. Johnson*, (C. C. A. 1906) 148 Fed. 337.

**On foreign corporations.**—Where service of process, in an action brought in the court of a state against a corporation of another

state, is made upon an officer of such corporation temporarily in such state on his own private business, the corporation having no office or agent or property in the state where such service is made, and doing no business there, the court obtains no jurisdiction of such corporation, even though the statutes of the state and its highest court pronounce and hold such service good and sufficient, and in such cases, after removal to the federal courts, the actions must be dismissed. *Venner v. Great Northern R. Co.*, (1907) 153 Fed. 408, *affirmed* (1908) 209 U. S. 24, 28 S. Ct. 323, 52 U. S. (L. ed.) 666, citing the earlier decisions to this effect.

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## I. CASES INVOLVING FEDERAL QUESTION.

The phrase "laws of the United States," as used in the Removal Acts, means Acts of Congress, and does not include executive rules and regulations, unless a recovery of damages is expressly authorized by statute for a disregard of such regulations. *Beck v. Johnson*, (1909) 169 Fed. 154.

A suit is removable as arising solely under the Constitution, laws, or treaties of the United States if from the questions raised by the bill it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or laws of the United States, and sustained by the opposite construction. *Oregon v. Three Sisters Irrigation Co.*, (1907) 156 Fed. 346; *Beck v. Johnson*, (1909) 169 Fed. 154.

Where the facts stated in plaintiff's petition disclose a right of action given or created by an Act of Congress, and also a right of action created by a state law, it would be for the court on petition to remove to determine under which statute the action was maintainable, if at all, and if one construction of the federal statute would sustain and another defeat a recovery, the action would be one arising under a law of the United States, and therefore of federal cognizance. *Hall v. Chicago, etc., R. Co.*, (1906) 149 Fed. 564.

But a cause cannot be removed to a federal court, on the ground that it is one arising under the Constitution, laws, or treaties of the United States, merely because it may become necessary in the progress of the litigation to construe the Constitution or laws

of the United States; the cause must be one the decision of which depends on such construction. *Miller v. Illinois Cent. R. Co.*, (1909) 168 Fed. 982; *Leggett v. Great Northern R. Co.*, (1910) 180 Fed. 314; *Schuyler v. Southern Pac. Co.*, (Utah 1910) 169 Pac. 458.

A suit in equity to cancel certain agreements regulating the price of paint and varnish removers, manufactured and sold under patents issued to defendant, on the ground that such agreements are in violation of the Sherman anti-trust law, is a suit directly involving the construction of a law of the United States, and is therefore removable to the federal courts, regardless of the citizenship of the parties. *Chalmers Chemical Co. v. Chadeloid Chemical Co.*, (1909) 175 Fed. 995.

Where a contract between plaintiff, the state of Oregon, and defendants, for the reclamation of certain desert lands, depends for its validity on federal legislation, an action by the state to annul the contract because of defendant's failure to comply therewith is one arising solely under the laws of the United States, and therefore removable to the federal courts. *Oregon v. Three Sisters Irrigation Co.*, (1907) 156 Fed. 346.

An action on a promissory note by one claiming as a *bona fide* holder for value before maturity does not arise under the Constitution or laws of the United States, so as to be removable to a federal Circuit Court, because the makers of the note relied for their defense upon provisions of certain federal

statutes as establishing that the transaction upon which the right to recover was based was prohibited by law, which would only demonstrate that the suit could not be maintained at all, and not that the cause of action arose under the Federal Constitution or laws. *Williams v. Pauls Valley First Nat. Bank*, (1910) 216 U. S. 582, 30 S. Ct. 441, 54 U. S. (L. ed.) 825, *affirming* (1908) 20 Okla. 274, 95 Pac. 457.

**Effect of previous determination.**—A federal question which will confer jurisdiction on a United States court either by original process or by removal must be a question of law as stated by the plaintiff in his complaint, and when a legal question arising under the Constitution or a law or treaty of the United States has been decided by the Supreme Court, it ceases to be a federal question for removal purposes. Where the facts only are in dispute, the federal court cannot take jurisdiction. *Arkansas v. Choctaw, etc.*, R. Co., (1905) 134 Fed. 106; *Myrtle v. Nevada, etc.*, R. Co., (1905) 137 Fed. 193.

**Action under postal laws.**—Although Congress has not authorized by special act the removal of causes arising under the postal laws of the United States, if the bill on its face shows that the controversy is one arising under the postal laws of the United States, and the value of the matter in controversy exceeds \$2,000, exclusive of interest and costs, such cause is removable from the state to a national court. *Lewis Pub. Co. v. Wyman*, (1907) 152 Fed. 200. See also *Bryant Bros. Co. v. Robinson*, (1906) 149 Fed. 321, 79 C. C. A. 259.

**Actions based on federal "Employer's Liability Law."**—An action by an employee against a railroad company to recover for a personal injury, where both parties were engaged in interstate commerce at the time of the injury, is governed by the federal Employers' Liability Act, which supersedes all other law and is controlling on the question of the jurisdiction of a federal court and the right of removal. *Bottoms v. St. Louis, etc.*, R. Co., (1910) 179 Fed. 318.

Although state courts have concurrent jurisdiction with federal courts in actions in which it is sought to recover damages for injury or death caused by a violation of the federal Employers' Liability Act, if action is brought in the state court and motion is made in due time in such court by defendant to remove the action to the federal court, the motion must prevail; the right to remove depending on the original jurisdiction of the United States court. *Calhoun v. Central of Georgia R. Co.*, (1910) 7 Ga. App. 528, 67 S. E. 274; *Lemon v. Louisville, etc.*, R. Co., (1910) 137 Ky. 276, 125 S. W. 701.

But even though an action for injuries to a servant of a railroad company is brought under the Employers' Liability Act, if it does not appear from the plaintiff's declaration that the construction of the Act is involved, but that the decision will depend on the law as applied to the facts, the cause is not removable as arising under the laws of the United States. *Miller v. Illinois Cent. R. Co.*, (1909) 168 Fed. 982; *Nelson v. Southern R. Co.*, (1909) 172 Fed. 478.

Thus, where the plaintiff brought suit against defendant, an interstate carrier, for death of her husband, a locomotive fireman, while engaged in interstate commerce, alleging that his death resulted from a collision due to the negligence of the engineer and conductor of the train on which he was employed, it was held that such action was not brought under or in pursuance of the federal Employers' Liability Act, but under the Missouri state law, and hence the cause was not removable on the ground that it involved a construction of a law of the United States. *Thompson v. Wabash R. Co.*, (1911) 184 Fed. 554.

**Suits under federal "Safety Appliance Act."**—Where, after pleas of assumed risk and contributory negligence in an action for injuries to a brakeman while uncoupling cars, plaintiff amended his petition so as to allege a violation of the federal Safety Appliance Act, prohibiting interstate carriers from using cars not equipped with automatic couplers, and providing that a servant injured while using cars not so equipped should not be held to have assumed the risk, the cause thereupon became one arising under the laws of the United States, and is removable to the federal court, though the petition, before amendment, stated a cause of action independent of such statute. *Nicholas v. Chesapeake, etc.*, R. Co., (1907) 127 Ky. 310, 105 S. W. 481.

But an action in a state court to recover for personal injuries alleged to have been received by reason of the failure of defendant railroad company to properly equip its cars with safety appliances is not removable merely because of an allegation in the complaint that defendant is engaged in interstate commerce, where it does not appear that there is any controversy as to the construction or effect of the federal law relating to railroads engaged in such commerce, because the questions of fact as to whether the defendant is engaged in interstate commerce, and, if so, whether it has complied with the law, are not federal questions. *Myrtle v. Nevada, etc.*, R. Co., (1905) 137 Fed. 193.

Even if the allegation of the petition of a switchman against a railroad company for injury from defective couplers, that the "cars in use on defendant's said railway, and particularly the cars on which plaintiff was injured, were not properly equipped with automatic couplers, as required by law," necessarily implies a reliance on the Act of Congress requiring automatic couplers, a removable case is not shown, as the statute applies only to carriers engaged in interstate commerce; and neither the petition in the case nor the petition for removal shows that defendant was so engaged, nor that the cars in question were being used in such commerce. *International, etc.*, R. Co. v. *Elder*, (1907) 44 Tex. Civ. App. 605, 99 S. W. 856.

**Suit against federal corporation.**—In an action pending in the United States Court of Appeals for the Indian Territory at the time of the admission of the state, in which plaintiff, who was a resident of the Indian Territory prior to statehood and has been a citizen of the state since its admission, alleges

in her complaint that defendant is a corporation organized under an Act of Congress, the action arises under the laws of the United States, and the defendant is entitled to have the case removed to the Circuit Court of the United States. *Choctaw, etc., R. Co. v. Hendricks*, (1908) 21 Okla. 135, 95 Pac. 970.

Where the plaintiff, a corporation, sued defendant in a state court and alleged that it was, and at all times had been, a corporation created, organized, and existing under an Act of Congress, and it appeared that the plaintiff was organized as a corporation in the Indian country under the Arkansas laws made applicable thereto by such Act of Congress, the action was held to be one necessarily arising under and involving the Constitution and laws of the United States. *Canary Oil Co. v. Standard Asphalt, etc., Co.*, (1909) 182 Fed. 663.

An action brought jointly against a corporation chartered under an Act of Congress, and a local defendant, upon a joint liability, is a suit arising under the laws of the United States, and, as such, is removable from a state court to a federal Circuit Court on petition of both defendants. *In re Dunn*, (1909) 212 U. S. 374, 29 S. Ct. 299, 53 U. S. (L. ed.) 558; *Texas, etc., R. Co. v. Eastin*, (1909) 214 U. S. 153, 29 S. Ct. 564, 53 U. S. (L. ed.) 946, *affirming* (1907) 100 Tex. 556, 102 S. W. 105; *Martin v. St. Louis Southwestern R. Co.*, (1904) 134 Fed. 134; *Choctaw, etc., R. Co. v. Hamilton*, (1908) 21 Okla. 126, 95 Pac. 972; *Texas, etc., R. Co. v. Beckworth*, (Tex. 1909) 118 S. W. 729.

**Suits against federal officers.**—Where suit was brought in a state court against defendant as "the duly qualified and acting postmaster at Dallas, Tex.," and sought relief against certain official acts performed by the defendant under orders of the postmaster-general, it was held to be a suit against an officer of the United States in his official capacity, and removable to the federal courts. *Bryant Bros. Co. v. Robinson*, (1906) 149 Fed. 321, 79 C. C. A. 259.

But an action for libel against individuals is not removable upon averments in the petition for removal that the action complained of was taken by defendants as officers of the United States, and that such fact was fraudulently omitted from plaintiff's petition for the purpose of preventing a removal, since such fact, if it had been pleaded, would not have conferred original jurisdiction on the federal court. *People's U. S. Bank v. Goodwin*, (1908) 160 Fed. 727.

A receiver of a national bank being entitled to remove actions against him to the federal courts as an action arising under the laws of the United States, as provided by R. S. sec. 629, 4 Fed. Stat. Annot. 245, a defendant when sued in a state court by such receiver is also entitled to exercise the same right. *Johnson v. Rankin*, (Tex. 1906) 95 S. W. 665.

**Suits against other receivers appointed by federal court.**—The fact alone that a defendant in an action in a state court is a receiver appointed by a federal court does not render the cause removable as one arising under the laws of the United States. *Pepper v. Rogers*,

(1904) 128 Fed. 987; *Rural Home Telephone Co. v. Powers*, (1910) 178 Fed. 986; *People v. Bleecker St., etc., R. Co.*, (1910) 178 Fed. 156; *Dale v. Smith*, (1910) 182 Fed. 360; *Vanderbilt v. Kerr*, (1911) 188 Fed. 537; *Jeffery v. Osborne*, (1911) 145 Wis. 351, 129 N. W. 931.

Where receivers of an interstate railroad were appointed by a federal court, it was held that actions against them instituted by claimants in a state court were not removable to the federal court as involving a federal question on the theory that to permit such suits to be maintained in the state court would interfere with the receiver's operation of the road and their performance of its duties to the public. *Dale v. Smith*, (1910) 182 Fed. 360.

That no consent had been obtained to sue federal receivers does not warrant a removal of the cause to the federal court. *People v. Bleecker St., etc., R. Co.*, (1910) 178 Fed. 156.

**Suits concerning navigable streams.**—An original application in the state Supreme Court for a writ of mandamus to compel railroad companies owning and operating a bridge over a navigable river to replace it with another bridge according to plans and specifications to be approved by the court, is a case arising under the laws of the United States. *State v. White River Valley R. Co.*, (S. D. 1911) 129 N. W. 1034.

The justness and feasibility of railroad regulations made by the State Corporation Commission are reviewable only by the state tribunals, and not by the federal courts, unless the regulations are so unreasonable or arbitrary as to violate the protective clauses of the Fourteenth Amendment of the Constitution, when they may be reviewed only by the Supreme Court of the United States on a writ of error after the railroad company has exhausted its right of review afforded by the laws of the state. *North Carolina Corp. Commission v. Southern R. Co.*, (1909) 151 N. C. 447, 66 S. E. 427.

The validity of resolutions prohibiting the construction by a street railway company of switches on a bridge, and approaches thereto, etc., adopted by a city possessing power under its charter, statutes, and its franchise ordinance to the street railway, to prescribe reasonable regulations, etc., does not involve a federal question. *Eastern Wisconsin R., etc., Co. v. Hackett*, (1908) 135 Wis. 464, 115 N. W. 376, 1136, 1139.

**Question depending on federal homestead law.**—A question depending for solution upon the laws of the United States, and therefore justifying removal from a state to a federal Circuit Court, is involved in a suit by the daughter of a deceased homestead settler to establish her title under the operation of the state laws, as against his widow, to whom, in accordance with a federal statute, the patent has issued. *McCune v. Essig*, (1905) 199 U. S. 382, 26 S. Ct. 78, 50 U. S. (L. ed.) 237, *affirming* (1902) 118 Fed. 273, (1903) 122 Fed. 588, 59 C. C. A. 429.

**Suits affecting judgment of federal court.**—Suits in equity in a state court, the effect

of which, as disclosed on the face of the bills, is to delay and obstruct, and perhaps defeat, the enforcement of a judgment of a federal court, are removable, as involving a federal question. *Cornue v. Ingersoll*, (1909) 174 Fed. 666, *decree affirmed* (1910) 176 Fed. 194, 99 C. C. A. 548.

**How federal question presented.**—To entitle a party to remove a cause to a federal court on the ground that a federal question is involved, it is necessary that the fact appear from the plaintiff's statement; that the allegation be real and substantial; that it appear from the complaint that in some aspect which the case may assume a federal question will be involved, and that it is set up in good faith; but, if there is a doubt as to the right to remove, the doubt must be resolved against jurisdiction. *Minnesota v. Northern Securities Co.*, (1904) 194 U. S. 48, 24 S. Ct. 598, 48 U. S. (L. ed.) 870; *Arkansas v. Choctaw, etc., R. Co.*, (1905) 134 Fed. 106; *Oregon v. Three Sisters Irrigation Co.*, (1907) 158 Fed. 346; *People's U. S. Bank v. Goodwin*, (1908) 160 Fed. 727; *Beck v. Johnson*, (1909) 169 Fed. 154; *Clark v. Southern Pac. Co.*, (1909) 175 Fed. 122; *Leggett v. Great Northern R. Co.*, (1910) 180 Fed. 314; *St. Louis, etc., R. Co. v. Neal*, (1906) 83 Ark. 591, 98 S. W. 958; *Missouri, etc., R. Co. v. Hollan*, (1908) 49 Tex. Civ. App. 55, 107 S. W. 642; *Schuyler v. Southern Pac. Co.*, (Utah 1910) 109 Pac. 458. See also *Missouri, etc., R. Co. v. Blachley*, (1908) 50 Tex. Civ. App. 141, 109 S. W. 995.

**Allegations in the petition for the removal** will not justify removal on the ground that the cause is one arising under the Federal Constitution and laws, where the cause of action itself is not so based. *In re Winn*, (1909) 213 U. S. 458, 29 S. Ct. 515, 53 U. S. (L. ed.) 873; *Mitchell Engineering, etc., Co. v. Worthington*, (1905) 140 Fed. 947; *Cella v. Brown*, (1906) 144 Fed. 742, 75 C. C. A. 608; *Hall v. Chicago, etc., R. Co.*, (1906) 149 Fed. 564; *Miller v. Illinois Cent. R. Co.*, (1909) 168 Fed. 982; *Rural Home Telephone Co. v. Powers*, (1910) 176 Fed. 986; *Hubbard v. Chicago, etc., R. Co.*, (1910) 176 Fed. 994; *Shohoney v. Quincy, etc., R. Co.*, (1909) 223 Mo. 649, 122 S. W. 1025.

A defendant by his petition to remove cannot change plaintiff's cause of action as stated in his petition, so as to bring it within a federal law, nor can plaintiff so state his cause of action as to deprive defendant of the right of removal, if defendant by his answer or plea shows that he relies for his defense on an Act of Congress or a provision of the Federal Constitution. *Shohoney v. Quincy, etc., R. Co.*, (1909) 223 Mo. 649, 122 S. W. 1025.

But the petition for the removal of the cause, on the ground that it is one arising under the Constitution or laws of the United States, must state the facts showing that such is the case, what the federal question is, and how it arises. *Rural Home Telephone Co. v. Powers*, (1910) 176 Fed. 986.

## II. DIVERSE CITIZENSHIP AND ALIENAGE.

### 1. IN GENERAL.

A state is not a citizen, so as to come within this section authorizing removal on the ground of diversity of citizenship. *Ayer, etc., Tie Co. v. Kentucky*, (1906) 202 U. S. 409, 26 S. Ct. 879, 50 U. S. (L. ed.) 1082; *O'Connor v. Texas*, (1906) 202 U. S. 501, 26 S. Ct. 726, 50 U. S. (L. ed.) 1120.

Therefore an action in which a state is the real party in interest cannot be removed from a state to a federal court solely on the ground of diverse citizenship. *Southern R. Co. v. State*, (1905) 165 Ind. 613, 75 N. E. 272.

Thus it has been held that a suit by a state to recover taxes on property omitted from taxation, brought against nonresidents, is not removable to the federal court. *Darnell v. State*, (Ind. 1910) 90 N. E. 769.

In an action in the name of the state, by the prosecuting attorney of a judicial circuit against a railroad company, to recover penalties for the railroad's violation of a local statute requiring the posting of trains in passenger depots in which there is a telegraph office, the state is the real party in interest, even though one-half of the penalties recovered are payable to the prosecuting attorney. *Southern R. Co. v. State*, (1905) 165 Ind. 613, 75 N. E. 272.

But the mere presence on the record of the state as a party plaintiff will not defeat the jurisdiction of a federal Circuit Court to

which the cause has been removed from a state court, if it appears that the state has no real interest in the controversy. *Ex p. Nebraska*, (1908) 209 U. S. 436, 28 S. Ct. 581, 52 U. S. (L. ed.) 876.

**Citizens of territories.**—An action by a citizen and resident of the Indian Territory against a citizen of a state is not removable to the federal court on the ground of diversity of citizenship. *Kansas City Southern R. Co. v. McGinty*, (1905) 76 Ark. 356, 88 S. W. 1001.

An action against defendants, some of whom are citizens of Porto Rico, is not removable on the ground of diversity of citizenship. *Healy v. McCormick*, (1907) 157 Fed. 318.

**Representative parties.**—The personal representative of a nonresident deceased, having qualified as such, is a "citizen" of the state for purposes of the action, and as bearing on the question of removal of the cause. *Lemon v. Louisville, etc., R. Co.*, (1910) 137 Ky. 276, 125 S. W. 701.

But where the plaintiffs sued as individuals, and the state courts sustained their right to maintain the suit in such capacity, their individual citizenship must determine the right of a defendant to remove the cause, notwithstanding an averment in the petition for removal that they sued as stockholders of a corporation, and that the recovery they sought was in the sole right and for the bene-

fit of such corporation. *Dodd v. Louisville Bridge Co.*, (1904) 130 Fed. 186.

**Interveners and substituted parties.**—The lessee under a long-term lease of a railroad assuming all the lessor's obligations is the real party to a suit to compel the lessor to grant switch connections in accordance with a stipulation in its grant of a right of way, and is entitled to intervene, and being a citizen of another state is entitled to a removal to the federal court. *Chase v. Beech Creek R. Co.*, (1906) 144 Fed. 571.

Where a person found in possession of part of the property, on the service of a summons in ejectment, is thereupon brought in as a defendant, and serves as provided by the state statute, he becomes a party for all purposes, and if a citizen of the same state as plaintiff, the cause is not removable by the original defendant unless a separable controversy is shown, nor is the filing of a disclaimer by such person in the federal court sufficient to sustain the removal, the question of his possession and consequent liability for costs and mesne profits remaining, which the federal court is not competent to try. *Davies v. Wells*, (1904) 134 Fed. 139.

In an action against a foreign railroad corporation, an amended petition, tendered after the filing by the defendant of a petition for the removal of the case to the federal court, making a domestic corporation, original defendant's lessor, a party, comes too late to prevent the removal. *Davis v. Chesapeake, etc.*, R. Co., (1903) 116 Ky. 144, 75 S. W. 275, *withdrawing opinion* in (1902) 70 S. W. 857, 24 Ky. L. Rep. 1125.

**Dismissal as to coparty.**—The dismissal, against the contention of plaintiff, after the expiration of the time prescribed by statute for the removal of causes from the state to the federal court, of an action which was brought against a resident and a nonresident, so far as it affects the former, does not deprive the state court of jurisdiction to proceed with the cause against the latter, or entitle him to remove the cause to the federal court. *Lathrop, etc., Co. v. Interior Constr., etc., Co.*, (1906) 215 U. S. 246, 30 S. Ct. 76, 54 U. S. (L. ed.) 177, *reversing* (1907) 150 Fed. 666.

Plaintiff's announcement that he was ready for trial in an action against two defendants, one of whom had not then been served, which was known to the other defendant, amounted to notice to the defendant served that plaintiff would proceed against it alone, and was a severance of the action as to such defendant, rendering the defendant served the sole defendant, within this section. *Golden v. Northern Pac. R. Co.*, (1909) 39 Mont. 435, 104 Pac. 549.

Where a suit to remove a cloud from the complainants' title is brought against a resident and a nonresident, and the resident disclaims interest, thereby retiring from the suit, the nonresident may procure the removal of the cause to the federal court. *Day v. Oatis*, (1904) 85 Miss. 128, 37 So. 559.

**Time of diverse citizenship.**—To render an action removable to the federal court, on the grounds of diversity of citizenship, such di-

versity must exist both at the beginning of the suit, and when the petition for removal is filed. *O'Connor v. Chicago, etc., R. Co.*, (1909) 144 Ia. 289, 122 N. W. 947; *Day v. Oatis*, (1904) 85 Miss. 128, 37 So. 559.

Where both at the commencement of an action in the state court by attachment, and at the time of its removal, the defendants were citizens of states other than that of which the plaintiff was a citizen, the fact that, after removal on the ground of diverse citizenship, one of the defendants removed to the state where plaintiff resided, and became a citizen of that state, does not deprive the federal court of jurisdiction. *Lebensberger v. Scofield*, (1905) 139 Fed. 380, 71 C. C. A. 476.

Where an original complaint stated a joint cause of action against a resident and non-resident defendant, and an amended complaint for the first time made the resident defendant a mere nominal party to the record, asserting no cause of action against him, it was held that the nonresident defendant was not precluded from removing the cause to the federal court because the case was not removable at the time when, by the literal terms of the statute, removal might be had, and he had answered the original complaint and went to trial thereon; the time within which application for removal must be made being not jurisdictional, but modal and formal. *Bagenas v. Southern Pac. Co.*, (1910) 180 Fed. 887.

**Both plaintiff and defendant nonresidents.**—Where a suit is brought in a state court, and neither plaintiff nor defendant is a resident of that state, it is not removable to the Circuit Court of the United States solely on the ground of diversity of citizenship. *Gebbie v. Review of Reviews Co.*, (1905) 134 Fed. 150; *Baxter, etc., Constr. Co. v. Hammond Mfg. Co.*, (1907) 154 Fed. 992; *Gillespie v. Pocahontas Coal, etc., Co.*, (1907) 162 Fed. 742; *Gruetter v. Cumberland Telephone, etc., Co.*, (1909) 181 Fed. 248; *Southern R. Co. v. Ansley*, (1910) 8 Ga. App. 325, 68 S. E. 1086.

But this section confers jurisdiction on a federal Circuit Court of a suit to remove a cloud from the title to land lying within the district where the suit is brought; so, where neither of the parties to a suit for such relief was a resident of the state in the courts of which the suit was brought, it was held to be removable to the federal Circuit Court. *Gillespie v. Pocahontas Coal, etc., Co.*, (1907) 162 Fed. 742.

So, also, where the parties to a suit in a state court are citizens of different states, and the other conditions necessary to make the cause one of federal cognizance exist, it is removable by the defendant, although neither party is a citizen or resident of the state in which suit is brought. *Robert v. Pineland Club*, (1905) 139 Fed. 1001; *Illinois Cent. R. Co. v. Whitworth*, (1903) 115 Ky. 286, 73 S. W. 766. But see dissenting opinion in this case in 75 S. W. 849, 25 Ky. L. Rep. 439.

**Suits by and against aliens.**—An action brought by a nonresident alien in a state court against a citizen of another state is

removable by the defendant where the requisite amount is involved. *Barlow v. Chicago, etc., R. Co.*, (1908) 164 Fed. 765, *rehearing denied* (1909) 172 Fed. 513; *Bagenas v. Southern Pac. Co.*, (1910) 180 Fed. 887; *Katalla Co. v. Rones*, (C. C. A. 1911) 186 Fed. 30, *affirming* (1910) 182 Fed. 946.

Where an alien brought suit in a state court against a nonresident corporation, it was held that the plaintiff thereby voluntarily submitted his person to the jurisdiction of any court sitting in that state having jurisdiction of the subject-matter, so that, the action being otherwise removable to the federal courts sitting in such state, it was removable by defendant without plaintiff's consent. *Iowa Lilloet Gold Min. Co. v. Bliss*, (1906) 144 Fed. 446.

**Diverse citizenship as to several plaintiffs or defendants.**—Where a plaintiff and one of the defendants were citizens of Maryland, it was held that the other defendant could not have the cause removed to the United States court on the ground of diverse citizenship, though it was a foreign corporation. *Diamond State Telephone Co. v. Blake*, (1907) 105 Md. 570, 66 Atl. 631.

An action by a citizen of another state against citizens of the state in which it is brought, and aliens, is not removable. *Hackett v. Kuhne*, (1907) 157 Fed. 317.

In an action to foreclose a mortgage and adjust liens on the property, where the plaintiff and defendant mortgagor are citizens of the same state, and the creditor of the mortgagors, claiming a lien on the property, is a citizen of another state, such mortgage creditor cannot, on the ground of diverse citizenship, remove the case into the federal court. *Boatmen's Bank v. Fritzlen*, (1905) 135 Fed. 650, 68 C. C. A. 288, *reversing* (1904) 128 Fed. 608.

A recovery against one only of several defendants charged with joint and concurring negligence does not deprive such defendant of any federal right, because if it had been sued alone the diversity of citizenship existing between it and the plaintiff would have authorized the removal of the cause from the state court to a federal Circuit Court. *Southern R. Co. v. Carson*, (1904) 194 U. S. 136, 24 S. Ct. 609, 48 U. S. (L. ed.) 907, *affirming* (1902) 68 S. C. 55, 48 S. E. 525.

But where a domestic corporation is joined as defendant with a foreign corporation, the plaintiff has the right to a trial in the state court if the liability of the domestic corporation is fairly debatable, unless his conduct in joining the domestic corporation amounts to a fraudulent interference with the jurisdiction of the federal courts. *Keller v. Kansas City, etc., R. Co.*, (1903) 135 Fed. 202.

A suit against two railroad companies, one a foreign corporation and the other a domestic corporation, in which the petition sets forth no cause of action whatever against the domestic corporation, either as a joint wrongdoer with a foreign corporation, or otherwise, and the amount in controversy exceeds \$2,000, is removable to the federal court on the application of the foreign corporation, on the ground of diverse citizenship. *Louisville, etc.,*

*R. Co. v. Newman*, (1907) 128 Ga. 283, 57 S. E. 515.

A partnership suing as such in a state court cannot prevent a nonresident defendant from removing the cause to the proper Circuit Court of the United States on the ground of diverse citizenship, if its individual members are shown in the petition for removal to be each and all citizens and residents of a state other than that of the plaintiffs, in which they reside and the suit is brought. *Bruett v. F. C. Austin Drainage Excavator Co.*, (1909) 174 Fed. 668.

**Indispensable and unnecessary parties.**—In determination of the jurisdiction of the national courts and the right to remove causes of action to them, indispensable parties only should be considered, because all others may be dismissed if their presence will oust or restrict jurisdiction. *Boatmen's Bank v. Fritzlen*, (1905) 135 Fed. 650, 68 C. C. A. 288; *Cella v. Brown*, (1905) 136 Fed. 439; *Rogers v. Penobscot Min. Co.*, (C. C. A. 1907) 154 Fed. 606.

Where the complainants, who were citizens of Missouri, sued B. & Co., nonresidents, to avoid a railroad reorganization contract and for specific performance of a contract of B. & Co. to convey to complainants their share of certain pledged securities of the railroad without complainants consenting to certain alleged invalid conditions, the bill also alleged that defendant bank, of the same citizenship as complainants, through which the transaction was to be carried out, made the required payment of complainants' share of the railroad's indebtedness on complainants' refusal to consent to the conditions, and claimed the right to receive complainants' share of the securities, and demanded, as against the bank, that it be required to deliver to complainants their share of such securities on payment of their share of the indebtedness. It was held that the bank was not a necessary party to the determination of the controversies between complainants and B. & Co., and that they were entitled to remove the cause to the federal court. *Cella v. Brown*, (1905) 136 Fed. 439.

Where a bill in equity was filed by a citizen of Delaware against two respondents, one of whom was a citizen of Delaware and the other a citizen of Maryland, on petition of the latter, averring that the controversy was between him on the one side and complainant and the other respondent, both citizens of Delaware, on the other side, an order will be made for its removal to the United States Circuit Court. *Hutton v. Joseph Bancroft, etc., Co.*, (1896) 8 Del. Ch. 55, 67 Atl. 972.

An action by a resident of Iowa against a resident and a nonresident is not removable to the federal court on the application of the nonresident, where the resident defendant is a proper, if not a necessary, party to the determination of the controversy. *Wilson v. Big Joe Block Coal Co.*, (1907) 135 Ia. 531, 113 N. W. 348.

One improperly joined as a defendant is to be disregarded. *Axline v. Toledo, etc., R. Co.*, (1903) 138 Fed. 169.

Garnishees are not indispensable parties.

*Macurda v. Globe Newspaper Co.*, (1908) 165 Fed. 104.

The joinder of a tenant at will of the same citizenship as plaintiff as a party in ejectment does not prevent the removal of a cause otherwise removable to the federal court. *Wallin v. Reagan*, (1909) 171 Fed. 758.

Defendants, who were joined in a suit in a state court to recover an interest in lands only as trustees holding the paramount title in trust, and whose title as such was not disputed, are not indispensable parties, whose citizenship and residence in the same state as complainant would prevent a removal of the cause by the other defendants, who were the real parties in interest. *Lawrence v. Southern Pac. Co.*, (1908) 165 Fed. 241.

Where bill in equity instituted in the state court on its face states no ground of equitable relief against two defendant corporations, citizens of the same state as that of the complainants, such defendants should be eliminated from the case in determining the right of removal by a nonresident defendant in such action. *Cella v. Brown*, (1906) 144 Fed. 742, 75 C. C. A. 608.

Where, in a suit to avoid a scheme and contract of B. & Co. to reorganize certain railroads, and to enforce specific performance of B. & Co.'s contract to convey to complainants their share of certain pledged securities of the railroad companies, there was no allegation that the railroads had done or threatened to do any act in violation of, or to prevent performance of, the contracts, and the only prayer affecting the railroads was for an injunction to forbid them doing any act or taking any steps interfering with plaintiff's rights, which prayer was unsupported by any averment of fact, it was held that the railroads were not indispensable parties. *Cella v. Brown*, (1905) 136 Fed. 439.

To a suit by a stockholder to have stock and bonds issued by a railroad company, to be exchanged for a prior issue of bonds, declared *ultra vires* and void, the company is the only necessary party defendant, and the joinder as defendants of directors or persons interested in the bonds to be retired will not prevent a removal of the cause by the company, where diversity of citizenship exists between it and the complainant. *Politz v. Wabash R. Co.*, (1907) 153 Fed. 941.

**Nominal or formal parties.**—A suit between a corporation of one state and a corporation of another is removable by the latter, although there are joined with it as defendants a second corporation and two individuals, all citizens of the same state as the complainant, where such second corporation is a mere stakeholder, having no interest in the suit, and the individual defendants are, respectively, the president and treasurer of complainant, and their interests are substantially identical. *Johnson Railroad Frog, etc., Co. v. Buda Foundry, etc., Co.*, (1906) 148 Fed. 883.

A bill for specific performance of a contract for the sale to complainant of certain shares of the issued stock of a corporation, and to recover damages for its breach, which does not allege the insolvency of the other party

to the contract, nor that he is about to dispose of the stock, does not state any cause of action against the corporation, which is not an indispensable nor a necessary party. If joined, it is merely a formal party, and its presence, although a citizen of the same state as complainant, will not defeat the right of the real defendant to remove the cause, where it is otherwise removable. *Lucas v. Milliken*, (1905) 139 Fed. 816.

But where the plaintiff's declaration in an action on a contract in a state court against three defendants alleged that the defendant which made the contract in its own name acted in doing so as the agent for its codefendants, who were the real parties, they cannot be treated as merely nominal or unnecessary parties to the suit, for the purposes of removal of the cause to the federal court. *Patton v. Meadows Co.*, (1909) 173 Fed. 224.

So where the local law provides that personal judgment is to be rendered in a suit to foreclose a mortgage against those personally liable for the debt, a corporation and its receiver, made defendants, and shown by the complaint to be personally liable, cannot be held nominal parties merely, so as to make the controversy wholly between plaintiff and the owner of the mortgaged land, though the petition for removal to the federal court alleges that the corporation and its receiver have been duly released and discharged of personal liability; this being a defense personal to them. *McClure v. U. S. Mortgage Co.*, (1905) 197 U. S. 624, 25 S. Ct. 798, 49 U. S. (L. ed.) 911.

**Sham parties.**—The institution of a fictitious action in a court of the state of which the plaintiff is a citizen, for the purpose of bringing two defendants of diverse citizenship—one being a nonresident—into such court, to enable the resident defendant to litigate a cause of action against the nonresident defendant in that court, and to prevent the nonresident defendant from removing such cause into the federal court, is a fraud upon the jurisdiction of the federal court and upon the nonresident defendant, and upon a reasonable application by the nonresident defendant the sham plaintiff should be disregarded and the real controversy removed to the federal court. *Boatmen's Bank v. Fritzlen*, (1907) 75 Kan. 479, 89 Pac. 915.

**Rearrangement of the parties.**—In determining questions as to removal of causes the court should ascertain the real matter in dispute and arrange the parties on opposite sides according to the facts and their respective interests. *Boatmen's Bank v. Fritzlen*, (1905) 135 Fed. 650, 68 C. C. A. 288, reversing (1904) 128 Fed. 608.

In considering a petition for removal of a cause to a federal court, a court should disregard an improper or sham party who has injected a fictitious cause of action into the case and may arrange the actual parties on opposite sides of the real controversy according to their respective interests, and if there then appears to be a controversy between citizens of different states involving the requisite amount, the cause may be removed. *Boat-*



men's Bank v. Fritzlen, (1907) 75 Kan. 479, 89 Pac. 915.

In a suit by a stockholder of a corporation against the corporation and other stockholders to prevent the consummation of an alleged conspiracy by the latter to obtain control of the corporation for the purpose of canceling or terminating a contract made by the corporation, and alleged to be for its benefit, and substituting another, by which the conspirators would profit at the expense of the company and its other stockholders, the corporation must be aligned with the complainant for the purpose of determining the removability of the cause, in accordance with its interest as shown by the bill, and especially where it adopts the allegations of the bill by its answer. *Lucas v. Milliken*, (1905) 139 Fed. 916.

A proceeding in garnishment, after judgment, is a civil suit in which an issue of fact is or may be joined between the plaintiff and garnishee, and in such proceeding, while the judgment defendant is an indispensable party, his pecuniary interest is with the plaintiff on the issues between him and the garnishee, and he is to be ranged on that side of the controversy for the purposes of removal. *Baker v. Duwamish Mill Co.*, (1906) 149 Fed. 612.

## 2. HOW DIVERSE CITIZENSHIP MADE TO APPEAR.

From the record. — Where the jurisdiction of a federal court depends upon the citizenship of the parties, such citizenship, and not merely their residence, must be shown by the record. *Kansas City Southern R. Co. v. Prunty*, (1904) 133 Fed. 13, 66 C. C. A. 163.

The fact that there are a large number of parties plaintiff or defendant does not take a case out of the well-settled rule that, in order to show the jurisdiction of the federal court on removal, the petition therefor must allege the citizenship of each party. It is not sufficient to allege a diversity of citizenship in general terms. *Jones v. Adams Express Co.*, (1904) 129 Fed. 618.

A petition for the removal of a cause from a state to a federal court on the ground of diverse citizenship should not only allege that the citizenship of the parties is diverse, but should also disclose the states of which the parties, respectively, are citizens. *Thompson v. Stalman*, (1904) 131 Fed. 809.

An allegation in a petition for removal that defendant is a citizen of a state other than that in which the suit is pending is not equivalent to an allegation that he is a "non-resident of that state" and does not show his right to a removal. *Irving v. Smith*, (1904) 132 Fed. 207.

But a petitioner to remove a cause to the federal court is only required to allege the diverse citizenship, and is not required to negative any defense which may be made to the petition. *Wisecarver v. Chicago, etc., R. Co.*, (1906) 139 Ia. 596, 117 N. W. 961.

*Allegations deemed to be true.* — A petition for removal may allege the citizenship of the parties regardless of the allegations of the plaintiff's pleading, and where its allega-

tions show the requisite citizenship to authorize the removal they are to be deemed true unless controverted by the plaintiff. *Harrington v. Great Northern R. Co.*, (1909) 169 Fed. 714.

Where the alleged ground for removal of a cause from the state to the federal court is diverse citizenship, the allegations of the petition alone can be looked to by the state court in determining the right of removal. *Texarkana Telephone Co. v. Bridges*, (1905) 75 Ark. 116, 80 S. W. 841.

*Sufficiency of averment* — *Sufficient allegation of citizenship.* — Where the plaintiff, a citizen of Nebraska, averred that defendant was a corporation under the laws of the state of New York, and defendant in the petition for removal alleged and in its answer admitted that it was a corporation organized under the laws of New York, it was held that the citizenship of the defendant in that state sufficiently appeared from the pleading. *Adams Express Co. v. Adams*, (C. C. A. 1908) 159 Fed. 62.

Where a corporation defendant in a petition for removal alleges that it was organized under the laws of a state other than that in which it is sued, an allegation that it is not a citizen of the latter state is unnecessary. *Lee v. Atlantic Coast Line R. Co.*, (1906) 150 Fed. 775.

*Insufficient allegation.* — Where a suit by the transferee of a note was removed to the federal courts, but the removal petition contained no allegation as to the citizenship or residence of the transferor, showing that the citizenship of the defendant and transferor was diverse, or that the action could have been originally brought in the Circuit Court for the particular district, the federal court has no jurisdiction. *Hall v. Tevis*, (1910) 177 Fed. 600.

Where a suit in equity was removed to the federal court on the ground of diversity of citizenship, an allegation that plaintiff was and is "a citizen of the state of Michigan," plaintiff elsewhere being styled a "partnership association organized and existing under the laws of the state of Michigan," in the absence of some further averment concerning the citizenship of the members of the association, was held to be insufficient to establish that plaintiff was a citizen of the state of Michigan for the purposes of federal jurisdiction, unless the plaintiff was a corporation of that state. *Fred Macey Co. v. Macey*, (1905) 135 Fed. 725, 68 C. C. A. 363.

An allegation in a petition for removal, merely, that certain of the petitioners are "residents" of a state other than that of which plaintiff is a citizen, and that none of the petitioners are "residents and citizens" of the state whereof the plaintiff is a citizen, is insufficient to give the federal court jurisdiction. *Laden v. Meck*, (1904) 130 Fed. 877, 65 C. C. A. 361.

A petition for removal filed by a defendant railroad company stated that it was a corporation incorporated under the laws of a number of different states, among which were the states of Indiana and Illinois; that it was formed by a consolidation of corpora-

tions of said several states; that the cause of action sued on arose out of a contract for the use of a bridge across the Ohio river owned by a Kentucky corporation of which complainants were stockholders, which contract was made by an Indiana railroad company subsequently consolidating with others to form the defendant. It further averred, as a conclusion from such facts, that, in respect of the obligation sued on, defendant was a corporation of the state of Indiana, and no other state. It did not appear in what state the defendant was first incorporated, where its general offices were, where the cause of action arose, nor whether its assumption of the contract and its use of the bridge for which complainants sought to recover were in its capacity of an Indiana corporation or generally. It was held that in the absence of any statement in the complainant's pleadings to show that the defendant was sued as a citizen of Indiana alone, the facts alleged in the petition did not warrant such a finding, and, it being shown that one of the complainants was a citizen of Illinois, the cause was not removable on the ground of diversity of citizenship. *Dodd v. Louisville Bridge Co.*, (1904) 130 Fed. 186.

A petition to remove a cause from the state court of California, alleging that when the action was commenced and when the petition was filed the petitioner was a resident of New York, does not allege that he was a "non-resident" of California, as required by this section. *De La Montanya v. De La Montanya*, (1907) 158 Fed. 117.

**Amendment.**—On the removal of a cause in which, as appears by the record, the parties are citizens of different states, but neither is an inhabitant of the district of suit, the federal court acquires general jurisdiction by virtue of the diversity of citizenship of the parties, and has power to permit the petition for removal to be amended to show that plaintiff is in fact a citizen and resident of the district of suit. *Harding v. Standard Oil Co.*, (1909) 170 Fed. 651.

Where a cause has been removed on the ground of diversity of citizenship on a motion to remand on the ground that plaintiff sues as assignee of a chose in action, and that the petition for removal does not show the citizenship of the assignors, the court has power to permit its amendment to show, according to the fact, that their citizenship was such as to give jurisdiction. *Muller v. Chicago, etc., R. Co.*, (1906) 149 Fed. 939.

### 3. HOW AMOUNT IN CONTROVERSY MADE TO APPEAR.

**Amount demanded.**—In determining a party's right to remove to the federal court an action between citizens of different states, the amount demanded in the complaint must be taken as the amount in controversy, though differing from the damages alleged, and though the prayer was amended before answer to prevent a removal. *Lake Erie, etc., R. Co. v. Juday*, (1898) 19 Ind. App. 436, 49 N. E. 849.

In actions for unliquidated damages, the amount in controversy is the amount which plaintiff in good faith demands, and where the law prescribes no limitation on the extent of the recovery, the determination of the amount rests with the court and jury. *Chicago, etc., R. Co. v. Stone*, (1905) 70 Kan. 708, 79 Pac. 655.

The fact that a judgment is recovered for less than \$2,000 does not affect the jurisdiction acquired by a federal court by a removal of the cause, where the amount claimed, apparently in good faith, exceeded such sum. *Roesaler-Hasslacher Chemical Co. v. Doyle*, (1905) 142 Fed. 118, 73 C. C. A. 174.

Where a plaintiff in a state court alleges title to real estate and a trespass thereon by defendant, and prays for damages and for general relief, as may be done under the state practice, and his title is put in issue by the answer, it is a part of the matter in dispute, the value of which is to be taken into account in determining the right of removal. *Porter v. Northern Pac. R. Co.*, (1908) 161 Fed. 773.

**Effect of limiting demand.**—Though a party may allege facts in his complaint from which it appears that more than \$2,000 is due him, yet if he limit his demand to less than that amount the cause cannot be removed to the federal court on the ground of diverse citizenship. *Lesh v. Bailey*, (Ind. 1911) 95 N. E. 341.

Where plaintiff's original complaint averred a cause of action for damages amounting to \$2,040.50, but prayed judgment only for the sum of \$1,932, it was held that the demand for judgment constituted the matter in dispute, for the purpose of determining whether the cause was removable to the federal courts. *Stark v. Port Blakely Mill Co.*, (1906) 44 Wash. 309, 87 Pac. 339.

**Sufficient demand.**—A cause between citizens of different states, wherein plaintiff sought \$2,000 damages and a permanent injunction to prevent his land from becoming "wholly worthless," is removable as a cause wherein the relief asked for exceeds the jurisdictional amount. *Harbison v. Allen*, (1910) 152 N. C. 720, 68 S. E. 207.

Where a suit was brought by a city against a telegraph company to recover \$1,772 for street rentals for the maintenance of defendant's poles and wires, and the bill prayed for the payment of the rentals or forfeitures of defendant's rights in the streets, and that its occupation thereof should cease, it was held that the amount in controversy was sufficient to confer federal jurisdiction. *Memphis v. Postal Tel. Cable Co.*, (1906) 145 Fed. 602, 76 C. C. A. 292, reversing (1905) 139 Fed. 707.

**Insufficient demand.**—A suit relating to a mortgage given to secure a note for \$1,700 does not involve a sum exceeding \$2,000, exclusive of interest and costs, and is not removable. *Daugherty v. Sharp*, (1908) 171 Fed. 466.

A suit involving exactly \$2,000 is not removable to the federal courts. *Kaufman v. I. Rheinstrom Sons Co.*, (1911) 188 Fed. 544.

An action on the case to recover \$2,000 damages for negligence is not removable, al

though the actual damages are alleged to be greater. *Barber v. Boston, etc., R. Co.*, (1906) 145 Fed. 52.

Where a complaint in an action for death seeks damages in the sum of \$2,000, the amount in dispute is not modified by the formal prayer for "other and proper relief" so as to warrant removal to the federal court, there being no proper relief other than the pecuniary remedy demanded. *Baltimore, etc., R. Co. v. Ryan*, (1903) 31 Ind. App. 597, 68 N. E. 923.

**Allegations in petition for removal.**—In a suit in a state court for an injunction, based upon a law of the United States, where the value in controversy is not shown by the complainant's pleading, for the purposes of removal of the cause, it may be shown in the petition for removal. *Order of Railroad Telegraphers v. Louisville, etc., R. Co.*, (1906) 148 Fed. 437.

An allegation, in a petition for removal, that the amount in dispute exceeds \$2,000, exclusive of interest and costs, is sufficient to give the federal court jurisdiction, although there may be no proof given on the trial to sustain it. *South Dakota Cent. R. Co. v. Chicago, etc., R. Co.*, (1905) 141 Fed. 578, 73 C. C. A. 176.

An allegation in a petition for the removal of a suit to determine the right to take water from a public stream for irrigation or other purposes, that the value of the matter in dispute exceeds \$2,000, where not denied, is sufficient to authorize the federal court to take jurisdiction. *Waha-Lewiston Land, etc., Co. v. Lewiston-Sweetwater Irrigation Co.*, (1907) 158 Fed. 137.

Where a controversy relates to plaintiffs' right to have their property and business undisturbed and undiminished in value by defendant's malicious conduct, and the petition for removal avers that the matter in controversy exceeds \$2,000, this is controlling, it not appearing from the averments of the bill that the matter in controversy is not capable of being valued in money, and that it does not exceed \$2,000 in value. *Duff v. Hildreth*, (1903) 183 Mass. 440, 67 N. E. 356.

In a complaint to the corporation commission to compel a railroad company to deliver four cars of coal on a private siding, the complainant put no valuation either on the particular delivery or on the effect of a similar delivery of all cars in future. After an appeal to the Superior Court, the railroad company petitioned for removal to the federal Circuit Court, alleging that the proceeding was of a civil nature to assert the right of the complainant to have the commission order the company to deliver interstate shipments to the complainant, and that the matter actually in controversy, involving the right of the defendant to manage its large interstate commerce without any interference on the part of the plaintiffs, largely exceeds the sum or value of \$2,000. It was held that as the allegation as to value was a mere conclusion of law, unwarranted by the facts in the record or the petition, the petition was insufficient to oust the state court of jurisdiction, and was properly denied. *North Caro-*

*lina Corp. Commission v. Southern R. Co.*, (1904) 135 N. C. 81, 47 S. E. 229.

In a suit against two defendants, where no joint liability was alleged, and the amount claimed against each was less than \$2,000, it was held that the cause was not removable to the federal court. *Texas, etc., R. Co. v. Dishman*, (1905) 38 Tex. Civ. App. 277, 85 S. W. 319.

**Several counts.**—Where a complaint in an action for negligent death contained several counts, each demanding damages in the sum of \$1,990, and only damages resulting from the death were sought to be recovered, it was held that the cause was not removable to the federal court, as the sum sought to be recovered was not within its jurisdiction. *Nashville, etc., R. Co. v. Hill*, (1906) 146 Ala. 240, 40 So. 612.

Although each paragraph of a complaint in an action for personal injuries alleged that plaintiff was damaged in the sum of \$5,000, but demanded judgment in a sum less than \$2,000, it was held that the petition to remove was properly denied. *Springer v. Bricker*, (1905) 165 Ind. 532, 76 N. E. 114.

Where each of two paragraphs of a complaint seeks a recovery for the death of the same person, wrongfully caused by defendant's servants, and each relates to the same occurrence, and each seeks a recovery in the sum of \$2,000, the matter in dispute does not amount to \$4,000, so as to authorize a removal to the federal court. *Baltimore, etc., R. Co. v. Ryan*, (1903) 31 Ind. App. 597, 68 N. E. 923.

A cause removed from the state court will be remanded on the ground that the amount involved is only \$1,900, and therefore not within the jurisdiction of the federal Circuit Court, though the complaint, in form, states two causes of action, the prayer as to each of which is for a judgment for \$1,900; each being for nondelivery of a telegram; the only difference therein being that one is addressed to "Mrs. P." and the other to "Mr. P."; and it appearing that the complaint, in form, stated two causes of action because plaintiffs' counsel was uncertain, from the chirography, as to which of the two persons the telegram was addressed. *Pooser v. Western Union Tel. Co.*, (1905) 137 Fed. 1001.

But a declaration containing two counts, each claiming damages in the sum of \$1,900, and which alleges that the acts of defendant complained of have caused damage to the plaintiff in its present and accrued sales in the sum of \$1,900, and also in its future sales and business in a like sum, authorizes a recovery of \$3,800, and the amount involved is sufficient to render the cause removable, where the other jurisdictional facts appear. *Southern Cash Register Co. v. Montgomery*, (1906) 143 Fed. 700.

Where plaintiff's pleading in a state court contained a number of counts or paragraphs, each claiming damages for alleged wrongful acts of the defendant in the sum of \$1,900, and also a prayer for an injunction to restrain a continuance of such acts, an allegation in a petition for removal that the amount in controversy exceeds \$2,000 must

be accepted as true, even if the prayers for damages be construed as claiming only \$1,900 in all, there being nothing in the pleading showing the value of the matter involved in the controversy with respect to the injunctive relief sought. *Southern Cash Register Co. v. National Cash Register Co.*, (1906) 143 Fed. 659.

**Consolidated causes.**—The fact that two actions between the same parties, pending in the same state court, and each involving less than \$2,000, are consolidated on motion of the defendant for "taking proof and hearing," does not render the consolidated cause removable as a single action. *Holmes v. U. S. Fire Ins. Co.*, (1906) 142 Fed. 863.

**Suit for penalty.**—Under a local statute which defines what shall amount to railroad extortion, and declares that the party injured may recover of the person or corporation guilty of extortion twice the amount of damages sustained by the overcharge or discrimination, as the case may be, it was held that where a declaration against a railroad company for extortion minutely alleged the overcharges claimed, which amounted to \$837.18, and the amount of the recovery on that account was alleged to be \$1,674.36, the amount in controversy was not sufficient to justify a removal of the cause to the federal court, though the declaration also alleged that, by the railroad company's failure to pay the damages alleged, plaintiff had been damaged in the sum of \$2,500. *Barataria Canning Co. v. Louisville, etc., R. Co.*, (1906) 143 Fed. 113, 74 C. C. A. 307.

**Interest.**—Where plaintiff sued defendant insurance company to recover dues and assessments amounting to \$1,527.25, together with interest, in all amounting to \$2,346.50, and prayed judgment against defendant for the sum of \$2,346.50, being the amount of dues and assessments paid to date, with interest, and for costs, the fact that the interest was added to the principal did not change it to principal, so as to justify a removal of the cause to the federal court on the ground that the parties were citizens of different states, and that the amount involved exceeded \$2,000, exclusive of interest and costs. *Gilson v. Mutual Reserve Fund L. Assoc.*, (1904) 129 Fed. 1003.

**Costs.**—Under a statute providing that on a recovery in certain suits a reasonable attorney's fee shall be allowed "as part of the costs," the amount prayed for as an attorney's fee cannot be added to the amount of the lien for the purpose of making the requisite amount to give a federal court jurisdiction on removal. *Swofford v. Cornucopia Mines of Oregon*, (1905) 140 Fed. 957.

**Counterclaim.**—Where the defendant, in an action by a nonresident in a state court to recover a sum less than \$2,000, files a counterclaim by which he seeks to recover a sum greater than \$2,000, the cause is removable by the plaintiff at or before the time he is required to plead such counterclaim. *Price v. Ellis*, (1904) 129 Fed. 482.

**Amendment reducing demand.**—Where a complaint at the time petition for removal and bond are filed states a case removable to

a federal court, a subsequent amendment reducing the amount of dispute to less than a sum cognizable by the federal court, in order to prevent removal, cannot be allowed. *Johnson v. Computing Scale Co.*, (1905) 139 Fed. 339; *Donovan v. Dixieland Amusement Co.*, (1907) 152 Fed. 661; *Chicago, etc., R. Co. v. Stone*, (1905) 70 Kan. 706, 79 Pac. 655; *Ray v. Southern R. Co.*, (1906) 77 S. C. 103, 57 S. E. 636.

But see *Western Union Tel. Co. v. Campbell*, (1905) 41 Tex. Civ. App. 204, 91 S. W. 312, wherein it appears that a petition in an action against a foreign corporation demanded judgment for \$5,000, and that plaintiff filed in vacation and without notice an amended petition, reducing the amount claimed to \$1,999; and it was held that the amended petition superseded the original petition, and changed the suit to one for less than \$2,000, and thereby deprived defendant of his right to remove the same to the federal court.

#### 4. WHO MAY REMOVE THE SUIT.

**Who is a defendant.**—The word "defendant," as used in the Removal Act, includes only a party who was a defendant on the record in the state court. *Illinois Cent. R. Co. v. Waller*, (1908) 164 Fed. 358.

A local statutory provision to the effect that, on the appeal to a District Court, which either party may take from the commissioners' award in proceedings to condemn land for railway purposes, the "landowner shall be plaintiff and the corporation defendant," does not fix the status of the parties under the Removal Act, but the landowner must be deemed the defendant so far as the right of removal to a federal Circuit Court on the ground of diverse citizenship is concerned, because, under the state statutes, the institution and continuance of the proceedings depend upon the will of the railroad company. *Mason City, etc., R. Co. v. Boynton*, (1907) 204 U. S. 570, 27 S. Ct. 321, 51 U. S. (L. ed.) 629.

**Parties brought into an action in a state court by a cross-complaint** alleging that they claim an interest in the property involved, and who appear and file a complaint setting up that they have succeeded to the interest of the plaintiffs, and alleging substantially the same cause of action against defendants upon which the original complaint was based, must be treated as plaintiffs, taking the place and rights of the original plaintiffs, and have no standing as defendants to remove the cause. *Nash v. McNamara*, (1906) 145 Fed. 541.

Where a nonresident of the state sued in a state court, and defendant, by cross-petition, sought affirmative relief, the plaintiff did not thereby become a defendant, so as to be entitled to remove the cause to the federal court. *Smithers v. Smith*, (1904) 35 Tex. Civ. App. 508, 80 S. W. 646, rehearing granted 98 Tex. 83, 81 S. W. 283.

**Intervener.**—A nonresident heir, who by leave of court intervenes in the matter of a contested claim in the court of probate, cannot, where an administrator *pro tem* repre-

senting the estate is defendant and does not join with him, petition for the removal of such a cause to the federal court. *Mayer v. Schneider*, (1903) 112 Ill. App. 628, *affirmed* (1904) 212 Ill. 286, 72 N. E. 436.

**Effect of counterclaim.** — A plaintiff in a suit in a state court for the recovery of a sum less than \$2,000 does not become theoretically or constructively a defendant, so as to entitle him to remove the cause on the ground of diversity of citizenship, because the defendant in his answer sets up a counterclaim for more than \$2,000, as permitted by the statute of the state, and which counterclaim under such statute would remain for trial, although the plaintiff should dismiss his action. *Illinois Cent. R. Co. v. Waller*, (1908) 164 Fed. 358.

**Being nonresidents of that state.** — The phrase "being nonresidents of that state" should be construed as equivalent to the words "not being citizens of that state." *Madisonville Traction Co. v. St. Bernard Min. Co.*, (1904) 130 Fed. 789.

A defendant, sued jointly with another in a state court, who testified that his home was in another state, where he had property and to which he expected to return, does not become a resident of the state and district of suit so as to prevent a removal of the cause by the defendants by moving there with his family for temporary purposes of his employment and for an indefinite time. *Willingham v. Swift*, (1908) 165 Fed. 223.

Where plaintiff, a citizen of Pennsylvania, brought suit on contract in the Supreme Court of New York against citizens of that state, it was held that it was not removable to the Circuit Court of the United States sitting in New York under this section. *Juillard v. Barr*, (C. C. A. 1910) 177 Fed. 921.

A suit in a state court is not removable to the United States court on motion of a nonresident defendant on the ground of diverse citizenship, when the resident codefendant is an indispensable party against whom substantial relief is prayed. *Paulk v. Ensign-Oskamp Co.*, (1905) 123 Ga. 467, 51 S. E. 344.

Where, in a joint action of negligence in the state court against three defendants, a peremptory instruction is given in favor of two of them who are residents of the state, it does not entitle the other, though a citizen of another state, to remove the cause to the United States court for diverse citizenship. *Southern R. Co. v. Nichols*, (1910) 135 Ga. 11, 68 S. E. 789.

An alien nonresident can no longer claim the privilege of removing to a federal Circuit Court an action commenced against him in a state court. *O'Connor v. Texas*, (1906) 202 U. S. 501, 26 S. Ct. 726, 50 U. S. (L. ed.) 1120, *affirming* (1903) 96 Tex. 484, 73 S. W. 1041.

##### 5. PETITION FOR REMOVAL.

**All the defendants must join in the application.** — Where a suit does not present a separable controversy, it can only be removed on a petition in which all the defendants join.

*Huntington v. Pinney*, (1903) 126 Fed. 237; *Miller v. Clifford*, (1904) 133 Fed. 880, 67 C. A. 52, 5 L. R. A. N. S. 49; *Blackburn v. Blackburn*, (1906) 142 Fed. 901.

A petition to remove an action against two defendants for a joint tort to the federal court on the ground that both defendants are nonresidents should be made on behalf of both. *Baber v. Southern R. Co.*, (1907) 76 S. C. 4, 56 S. E. 540.

A cause is not removable by one of several defendants on the ground of diversity of citizenship alone, where no separable controversy is alleged or shown. *McNaul v. West Indian Securities Corp.*, (1910) 178 Fed. 308.

**Fraudulent joinder to prevent removal.** — The jurisdiction of the federal court cannot be defeated by plaintiff's fraud in stating a case of joint liability against two or more defendants for that sole purpose. *Reinartson v. Chicago G. W. R. Co.*, (1909) 174 Fed. 707; *Floyd v. Shenango Furnace Co.*, (1911) 186 Fed. 539; *St. Louis Southwestern R. Co. v. Adams*, (1908) 87 Ark. 136, 112 S. W. 186; *Stratton's Independence v. Sterrett*, (Colo. 1911) 117 Pac. 351; *Eastin v. Texas*, etc., R. Co., (1906) 99 Tex. 654, 92 S. W. 838, *reversing* (1905) 89 S. W. 440.

Where it is apparent that a resident defendant was joined with a nonresident defendant only to prevent the removal of the case to the United States court, and without any reasonable ground on the part of the plaintiff to expect a recovery against him, the court should dismiss the action as to the defendant thus joined, and remove the cause to the federal court. *Underwood v. Illinois Cent. R. Co.*, (Ky. 1907) 103 S. W. 322.

A federal Circuit Court to which a case has been removed as presenting a separable controversy properly refuses to remand the cause to the state court, where the testimony shows that the real purpose of the plaintiff in suing jointly in tort a resident employee and his nonresident employer was to prevent the exercise of the right of removal by the nonresident defendant. *Wecker v. National Enameling, etc., Co.*, (1907) 204 U. S. 176, 27 S. Ct. 184, 51 U. S. (L. ed.) 430.

Where an action is brought against a foreign corporation and a resident citizen, and it appears from the evidence on the trial that plaintiff had no reasonable ground to believe that the resident was in any manner liable, the court should give a peremptory instruction in behalf of the resident defendant, and order the case removed to the federal court on application of the defendant corporation. *Clinger v. Chesapeake, etc., R. Co.*, (Ky. 1908) 109 S. W. 315.

Where, in an action for injuries to a servant, plaintiff joined a resident employee as a party defendant with the railroad company, which was a nonresident, and at the close of plaintiff's evidence no cause of action had been established against the resident defendant, and there was nothing to warrant the presumption that a stronger case could have been made out when the petition was filed, it was proper for the court to grant the railroad company's renewed motion for a removal of the cause to the federal court, on the

ground that the citizen defendant had been joined for the sole purpose of preventing such removal. *Dudley v. Illinois Cent. R. Co.*, (1906) 96 S. W. 835, 29 Ky. L. Rep. 1029.

In an action for death, plaintiff joined a resident corporation and two nonresident corporations, charging that defendants, together and jointly, were engaged in the building of a bridge over the Tennessee river, and that plaintiff's intestate was employed by the three defendants to work on the bridge, and while so engaged was killed by the fall of a mortar bucket, owing to the negligence of the three defendants and to the improper, defective, and unsafe condition of the machinery in use; it was held that the petition stated a cause of action against all the defendants, which precluded a removal of the cause to the federal court by the nonresident defendants, on a petition alleging that the resident corporation was joined for the fraudulent purpose of preventing a removal, etc. *White v. Chicago, etc., R. Co.*, (1906) 96 S. W. 911, 29 Ky. L. Rep. 1062.

Where an attorney, when drawing a pleading, had knowledge of facts which showed that allegations of negligence made therein against a defendant were without foundation, or notice of other facts to put him on inquiry which would have led to such knowledge, both he and his client are chargeable therewith; and where such allegations were made for the purpose of showing a joint cause of action against two defendants, one a citizen of the state and the other of another state, it is a fair inference that the defendants were joined for the sole purpose of preventing a removal of the cause by the nonresident defendant. *Gustafson v. Chicago, etc., R. Co.*, (1904) 128 Fed. 85.

The right of removal cannot be defeated by the joinder of a resident with a nonresident defendant, even though a joint cause of action is alleged, where the court finds as a fact that the averments on which the joint liability is asserted are palpably untrue, and were not made in good faith, but for the sole purpose of preventing a removal, and in fraud of the jurisdiction of the federal court. *Crawford v. Illinois Cent. R. Co.*, (1904) 130 Fed. 395.

The question of fraud or good faith as affecting the right to remove a cause to the federal court is not presented by the plaintiff's claim that the liability of the master and servant is joint, but would arise where defendant denies the truth of the facts stated in the complaint, and so conclusively establishes that the relation of master and servant did not exist, or that the claim of the plaintiff was for other reasons false in fact, and that the complaint could not have been presented in good faith. *Jacobson v. Chicago, etc., R. Co.*, (1910) 176 Fed. 1004.

In a suit against a railroad company and a general foreman employed to repair engines, by an engineer, for personal injuries caused by the bursting of a "sight tube," the railroad company being the only defendant against whom a cause of action was stated in the pleadings, and being a citizen of another state, the cause was held to be removable.

*Cincinnati, etc., R. Co. v. Robertson*, (1903) 115 Ky. 858, 74 S. W. 1061.

**Fraud must be alleged and proved.**—Where a joint cause of action against a resident and a nonresident defendant for a tort is stated in the complaint, the joinder of the defendants is within the plaintiff's right, and the cause is not removable on the ground that such joinder was for the fraudulent purpose of preventing a removal, unless such actual purpose is alleged and proved. *Chicago, etc., R. Co. v. Willard*, (1911) 220 U. S. 413, 31 S. Ct. 460, 55 U. S. (L. ed.) 521, *affirming* (C. C. A. 1908) 165 Fed. 181; *Thomas v. Great Northern R. Co.*, (1906) 147 Fed. 83, 77 C. C. A. 255; *Offner v. Chicago, etc., R. Co.*, (1906) 148 Fed. 201, 78 C. C. A. 359; *Welch v. Cincinnati, etc., R. Co.*, (1908) 177 Fed. 760; *Shaver v. Pacific Coast Condensed Milk Co.*, (1911) 185 Fed. 316; *Chesapeake, etc., R. Co. v. Banks*, (1911) 144 Ky. 137, 137 S. W. 1066; *Blackwell's Durham Tobacco Co. v. American Tobacco Co.*, (1907) 144 N. C. 352, 57 S. E. 5; *Hough v. Southern R. Co.*, (1907) 144 N. C. 692, 57 S. E. 469; *Baber v. Southern R. Co.*, (1907) 76 S. C. 4, 56 S. E. 540; *Eastin v. Texas, etc., R. Co.*, (1906) 99 Tex. 654, 92 S. W. 838, *reversing* (1905) 89 S. W. 440.

Where in an action for injuries to a passenger, the petition joined the railroad company and its servants as defendants, and charged them jointly as wrongdoers, a petition by the railroad company to remove the cause to the federal court, for diversity of citizenship, on the ground that the action involved a separable controversy between it and its servants, whose citizenship was the same as plaintiffs'—merely denying the negligence of its codefendants as charged, and alleging that plaintiffs' purpose in joining such codefendants was for the fraudulent purpose of defeating the jurisdiction of the federal court—was insufficient; such averments being mere conclusions, and not facts showing a separable controversy. *Rutherford v. Illinois Cent. R. Co.*, (1905) 120 Ky. 15, 85 S. W. 199.

Where, in an action for injuries to plaintiff at a railroad crossing, the petition stated a nonseparable cause of action against the railroad and the conductor and engineer of the train by which plaintiff was struck, and the railroad company, whose citizenship was diverse to that of plaintiff, pleaded that the engineer and conductor, who were citizens of the same state as plaintiff, had been fraudulently joined to prevent a removal of the cause to the federal court, but there was no proof of such fraud, the overruling of the railroad's petition to remove and plea in abatement for want of jurisdiction of the state court, on the same ground, was not error. *Stotler v. Chicago, etc., R. Co.*, (1906) 200 Mo. 107, 98 S. W. 509.

In a suit for injuries to a brakeman by the separation of a defective brake staff, plaintiff joined the railroad company and the manufacturer of the car, who were nonresidents, and two of the railroad's car inspectors who were residents of the state. The petition alleged a cause of action against the inspectors, but a removal petition, without

denying that the inspectors were such, or that they approved the car, alleged that no cause of action existed against them, that they had nothing to do with the matters alleged in the petition, nor with the defective brake staff, and that they were not in any manner responsible therefor. It was held that such allegations were insufficient to show that plaintiff had no cause of action against the inspectors, and that they were therefore fraudulently joined to prevent a removal of the cause. *Ward v. Pullman Car Corp.*, (1908) 131 Ky. 142, 114 S. W. 754.

*Allegations of petition taken as true in state court.*—Where it is charged in a petition for the removal of a cause to the federal court that averments against resident defendants jointly sued were falsely and fraudulently made to prevent removal, the state court must accept the allegations as to fraud as true, and sustain the petition; the truth of the issue of fraud being triable in the federal court upon a motion to remand. *Southern R. Co. v. Sittasen*, (1906) 166 Ind. 257, 76 N. E. 973.

A petition for removal of a cause to the federal courts, alleging diverse citizenship, etc., between plaintiffs and the principal defendant, and that there was no cause of action against the citizen defendant, but that he had been fraudulently joined by plaintiff to deprive the noncitizen defendant of its right to remove the cause, and that the citizen defendant acted in the matter in controversy merely as petitioner's agent, is sufficient on its face to require removal. *Eastin v. Texas*, etc., R. Co., (1906) 99 Tex. 654, 92 S. W. 838, reversing (1905) 89 S. W. 440.

In an action for personal injuries, two defendants were alleged in the complaint to be foreign corporations, but the complaint contained no allegation as to whether a street railway company which was joined as a defendant was a corporation. The two defendants described as foreign corporations filed a petition and bond for removal to the federal court, stating that the street railway company was not a corporation, but a trade name under which one of two individuals was doing business, and that neither of such persons had been served with process or was a party to the suit. It was held that on the showing made by the petition it was the duty of the trial court to accept the petition and bond, and proceed no further in the suit. *Texarkana Telephone Co. v. Bridges*, (1905) 75 Ark. 116, 86 S. W. 841.

*Where the fact is clear on the face of the pleadings* that an improper party has been joined, or an assumed cause of action injected into the case, to defeat the jurisdiction of the federal court over the real controversy, the court may find the attempted fraud on its jurisdiction from the record alone and prevent its perpetration. *Boatmen's Bank v. Fritzlen*, (1905) 135 Fed. 650, 68 C. C. A. 288, reversing (1904) 128 Fed. 608.

*Joinder to prevent removal.*—A plaintiff has the right to join a citizen of the same state with a citizen of another state as defendants, although his purpose is to thereby prevent a removal of the cause, if the cause

of action is in fact joint. *Gustafson v. Chicago*, etc., R. Co., (1904) 128 Fed. 85; *Evansberg v. Insurance Stove*, etc., Co., (1908) 168 Fed. 1001; *Atlantic Coast Line R. Co. v. Daniels*, (1909) 175 Fed. 302; *Southern R. Co. v. Sittasen*, (1906) 166 Ind. 257, 76 N. E. 973, reversing (1905) 74 N. E. 898; *Dowell v. Chicago*, etc., R. Co., (1910) 83 Kan. 562, 112 Pac. 136; *Calder v. Southern R. Co.*, (1911) 89 S. C. 287, 71 S. E. 841.

That a resident employee is joined with a nonresident corporation to keep the cause of action out of the federal courts is not conclusive on the question of plaintiff's good faith as affecting the right of removal. *Jacobson v. Chicago*, etc., R. Co., (1910) 176 Fed. 1004.

A joinder of parties cannot be fraudulent for the purpose of defeating federal jurisdiction where it is authorized by the laws of the state where the suit is brought. *Ward v. Pullman Car Corp.*, (1908) 131 Ky. 142, 114 S. W. 754.

In an action against a railroad company for injuries to plaintiff by the giving way of the floor of a platform at a coal dock at a small station, plaintiff's claim that it was the duty of the station agent to inspect and repair the platform, so as to render him jointly liable with the railroad company, cannot be said to be in bad faith, so as to authorize the removal of the case to the federal court. *Jacobson v. Chicago*, etc., R. Co., (1910) 176 Fed. 1004.

While a joint defendant sued purely by a fictitious name without other facts identifying him as a proper or necessary party to the action stated will be regarded as a formal party merely, whose presence on the record will not affect the right of removal by one otherwise entitled thereto, yet one may sue any or all of those jointly liable for a tort, and, where a joint cause of action is stated against them, a defendant so sued cannot question the good faith with which his co-defendants have been joined with him, though such joinder may appear to be for the very purpose of preventing a removal to the federal court. *Bagenas v. Southern Pac. Co.*, (1910) 180 Fed. 887.

Under a local statute declaring a corporation and its agents or servants negligently causing the death of another jointly liable therefor, an action for negligent death brought against a railroad and its servants causing such death is not removable to the federal court on the ground of the nonresidence of the railroad, where the servants are residents of the state, although they are joined solely for the purpose of preventing such removal. *Illinois Cent. R. Co. v. Sheegog*, (1909) 215 U. S. 308, 30 S. Ct. 101, 54 U. S. (L. ed.) 208, affirming (1907) 126 Ky. 252, 103 S. W. 323; *Pieroe v. Illinois Cent. R. Co.*, (1905) 86 S. W. 703, 27 Ky. L. Rep. 801.

*Time of diverse citizenship.*—A petition for the removal of an action to the federal court on the ground of diversity of citizenship must state that the petitioner was a nonresident at the commencement of the action, and it is not sufficient to aver that he

was a nonresident at the time of the application for removal. *Chesapeake, etc., R. Co. v. Banks*, (1911) 142 Ky. 746, 135 S. W. 285.

A petition by defendant for the removal of an action to the federal court, which avers that "the controversy in said action is between citizens of different states;" that defendant "at the time of the commencement was and still is a citizen and resident . . . of Illinois; that plaintiff was then and still is a resident . . . of Iowa," is insufficient, for failing to allege the citizenship of plaintiff at the commencement of the action. *O'Connor v. Chicago, etc., R. Co.*, (1908) 117 N. W. 979. On rehearing, (1909) 144 Ia. 289, 122 N. W. 947.

**Averment of nonresidence.**—A removal petition by an alien, failing to allege that he is a nonresident of the state, is fatally defective. *Mayer v. Karaghuesian*, (1909) 169 Fed. 736.

An averment, in a petition for removal, that defendant is, and was at the time of the

commencement of the suit, a citizen and resident of another state named, is equivalent to an allegation of nonresidence in the state of suit, and is sufficient. *Lawrence v. Southern Pac. Co.*, (1908) 165 Fed. 241.

Where a removal petition alleged that petitioner was a citizen of Illinois and a nonresident of Iowa, it was not necessary that it should also allege that it was not a citizen of Iowa; plaintiffs' remedy being by counter-showing if they desired to controvert the citizenship alleged. *Wisecarver v. Chicago, etc., R. Co.*, (1908) 139 Ia. 596, 117 N. W. 961.

A petition for removal to the federal court, alleging that certain defendants are united as codefendants to prevent petitioner from exercising its right of removal, necessarily concedes the residence of the codefendants, and an answer affirmatively alleging such residence is immaterial. *Pierce v. Illinois Cent. R. Co.*, (1905) 86 S. W. 703, 27 Ky. L. Rep. 801.

### III. SEPARABLE CONTROVERSIES.

#### 1. "BETWEEN CITIZENS OF DIFFERENT STATES."

See, generally, *supra*, this note, II. *Diverse Citizenship and Alienage*.

To authorize a removal by one or more of the defendants on the ground that there is a separable controversy which is "wholly between citizens of different states," it must appear from the petition that each party to the controversy is a citizen of some state. *Laden v. Meck*, (1904) 130 Fed. 877, 65 C. C. A. 361.

**Aliens.**—A suit in which there is a separable controversy between an alien corporation and a nonresident corporation defendant is subject to removal under this section. *Iowa Lilloet Gold Min. Co. v. Bliss*, (1906) 144 Fed. 446.

An alien corporation is, under this section, a nonresident although it has a branch office within the state for the transaction of business. *Baumgarten v. Alliance Assur. Co.*, (1907) 153 Fed. 301.

#### 2. WHO MAY REMOVE.

See, generally, *infra*, this note, subdivision 4. *Separable Character of Controversy*.

**Defendant sued in court of his own state.**

—A cause will not be removed to a federal court on the ground that certain parties in interest are not residents of Pennsylvania, where it appears that the application for removal is made by the only defendant in the case who is present, and is admittedly a resident of Pennsylvania. *McFadden v. McFadden*, (1907) 32 Pa. Super. Ct. 534.

**Assignee.**—An action to recover the price of property sold, brought against the original purchasers and one to whom they assigned their contract, who assumed payment and to whom the property was delivered, presents a separable controversy as to the assignee, who may remove the same into a federal court,

where the requisite jurisdictional facts appear, regardless of the citizenship of the other defendants. *Stimson v. United Wrapping Mach. Co.*, (1907) 156 Fed. 298.

Where there are several defendants, it is not necessary that the removing defendant should be a nonresident. *Battle Creek Nat. Bank v. Howard*, (1907) 54 Misc. 81, 103 N. Y. S. 814.

#### 3. PETITION FOR REMOVAL.

See, generally, *infra*, this title, vol. 4, p. 349, sec. 3, annotation I.; and see also *infra*, this note, subdivision 5, *How Separable Controversy Made to Appear*.

A contention that a suit against a domestic and against a foreign corporation presents a separable controversy, and is removable to the Circuit Court, cannot be considered on the hearing of a petition for removal where the petition is not grounded on any such proposition. *Keller v. Kansas City, etc., R. Co.*, (1903) 135 Fed. 202.

An action against two defendants is not removable from the state to the federal courts on their joint petition averring that the controversy arises under the laws of the United States as to one of them alone, where there is no separable controversy between the plaintiff and the latter defendants, nor any evidence showing that the other defendant was made a party solely to defeat the removal. *Texas, etc., R. Co. v. Huber*, (1903) 33 Tex. Civ. App. 75, 75 S. W. 547.

**Fraudulent joinder.**—Where a removable petition alleged the requisite diversity of citizenship, that the matter in dispute exceeded, exclusive of interest and costs, the sum of \$2,000, that a separable controversy existed between plaintiff and petitioner, and that a codefendant was fraudulently joined to defeat federal jurisdiction and prevent removal, it was sufficient for that purpose, though it



was defective in detail as to what constituted the alleged fraud. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

#### 4. SEPARABLE CHARACTER OF CONTROVERSY.

**Default.**—The complaint, in an action in a state court, stated a joint cause of action against two defendants, one a domestic and the other a foreign corporation. The latter, which was brought in by substituted service, made default, and a judgment was entered against it thereon. On a trial of the case against the domestic corporation, a judgment was rendered in its favor, from which plaintiff appealed. It was held that until final disposition of the appeal, it was not established that a separable controversy existed between plaintiff and the foreign corporation which entitled the latter to remove the cause. *Lathrop, etc., Co. v. Interior Constr., etc., Co.*, (1906) 143 Fed. 687.

**"Controversy" and "cause of action."**—Where the plaintiffs, who furnished materials to contractors of a building, sued, claiming the privilege on the building, making the contractors, the owners of the building, and a surety company which had executed a bond for faithful performance of the contract, defendants; and the complaint charged that the owners of the building had become personally liable by not having required the contractors to furnish a bond to secure the payment of workmen and materialmen, the surety was made a party on the ground that the contractors, having defaulted, had assigned the contract to the company with all its rights and all the materials belonging to them. The plaintiff was a Missouri corporation, the contractors were citizens of Texas, the surety company was a citizen of Maryland, and the owner of the building was a Louisiana corporation. It was held that an application by the contractors and the surety company to have the case removed to the federal court was properly denied, the action being joint and several, arising *ex contractu* so as not to present a separable controversy between plaintiffs and petitioners for removal. *Union Iron, etc., Co. v. Sonnefeld*, (1904) 113 La. 436, 37 So. 20.

Where, in an action against a railroad and a construction company for services under a contract made between the plaintiff and the latter, the citizenship of the construction company only was diverse, and the plaintiff alleged in a single cause of action that he performed services and furnished material for the railroad company, and that the construction company acted as agent of the railroad company, and sought to recover against the defendants jointly, it was held that the complaint did not allege a separable cause of action, and that the action was not, therefore, removable. *Lathrop-Shea, etc., Co. v. Pittsburg, etc., R. Co.*, (1905) 135 Fed. 619.

That plaintiff might have sued defendants separately is immaterial on a petition to remove the cause. *Davis v. Rexford*, (1907) 146 N. C. 418, 59 S. E. 1002.

Where an action was brought against a railroad company, which, if sued alone, would

have been entitled to remove the cause, and a resident not entitled to remove, and a verdict was rendered in favor of the resident and against the corporation, on which a judgment was entered, which was reversed on the railroad company's appeal, that plaintiff did not appeal from the judgment in favor of the resident defendant did not entitle the railroad company, after reversal, to remove the cause on the theory that the action then involved a controversy only between plaintiffs and itself. *Huber v. Texas, etc., R. Co.*, (Tex. 1908) 113 S. W. 984.

Where two persons, one a resident of the state and one a resident of another state, were joint receivers of a corporation, and acted jointly in receiving and holding what they had received from their predecessor, so that they were both indispensable parties to an action concerned with their receivership, or with their conduct as receivers, it was held that there was no separable controversy between the nonresident receiver and plaintiff suing for relief from certain transactions of the receivers' predecessor relating to the receivership, which would entitle the nonresident receiver to remove the cause to the federal court. *Wrightsville Hardware Co. v. Hardware, etc., Mfg. Co.*, (1910) 180 Fed. 586.

**Action on contract.**—A complaint against one resident and two nonresident defendants for breach of a contract to purchase land for the benefit of all, states a breach by all of the defendants, and therefore shows a joint liability defeating a removal of the cause, where it avers that by the terms of the contract the nonresident defendants agreed to furnish the money for the purchase of the land, the resident defendant to pass on the title to the land purchased, and the plaintiff to give his services in making the purchase; that the defendants, and each of them, had refused to carry out the agreement; and that one of the nonresident defendants notified the plaintiff to discontinue work under the contract and that the defendants would not further comply with it. *Davis v. Rexford*, (1907) 146 N. C. 418, 59 S. E. 1002.

*The contracts and liability of the maker of a promissory note and of the several indorsers thereon are each separate and distinct from the others, and their joinder as defendants in the same action, as permitted by a state statute, does not render the cause of action joint, or joint and several; but such an action is severable, and may be removed by any defendant who would have the right if sued alone, without regard to the citizenship of his codefendants. But such removal carries only the controversy between such defendant and the plaintiff, and does not give the federal court jurisdiction over the other defendants or of the causes of action against them.* *Manufacturers' Commercial Co. v. Brown Alaska Co.*, (1906) 148 Fed. 308.

**Action for tort.**—Where an action for tort is brought in the state court by a resident plaintiff, against a resident and a nonresident defendant who are jointly liable and there is no separable controversy, it may not be removed. *Heffelfinger v. Choctaw, etc., R. Co.*,

(1905) 140 Fed. 75; *Blunt v. Southern R. Co.*, (1907) 155 Fed. 499; *Foster v. Coos Bay Gas, etc., Co.*, (1911) 185 Fed. 979; *Wabash R. Co. v. Keeler*, (1906) 127 Ill. App. 265; *Illinois Cent. R. Co. v. Coley*, (1905) 121 Ky. 385, 89 S. W. 234, 1 L. R. A. N. S. 370; *Illinois Cent. R. Co. v. Houchins*, (1905) 121 Ky. 526, 89 S. W. 530, 1 L. R. A. N. S. 375, 123 Am. St. Rep. 205; *Illinois Cent. R. Co. v. Proctor*, (1905) 122 Ky. 92, 89 S. W. 714; *White v. Southern R. Co.*, (1907) 148 N. C. 340, 59 S. E. 1042.

Where the complainant in an action for injuries to a servant against two railroad companies, one of which only was a nonresident, did not allege a separable controversy between plaintiff and each defendant, it is immaterial to the right of the nonresident company to remove the cause to the federal court that a peremptory instruction was given by the court in favor of the resident defendant. *Illinois Cent. R. Co. v. Harris*, (1905) 85 Miss. 15, 38 So. 225.

Where the plaintiff, in an action for death, pleaded a cause of action against several defendants, some of whom were of the same citizenship as the plaintiff, the test of plaintiff's right to join such defendants, and thereby preclude a removal of the cause to the federal courts by defendants whose citizenship was diverse, depended on whether there was a legal concert or identity of the defendants in the same tortious act, or in the concurring acts of negligence contributing to the same injury, and not whether such defendants might present separate and different defenses to the action. *American Bridge Co. v. Hunt*, (1904) 130 Fed. 302, 64 C. C. A. 548.

In a suit to enjoin the destruction of a water privilege by diverting water from a stream, the complainant may properly join as defendants the persons who are undertaking such diversion, and one with whom they have contracted to do the work, and ask for a common injunction against all, and in such case there is no separable controversy which entitles the former to remove the cause when the contractor could not. *McMillan v. Noyes*, (1906) 146 Fed. 926.

An action to recover damages for the negligent injury of a person while a passenger on a street car is one *ex delicto*, and not on the contract of carriage, and the plaintiff may join as defendants the street railroad company and an employee, where their joint negligence is alleged to have been the cause of the injury; and in such case the cause of action is not separable for the purpose of removal. *Knuth v. Butte Electric R. Co.*, (1906) 148 Fed. 73.

A suit by a citizen of the state against a foreign and a domestic railroad company for damages for interference with his easements in streets on which his property abuts, caused by the operation of trains thereon pursuant to an agreement between the companies, and for an injunction to prevent further interference, presents a controversy which is not separable, and the foreign company is not entitled to remove the cause to the federal court on the ground of diversity of citizenship. *Staton v. Atlantic Coast Line*

*R. Co.*, (1907) 144 N. C. 135, 56 N. E. 794.

Where the plaintiff, a brakeman in the employ of defendant G. Railroad Company, alleged that it had an agreement with defendant I. Railroad Company for the use of the latter's switches and yard, subject to the control of the latter company's yardmaster; that, on the occasion of plaintiff's injury, his conductor and such yardmaster negligently ordered the caboose of plaintiff's train to be placed on a specified track; and that, in so placing it, it encountered the corner of a freight car belonging to the I. Company, negligently protruding over the way, but invisible to plaintiff, causing a collision, in which plaintiff was hurt, it was held that such declaration did not allege a separable controversy between plaintiff and the defendant companies, entitling the I. Company, which was the sole nonresident, to remove the case to the federal courts. *Illinois Cent. R. Co. v. Harris*, (1905) 85 Miss. 15, 38 So. 225.

A complaint in an action against a foreign railway corporation and a domestic corporation and individuals, citizens and residents of Kentucky, brought by a resident and citizen of the state, which alleges that the foreign corporation was the owner of a railroad and its equipments, and that the domestic corporation and the individuals were its agents to keep the same in safe condition, and had undertaken to perform such duty, and had assured plaintiff, an engineer, that they had put an engine in good repair, when they knew that it was out of repair, thereby causing injury to the plaintiff, states a cause of action jointly against the foreign and domestic corporations and the individuals, and the foreign corporations cannot remove the cause to the federal courts on the ground of diversity of citizenship. *Ayles v. Southern R. Co.*, (1905) 121 Ky. 59, 88 S. W. 1048.

But a joint action in a state court against two defendants for a tort, which is governed as to the two defendants by different statutes, fixing different grounds of liability and admitting of different defenses, is separable and is removable by one defendant, where the necessary diversity of citizenship exists as to such defendant, although the other defendant may be a citizen of the same state as plaintiff. *Jackson v. Chicago, etc., R. Co.*, (C. C. A. 1902) 178 Fed. 432.

Though, in a suit against two or more defendants one of whom is a nonresident, there may be charges of concurrent negligence against all, yet if there be also a distinct charge of negligence against the nonresident defendant alone, sufficient in and of itself to constitute a cause of action, the case is one involving a separable controversy between citizens of different states, and is therefore removable to the federal courts. *McIntyre v. Southern R. Co.*, (1904) 131 Fed. 985.

Where the plaintiff alleged the death of her decedent while working in the mill of defendant box company, a foreign corporation, owing to the latter's failure to provide a reasonably safe place for deceased to work,

in that such company was required, but failed, to provide a guarded platform over its shaving pit, where he was required to go to open the pipes leading into it, and that while performing such work, and using a defective stick provided by defendant, deceased fell from the platform by reason of its unguarded condition, and lost his life, the petition alleging also that defendant K., a resident of the same state as plaintiff, was negligent in failing to inspect the place and appliances, and discover and report any defects found therein to defendant company, it was held that the box company and defendant K. were not jointly liable, but that there was a separable controversy between plaintiff and the box company, which was removable to the federal court. *Marach v. Columbia Box Co.*, (1910) 179 Fed. 412.

**Action against master and servant — Removal allowed.** — Where the petition in a joint action in a state court against a railroad company and its servant to recover for a personal injury alleges facts which show that the corporation is charged with negligence solely because of an act of its codefendant, under the rule of *respondent superior*, it states a cause of action which is several and not joint, notwithstanding a general averment of joint negligence, and the cause involves a separable controversy which renders it removable by such company, the other jurisdictional facts being shown. *Atlantic Coast Line R. Co. v. Bailey*, (1907) 151 Fed. 891.

Where a complaint against a nonresident railway company and certain of its employees in charge of the train by which deceased was killed, who were of the same citizenship as plaintiff, alleged that, in violation of the rules of the railway company, "defendants negligently, wilfully, and maliciously, by their joint, concurrent acts," gave certain box cars a high, unusual, and dangerous rate of speed, uncoupled them from the engine, turned a switch, and permitted them to roll down a steep grade over a crossing, by which plaintiff's intestate was knocked down and killed; and the complaint also charged defendants jointly with negligence in maintaining such steep grade and closely adjoining switch at such place, in not providing a switchman at the crossing, in not providing a brakeman in charge of the cars, and in that the railway company's employees were incompetent, and that they were retained in its employ with knowledge that they were accustomed to violate its rules, it was held that such acts of negligence were not joint, but that the complaint alleged a separable controversy entitling the railway company to remove the cause to the federal courts. *McIntyre v. Southern R. Co.*, (1904) 131 Fed. 985.

Where, in an action for death of a passenger, the plaintiff joined the railroad company, a nonresident corporation, with certain of its employees, operating the colliding trains which caused the accident, who were of the same citizenship as plaintiff, but the only negligence averred was that of the servants in control of the trains, the corporation's liability being based wholly on the fact that the

acts of the servants were within the scope of their employments, and bound the company, it was held that the complaint did not charge a joint tort, and hence the corporation was entitled to remove the cause to the federal court. *Sessions v. Southern Pac. Co.*, (1904) 134 Fed. 313.

In an action for injuries to a servant, plaintiff sued defendant company, a nonresident, and B., a resident, who was plaintiff's superintendent. The corporation's liability, if any, was based on its negligence in providing a defective appliance, or because of B.'s negligence in directing plaintiff to pour iron into the mould known to him to be defective. It was held that the liability of B. and the corporation was not joint, but severable as to each, and that the cause was therefore removable. *Evansberg v. Insurance Stove, etc., Co.*, (1908) 168 Fed. 1001.

Where the petition against a railroad company and an individual for death of an employee of the company and the petition of the company for removal of the cause show that the individual defendant, a resident of the state, is a mere employee of the company, against whom no recovery can be had under the statute on which the action is based, so that there is no joint liability, the mere subsequent allegation in plaintiff's petition that "defendants" negligently did certain things, is ineffective to prevent the company, a nonresident, from removing the cause to the federal court. *Chicago, etc., R. Co. v. Stepp*, (1907) 151 Fed. 908. See also *Slaughter v. Nashville, etc., R. Co.*, (1906) 91 S. W. 744, 28 Ky. L. Rep. 1195.

A plaintiff corporation instituted suit against defendant railroad company, a non-citizen, and against the railroad company's engineer, a citizen of the same state as plaintiff, alleging the burning of plaintiff's warehouse by the joint negligence of the railroad company and the engineer, and that the fire was caused by the engineer's operation of an engine equipped with an improper spark arrester, also alleging that the engineer was negligent in handling the engine at the time and place alleged, so as to cause a great and unnecessary amount of sparks to be emitted. It was held that the engineer was not a necessary party to the determination of the controversy between plaintiff and the railroad company, the substantial defendant, since, if the locomotive had been equipped with a proper spark arrester, no conduct of the engineer could have caused the emission of sufficient sparks to cause a fire; and hence the controversy between the plaintiff and the railroad company was severable and removable to the federal courts. *Bainbridge Grocery Co. v. Atlantic Coast Line R. Co.*, (1910) 182 Fed. 276.

Where the petition in an action against a railroad company and an engineer of one of the trains for negligently causing the death of plaintiff's intestate is based on the Iowa statute giving a right of action for wrongful death, which has never been construed by the courts of the state to create a joint liability in such cases, and alleges acts of negligence on the part of the railroad company with

which its codefendant had no concern, and which are essential to make out a cause of action under the state law, a separable controversy is disclosed, and the cause is removable on petition of the railroad company showing diversity of citizenship, and alleging that the joinder of defendants was for the fraudulent purpose of preventing a removal. *Henry v. Illinois Cent. R. Co.*, (1903) 132 Fed. 715.

If the complaint against a nonresident corporation and its alleged resident foreman does not charge a joint liability, it will not preclude removal by the nonresident defendant. *Shaver v. Pacific Coast Condensed Milk Co.*, (1911) 185 Fed. 316.

*Removal denied.*—A suit in which plaintiff, in good faith, has joined as for a joint liability in tort a foreign railway corporation and certain of its resident employees whose negligence caused the injury complained of, is not removable to a federal Circuit Court as presenting a separable controversy between the plaintiff and the corporate defendant. *Southern R. Co. v. Miller*, (1910) 217 U. S. 209, 30 S. Ct. 450, 54 U. S. (L. ed.) 732, *affirming* (1908) 3 Ga. App. 410, 59 S. E. 1115; *Roberts v. Shelby Steel Tube Co.*, (1904) 131 Fed. 729, 65 C. C. A. 589; *Louisville, etc., R. Co. v. Roberts*, (Ga. 1911) 71 S. E. 425.

Where a nonresident mining corporation and its local foreman in charge were joined as defendants in an action by a miner for personal injuries, and the complaint alleged that the foreman knew of the unsafe condition of the stope where plaintiff was injured, and negligently permitted such condition to exist, and also charged that the stope was by negligence in mining rendered unsafe, and was negligently maintained in such condition under the direction of the corporation's superintending officers and with its knowledge and consent, it was held that the complaint charged concurrent acts of negligence against defendants, and did not present a separable controversy, so as to entitle the corporation to remove the cause to the federal court. *Stratton Cripple Creek Min., etc., Co. v. Ellison*, (1908) 42 Colo. 498, 94 Pac. 303.

In an action against a master for wilful tort committed by his servant in his employment, the servant is a proper party, and the case is not removable to the United States court on the theory that he is a sham defendant. *Able v. Southern R. Co.*, (1906) 73 S. C. 173, 52 S. E. 962.

That an action for causing death, against a railroad company, and a conductor and brakeman in its employ, is based as against the railroad company on a local statute providing that every railroad company shall be liable for damages inflicted on passengers, while the liability of the employees is for negligence under the common law, does not present a separable controversy so as to entitle the railroad to removal of the cause. *Painter v. Chicago, etc., R. Co.*, (1909) 177 Fed. 517; *Schwychart v. Barrett*, (Mo. 1910) 130 S. W. 388.

In *Taylor v. Southern R. Co.*, (1910) 178 Fed. 380, it appears that the plaintiff, a rail-

road bridge hand, was injured while at work on one of its bridges by an alleged defective scaffold on which he was directed to work. He joined the railroad company, a citizen and resident of another state, and his foreman, who was a resident and citizen of the same state as plaintiff, in which an action for his injuries was brought, alleging that while he was absent from work the foreman had placed a plank on the side of the bridge below the tracks to be used as a scaffold, without nailing it to the sills of the bridge, and that after his return he was directed by the foreman to tie a rope to the plank so that it might be lifted to the trestle, and while attempting to do so the plank tilted over the end of the sills, throwing plaintiff to the ground below. It was held that the complaint stated a cause of action against the railroad company for failing to furnish a safe place, and an action against the foreman for misfeasance, and that the cause was, therefore, not removable.

Where the plaintiff brought suit for the death of his intestate against the defendant railroad company and the engineer and conductor of the train by which deceased was killed, both of whom were of the same citizenship as plaintiff; and the declaration alleged negligence, consisting of a failure to warn deceased that the track where deceased was directed to work was defective, and that the operatives of the train negligently moved the same before deceased came out from between certain cars which he was engaged in coupling; and also alleged that "said negligence of the corporate defendant was done by and through its servants (to wit, the conductor and engineer), and was the joint negligence of all the defendants, and that the injuries and death suffered by plaintiff's intestate were the true and proximate result of the combined joint and concurrent negligence of the corporate defendant and its codefendants then in its service," it was held that the declaration stated a cause of action for a joint tort committed by all of the defendants, and that the railroad company, whose citizenship alone was diverse, was therefore not entitled to remove the cause to the federal court. *Louisville, etc., R. Co. v. Vincent*, (1906) 116 Tenn. 317, 95 S. W. 179.

An action in a state court against a servant of a railroad and the railroad jointly, for the negligence of the servant, and where any liability of the company was under the principle of *respondet superior*, the servant being a citizen of the state, and the railroad a corporation of another state, is not removable to the federal court. *Lanning v. Chicago G. W. R. Co.*, (1906) 196 Mo. 647, 94 S. W. 491.

Where, in an action for wrongful death of plaintiff's intestate, the complaint joined the coemployee by whose alleged negligence plaintiff's intestate was killed, whose citizenship was the same as that of plaintiff, with decedent's employer, which was a foreign corporation, and alleged that such corporation was negligent in supplying an electric crane which was not equipped with good and sufficient brakes or other appliances by which it might be controlled, in consequence of which

an iron beam being carried by the crane came in contact with other beams on the shop floor, causing them to fall on deceased, and that the corporation was also negligent in causing the crane to be operated by a young, inexperienced, and unskilful boy, who was alleged to have operated the crane so negligently as to permit the beam being carried to swing against the other beams and cause them to fall, etc., it was held that the complaint alleged a joint and not a separable controversy against such defendants. *American Bridge Co. v. Hunt*, (1904) 130 Fed. 302, 64 C. C. A. 548.

*Joinder to prevent removal.*—A case in which the plaintiff, in good faith, has elected to sue jointly in tort a corporation and its servants whose misconduct caused the injury complained of, does not, even though such joinder may have been made for the purpose of preventing removal, present a separable controversy between the plaintiff and the corporation which can be removed from a state to a federal Circuit Court without regard to the citizenship of the individual defendants. *Alabama G. S. R. Co. v. Thompson*, (1906) 200 U. S. 206, 26 S. Ct. 161, 50 U. S. (L. ed.) 441; *Louisville, etc., R. Co. v. Gollihur*, (1907) 40 Ind. App. 480, 82 N. E. 492; *Hough v. Southern R. Co.*, (1907) 144 N. C. 692, 57 S. E. 469; *Louisville, etc., R. Co. v. Vincent*, (1906) 116 Tenn. 317, 95 S. W. 179.

In an action against a railway company and its train dispatcher and others for the killing of plaintiff's intestate, it is not material that the train dispatcher was joined as a party for the sole purpose of preventing a removal of the cause for the railway company to the federal court, nor as to the motive for bringing a joint action against the defendants, unless they were illegally joined. *Hough v. Southern R. Co.*, (1907) 144 N. C. 692, 57 S. E. 469.

Where, in a suit for the death of a railroad employee, the plaintiff had a good cause of action for a joint tort against the railroad company and against certain of its servants, whose citizenship was the same as plaintiff's, it was held to be immaterial to the railroad company's right to remove the cause to the federal court, because its citizenship was diverse, that the plaintiff joined the resident defendants for the purpose of avoiding federal jurisdiction. *Louisville, etc., R. Co. v. Vincent*, (1906) 116 Tenn. 317, 95 S. W. 179.

Where the plaintiff in a negligence action against a railroad and its employee, which action is both joint and separable, elects to make it joint, the defendants cannot make it separable for the purpose of removal from a state to a federal court, although the purpose of suing defendants jointly was to prevent the removal, since the motive of a person asserting a right is immaterial. *Louisville, etc., R. Co. v. Gollihur*, (1907) 40 Ind. App. 480, 82 N. E. 492.

*Under a state statute authorizing the maintenance of a joint action against a corporation and its servant for death resulting from the negligence of a servant, such action is not removable to the federal courts because of*

diverse citizenship between the plaintiff and the corporation. *Cincinnati, etc., R. Co. v. Bohon*, (1906) 200 U. S. 221, 26 S. Ct. 166, 50 U. S. (L. ed.) 448, *affirming* (*Ky.* 1904) 83 S. W. 580; *Clinger v. Chesapeake, etc., R. Co.*, (1908) 128 Ky. 736, 109 S. W. 315; *Illinois Cent. R. Co. v. Leisure*, (1906) 90 S. W. 269, 28 Ky. L. Rep. 768; *Illinois Cent. R. Co. v. Cane*, (1906) 90 S. W. 1061, 28 Ky. L. Rep. 1018; *Dudley v. Illinois Cent. R. Co.*, (1906) 96 S. W. 835, 29 Ky. L. Rep. 1029.

*Condemnation proceedings — Removal allowed.*—In a proceeding in a state court by a railroad company to condemn right of way, in which the owners of different parcels of land are joined as permitted by a local statute, which provides that such owners may be joined or proceeded against separately, there is a separable controversy between the petitioner and the owner or owners of each tract, and, where all those defendants owning or having any interest in certain tracts are citizens of other states, and have no interest in any other tract, they may remove the cause as to them into the federal court, where the amount in controversy is sufficient. *Deepwater R. Co. v. Western Pocahontas Coal, etc., Co.*, (1907) 152 Fed. 824.

A proceeding by a railroad company to condemn a right of way under a local statute against a number of defendants owning land in severalty, presents a separable controversy with respect to each owner, and is removable by a defendant who is a citizen of another state, where the requisite amount is involved to give the federal court jurisdiction. *South Dakota Cent. R. Co. v. Chicago, etc., R. Co.*, (1905) 141 Fed. 578, 73 C. C. A. 176.

*Removal denied.*—An action in a state court to condemn right of way over a tract of land, the fee of which is owned by a defendant who is a citizen of the same state as plaintiff, does not involve a separable controversy between plaintiff and a nonresident defendant, joined as having a leasehold interest in all or a part of the tract, which entitles the latter to remove the cause into a federal court, although he may be entitled to a separate award of compensation, covering his interest. *Oroville, etc., R. Co. v. Leggett*, (1908) 162 Fed. 571.

Where it appears from the record in a proceeding in a state court to condemn land that the equitable title to the land is in a defendant who is a citizen of the state, while the legal title is in another defendant who is a citizen of another state, there is no separable controversy between the plaintiff and the nonresident defendant, which entitles the latter to remove the cause. *Helena Power Transmission Co. v. Spratt*, (1906) 146 Fed. 310.

Under the statutes of New Jersey, which provide for making a mortgagee a party to a proceeding for the condemnation of land for public use, both owner and mortgagee are indispensable parties and interested in the same questions, and the cause is not removable by the owner, on the ground of diversity of citizenship, where the mortgagee is a citizen of the same state as the petitioner, and it is immaterial that the owner alone appealed

from the award. *Fishblatt v. Atlantic City*, (1909) 174 Fed. 196.

In a condemnation proceeding instituted by a railroad company, by the filing of a petition in a Circuit Court of the state against numerous property owners, under a statute which provides for a hearing as to the petitioner's right to condemn, and, if such right is sustained, for the appointment of a commission, which, on request of the company or the owner, shall appraise any piece of the property described, from which appraisal an appeal may be taken to the court, and tried to a jury as in ordinary law actions, it was held that there is a single controversy only presented as to the right to condemn, to be determined between the petitioner, on one side, and all of the parties joined as defendants, on the other; and the mere fact that a defendant is the owner of a part of the lands sought to be taken in severalty does not create a separable controversy between him and the petitioner, which entitles him to remove the proceeding into a federal court on the ground of diversity of citizenship. *Perkins v. Lake Superior, etc., R. Co.*, (1905) 140 Fed. 906.

**Actions against lessor and lessee of railroad — Removal allowed.** — The declaration of an action in a state court by an employee of a railroad company which is a citizen of another state, operating a railroad under a lease from a local company, against both lessor and lessee, to recover for personal injuries alleged to have resulted solely from the negligence of the lessee in operating a train with improper and defective equipment, does not state a joint cause of action against the defendants, but a single cause of action against the lessee alone, and the action is removable by such defendant. *Curtis v. Cleveland, etc., R. Co.*, (1905) 140 Fed. 777.

**Removal denied.** — A case in which plaintiff has elected to sue jointly in tort a non-resident lessee railroad company operating a road, and its resident corporate lessor, under a cause of action arising in the state, cannot be removed to a federal Circuit Court as presenting a separable controversy. *Chicago, etc., R. Co. v. Willard*, (1911) 220 U. S. 413, 31 S. Ct. 460, 55 U. S. (L. ed.) 521, *affirming* (1908) 165 Fed. 181, 91 C. C. A. 215.

A petition alleging that a resident defendant, a sawmill corporation, was using by permission the tracks of a railroad defendant to haul logs, that the railroad ran through a certain city, and that it was the duty of both defendants in approaching the crossings of a street to signal, that plaintiff was driving at such crossing and by attempting to cross was damaged by the negligence of both defendants in failing to signal or ring the bell of the engine, that the drawgates were not down, and it was negligence in both defendants not to lower the drawgates, and that it was the custom and duty of defendants to cause the gates to be lowered, states a cause of action against both defendants, so that the nonresident defendants cannot remove the case as a separable controversy. *Atlantic Coast Line R. Co. v. Bryant*, (1910) 7 Ga. App. 703, 707, 67 S. E. 1049, 1051.

In an action by a widow to recover the statutory penal sum for the death of her husband, against a foreign railroad corporation and against a domestic terminal railroad company, the complaint alleged that a train belonging to the foreign corporation, while running over the tracks of the domestic corporation, ran over decedent, the train having been running at an unlawful rate of speed, and the operatives having failed to give the warning signals required by law, and that, under the traffic agreement between the corporations, the operatives of the train were, though in the employ of the foreign corporation, subject to the orders and directions of the domestic corporation; and it was held that an application to remove the cause to the federal court on the ground that the cause of action so far as the foreign corporation was concerned was separable, and that the domestic corporation was fraudulently joined, was properly denied. *Johnson v. St. Joseph Terminal R. Co.*, (1907) 203 Mo. 381, 101 S. W. 641.

A joint action brought in a state court of Illinois against a lessor and a lessee railroad company to recover for a personal injury incurred in the operation of the road, in which joint negligence and liability are charged, is not removable by the lessee on the ground that it is a foreign corporation and in the exclusive use and operation of the railroad and alone liable, if there is any liability, for the injury complained of, and that its co-defendant, a resident corporation, was fraudulently joined, in view of the established rule in Illinois which authorized the joinder and joint recovery in such cases in the state courts. *Willard v. Chicago, etc., R. Co.*, (C. C. A. 1908) 165 Fed. 181.

**Priority of liens.** — A separable controversy exists, removable from a state court to a federal court by a foreign corporation, joined as a party defendant to a suit to foreclose a mortgage, where both mortgagor and mortgagee, who are citizens of the state, unite in attacking the validity of a prior mortgage in favor of such corporation on the ground that it was doing business without complying with the state laws, and that the note secured thereby embraced charges exacted because of an illegal combination in restraint of trade. *Fritzen v. Boatmen's Bank*, (1909) 212 U. S. 364, 29 S. Ct. 366, 53 U. S. (L. ed.) 551, *affirming* (1907) 75 Kan. 479, 89 Pac. 915.

In a suit by a judgment creditor against the debtor and a lien creditor, a prayer for the subjection of the property of the defendant debtor to the plaintiffs' judgment does not make a separable controversy between plaintiffs and the nonresident creditor defendant, so as to authorize removal to the United States court on the ground of diverse citizenship. *Palmer v. Inman*, (1905) 122 Ga. 226, 50 S. E. 86.

In an action against a principal and his surety on a bond or other obligation, there is no separable controversy such as will entitle one defendant to remove the cause. *Mutual Reserve Fund L. Assoc. v. Farmer*, (1896) 77 Fed. 929, 23 C. C. A. 574.

But where plaintiff, an alien, sued defend-

ant guaranty company, a nonresident corporation, on a fidelity bond, in which the only obligation of the principal was to hold the guaranty company harmless from any liability on the bond, and in the same action the plaintiff sought to hold the principal liable for the embezzlement for which action was brought on the bond, it was held that the controversy between plaintiff and the guaranty company was separable from that between it and the principal on the bond and removable to the federal courts, regardless of the citizenship of the principal, who was a resident of the state where the action was brought. *Iowa Lilloet Gold Min. Co. v. Bliss*, (1906) 144 Fed. 446.

**Ejectment.**—A plaintiff in ejectment has the right to join a lessee in possession, having a leasehold estate and an equity for improvements made, and the lessor, so as to conclude both by one judgment; and, having such right, one of the defendants so joined cannot make the controversy separable, nor remove the cause, where the other defendant and plaintiff are citizens of the same state. *Cleveland v. Cleveland, etc., R. Co.*, (1906) 147 Fed. 171, 77 C. C. A. 467, *reversing* (1899) 93 Fed. 113.

An action of trespass to try title brought in a Texas court under a statute of that state, in which different persons, each claiming title to the same tract of land, are made parties, and answer setting up their respective claims, some of said defendants as well as the plaintiff being citizens of the state while others are citizens of another state, does not involve a separable controversy between citizens of different states which renders it removable by a nonresident defendant. *Lomax v. Foster Lumber Co.*, (C. C. A. 1909) 174 Fed. 959.

In a suit for an undivided half interest in a single tract of land alleged to be wrongfully withheld by the two defendants, there is no separable controversy, so as to allow removal to the federal Circuit Court, though the citizenship of plaintiffs and of only one of defendants is adverse. *Knight v. Litcher, etc., Lumber Co.*, (1905) 136 Fed. 404, 69 C. C. A. 248.

**Suit by or against stockholders.**—A bill by a stockholder of a railroad company against the company, its resident officers, and directors, certain bondholders and the trustee in a mortgage securing a new issue of bonds to be exchanged with a large bonus of stock for the old bonds of the company, praying that such exchange be adjudged illegal and *ultra vires* and that the original status be restored, and alleging that such exchange was effected through a confederacy of certain of the defendants for their own benefit and to the injury of the stockholders, states a joint cause of action, and the cause is not removable by the company, which is a foreign corporation, on the ground of separable controversy, where the other defendants are citizens of the state. *Pollitz v. Wabash R. Co.*, (C. C. A. 1910) 176 Fed. 333, *reversing* (1909) 167 Fed. 145.

In a suit in equity brought in a state court on behalf of all the creditors of an insolvent

bank in Colorado against a number of stockholders to enforce their double liability under the Colorado statute, by requiring them each to pay the full amount of such liability to a master, to be applied *pro rata*, together with such sums as may be collected from other stockholders, on the debts of the bank—the remainder, if any, to be returned to defendants—there is no separate controversy with a single defendant which entitles him to remove the cause into a federal court. *Miller v. Clifford*, (1904) 133 Fed. 880, 67 C. C. A. 52, 5 L. R. A. N. S. 49.

**Foreclosure suits.**—Changes in the pleadings in an action to foreclose a mortgage after the cause has been remanded to the state court whence it had been removed, which show the untruth of the averment in the petition of the junior character of another mortgage held by a foreign corporation which was made a party defendant, and the existence of a separable controversy between such corporation and the other parties, who are all citizens of the state, are sufficient to justify the granting of a second application for removal. *Fritzlen v. Boatmen's Bank*, (1909) 212 U. S. 364, 29 S. Ct. 366, 53 U. S. (L. ed.) 551, *affirming* (1907) 75 Kan. 479, 89 Pac. 915.

Where a bill against numerous defendants for the foreclosure of a mortgage alleged that certain property nominally owned by a defendant other than the mortgagor was within the complainant's mortgage, under a clause covering after-acquired property, in which claim some, but not all, of the defendants were interested, it was held that such claim created a separable controversy, which rendered the cause removable by the defendant claiming ownership of the property, the requisite diversity of citizenship being shown between the parties interested therein. *New England Water Works Co. v. Farmers' L. & T. Co.*, (1905) 136 Fed. 521, 69 C. C. A. 297.

It being necessary to join, in a suit to foreclose a mortgage, persons against whom the plaintiff desires personal judgment, there is not a separable controversy between the plaintiff and the owner of the land, for the purpose of removal to the federal court. *U. S. Mortgage Co. v. McClure*, (1902) 42 Ore. 190, 70 Pac. 543, *writ of error dismissed* (1904) 197 U. S. 624, 25 S. Ct. 798, 49 U. S. (L. ed.) 911.

In a suit by a purchaser to enforce specific performance of a contract for the sale of lands, against the vendor and grantees to whom he conveyed the land subsequent to the contract with complainant but before it was recorded, there is a separate controversy with such grantees, involving their right to hold the land as against the complainant, which gives them the right to remove the cause, where they are nonresidents and the requisite amount is involved. *Elkins v. Howell*, (1905) 140 Fed. 157.

In a suit by a purchaser to enforce specific performance of a contract for the sale of land against the vendor and a grantee to whom he conveyed the land subsequent to the contract with complainant, but before it was recorded, there is a separate controversy with

such grantee involving his right to hold the land as against the complainant, which gives him the right to remove the cause where he is a nonresident and the requisite amount is involved. *Wheeling Creek Gas, etc., Co. v. Elder*, (1909) 170 Fed. 215.

#### 5. HOW SEPARABLE CONTROVERSY MADE TO APPEAR.

##### From pleadings at time of filing petition.

— The question whether there is a separable controversy warranting a removal of a cause must be determined by the state of the pleadings and the record of the case at the time of the application for removal, and not by the allegations of the petition therefor, or the subsequent proceedings which may be had in the Circuit Court. *American Bridge Co. v. Hunt*, (1904) 130 Fed. 302, 64 C. C. A. 548; *Laden v. Meck*, (1904) 130 Fed. 877, 65 C. C. A. 361; *Cleveland v. Cleveland, etc., R. Co.*, (1906) 147 Fed. 171, 77 C. C. A. 467, *reversing* (1899) 93 Fed. 113; *Oroville, etc., R. Co. v. Leggett*, (1908) 162 Fed. 571.

On an application for the removal of a cause to the federal court, the question whether there is a separable controversy between plaintiff and each defendant which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition to remove, independent of the allegations of such petition or in the affidavit of petitioner, unless petitioner both alleges and proves that defendants were wrongfully made joint defendants for the purpose of preventing removal. *Thomas v. Great Northern R. Co.*, (1906) 147 Fed. 83, 77 C. C. A. 255.

**From plaintiff's pleading.**— The question whether the controversy in an action by a citizen of the state against another citizen of the state and a citizen of a sister state is separable, so as to authorize the latter to remove the cause to the federal court on the ground of diversity of citizenship, must be determined by the complaint, and the petition for removal cannot be considered. *Thomas v. Great Northern R. Co.*, (1906) 147 Fed. 83, 77 C. C. A. 255; *Blunt v. Southern R. Co.*, (1907) 155 Fed. 499; *Carp v. Queen Ins. Co.*, (1909) 168 Fed. 782; *Foster v. Coos Bay Gas, etc., Co.*, (1911) 185 Fed. 979; *Illinois Cent. R. Co. v. Harris*, (1905) 85 Miss. 15, 38 So. 225; *Staton v. Atlantic Coast Line R. Co.*, (1907) 144 N. C. 135, 56 S. E. 794.

The right of removal to a federal court on the ground of separable controversy must be determined solely by the case made by the complainant itself, unaided by judicial knowledge or by subsequent pleadings. *Straton Cripple Creek Min., etc., Co. v. Ellison*, (1908) 42 Colo. 498, 94 Pac. 303.

Whether two defendants are improperly joined, and whether there is a separable controversy authorizing a removal of the cause by one of the defendants to the federal court, must be determined by the case made by the complaint, and the question of removal cannot be made to depend upon the question whether the federal court might eventually determine that the theory on which the action

was brought was erroneous, and that no joint liability in fact existed. *Galeotti v. Diamond Match Co.*, (1910) 178 Fed. 127.

Where the right to remove a cause from a state court depends upon whether the declaration states a joint cause of action against the defendants, that question should be determined by the law of the state. *Morris v. Louisville, etc., R. Co.*, (1910) 175 Fed. 491.

*Where a removal petition is filed before the declaration is filed or due under the state practice, whether the suit involves a separable controversy is to be determined from plaintiff's sworn plea to the petition for removal.* *Welch v. Cincinnati, etc., R. Co.*, (1908) 177 Fed. 760.

**Removal allowed.**— It is usual in a petition for removal which alleges a separable controversy to set out the nature of such controversy, but it is sufficient if it appears from the record that such controversy actually exists. *Harding v. Standard Oil Co.*, (1909) 170 Fed. 651.

Where, in an action against a railroad company for the death of plaintiff's husband, the declaration alleged several joint and concurrent acts of negligence between the railroad company, a nonresident corporation, and the conductor and engineer, joined as codefendants, who were citizens and residents of the district, and then charged that the engineer was incompetent, stating several acts of negligent operation on his part, and charging that the railroad company employed him knowing that he was incompetent, it was held that such allegation raised a separable controversy between plaintiff and the railroad company, authorizing a removal of the cause. *Adderson v. Southern R. Co.*, (1910) 177 Fed. 571.

Separate causes of action disclosed by the bill or complaint in a single suit, on either of which a separate suit could be maintained, and the determination of neither of which is essential to the determination of the other, constitute separate controversies, and if either controversy, when the parties have been properly arranged on opposite sides, is wholly between citizens of different states, the suit is removable. *Boatmen's Bank v. Fritzlen*, (1905) 135 Fed. 650, 68 C. C. A. 288, *reversing* (1904) 128 Fed. 608.

Where the plaintiff, suing several defendants, does not allege with reasonable particularity the facts relied on to sustain a joint cause of action, but charges negligence generally against all, such allegation is indicative of an attempt to frame a petition that will prevent a defendant entitled to do so from removing the cause to a federal court. *Reinartson v. Chicago G. W. R. Co.*, (1909) 174 Fed. 707.

**Removal denied.**— Where a complaint on its face states a cause of action against both defendants which can be properly joined in one action, the cause cannot be removed on the ground that it is a separable controversy merely by raising an issue of fact in the petition for removal as to whether or not a joint cause of action exists. *St. Louis Southwestern R. Co. v. Adams*, (1908) 87 Ark. 136, 112 S. W. 186.



It has been held that where a complaint in a negligence action against a nonresident railroad company and a resident defendant alleged that defendants negligently caused a car that injured plaintiff to be or remain in the position where it caused the injury, it could not be said as matter of law on the face of the pleading that it was impossible for all the defendants to have participated in the single act charged in a manner to have constituted it in law the joint act of all, carrying with it a joint and several liability, so as to warrant a removal of the case against the railroad to the federal court. *Southern R. Co. v. Arnold*, (1909) 162 Ala. 570, 50 So. 293.

A bill which seeks to enjoin the principal defendants from practicing a secret process alleged to be owned by the complainant and to have been learned by such defendants through a breach of trust, and to restrain another defendant from assisting them in carrying out their unlawful purposes by using knowledge obtained while an employee of complainant as to the construction of machinery for practicing the process, does not present a separate controversy between complainant and the latter defendant, which gives him the right of removal. *Vulcan Detinning Co. v. American Can Co.*, (1904) 130 Fed. 635.

Though a separable controversy exists so as to authorize the removal of a cause, notwithstanding the joinder of a defendant whose citizenship is the same as that of the plaintiff, with a noncitizen defendant, when the case is one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side and citizens of another state on the other, which can be fully determined without the presence of any of the other parties to the suit as begun, or where two or more causes of action are united in one suit, and there can be a removal of the whole suit on the petition of one or more of the defendants interested in the controversy which, if it had been sued on alone, would be removable, the controversy does not necessarily become separable merely because the plaintiff could have prosecuted its cause of action against the defendant seeking to remove without the joinder of any other defendant. *Regis v. United Drug Co.*, (1910) 180 Fed. 201.

Since a proceeding to condemn land by

Kansas City under its city charter, as construed by the Supreme Court of the state, presents a case of an indivisible unit, to be tried to one and the same jury, unless a jury trial is waived, and the whole finding as against all the defendants must be embraced in one judgment, so that if reversed on appeal the entire case must be tried *de novo*, such a proceeding as against both residents and nonresidents does not present a separable controversy as between the city and the nonresidents whose property was sought to be condemned, and is therefore not removable to the federal courts. *Kansas City v. Hennegan*, (1907) 152 Fed. 249.

**Plaintiff's pleading to be taken as true.**—Whether an action against nonresident and resident defendants is separable, so as to warrant a removal to the federal court, must be determined from the record in the state court when the petition for removal is filed, independently of the allegations in the petition for removal or in the affidavit of the petitioner, unless the petitioner both alleges and proves that defendants were wrongfully joined to prevent a removal to the federal court, and in determining the question the averments of the complaint are to be taken as confessed. *Southern R. Co. v. Arnold*, (1909) 162 Ala. 570, 50 So. 293.

The question whether there is a separable controversy in a suit in equity is to be determined from the allegations of the bill alone, which, for the purpose of a motion to remand, are taken as confessed, and independent of any allegations in the petition for removal or of answers filed after removal. *Elkins v. Howell*, (1905) 140 Fed. 157.

#### 6. ENTIRE SUIT REMOVED.

There is a clear distinction between controversies which are merely "separable," within the meaning of the removal statute, and those which are wholly separate and distinct, and only joined in one suit by express statutory permission, as in case of proceedings for condemnation of a railroad right of way in which, as permitted by statute, owners of different tracts of land are joined in the same proceeding, and in such a case a removal of the cause by the owner or owners of one tract does not carry with it the proceedings as against other owners. *Deepwater R. Co. v. Western Pochontas Coal, etc., Co.*, (1907) 152 Fed. 824.

### IV. PREJUDICE OR LOCAL INFLUENCE.

#### 1. IN GENERAL.

**Classes of cases.**—This section relates only to special cases comprised in the preceding clauses, consisting of cases in which there is a controversy between a citizen or citizens of the state in which the suit was brought, and a citizen or citizens of other states, excluding cases wherein the controversy is partly between citizens of the same state. *Cochran v. Montgomery County*, (1905) 199 U. S. 260, 26 S. Ct. 58, 50 U. S. (L. ed.) 182, *reversing*

(1904) 128 Fed. 1019, 62 C. C. A. 680; *Southern R. Co. v. Thomason*, (1906) 146 Fed. 972, 77 C. C. A. 170.

An action to foreclose a mortgage and adjust liens on property cannot be removed into the federal court by a nonresident mortgage creditor of his codefendant mortgagor on the ground of prejudice and local influence. *Boatmen's Bank v. Fritzlen*, (1905) 135 Fed. 650, 68 C. C. A. 288, *reversing* (1904) 128 Fed. 608.

**Citizenship of parties.**—The existence of prejudice and local influence does not fur-

nish a separate and independent ground for the removal of a cause, but only operates to extend the time within which a case may be removed when the requisite diversity of citizenship exists. *Cleveland v. Cleveland, etc., R. Co.*, (1906) 147 Fed. 171, 77 C. C. A. 467, *reversing* (1899) 93 Fed. 113.

**Amount in controversy.**—Where, after judgment in favor of a nonresident plaintiff was affirmed as to the original cause of action, but was reversed as to a counterclaim, defendant obtained leave to amend the counterclaim by increasing the amount demanded, it was held that such amended counterclaim did not change the status of the parties so that the defendant became the plaintiff in the action, and the plaintiff became the defendant, and entitle plaintiff to remove the cause to the federal courts. *Indian Mountain Jellico Coal Co. v. Asheville Ice, etc., Co.*, (1905) 135 Fed. 837.

## 2. WHO MAY REMOVE.

A suit in which one of two defendants is a citizen of the same state as the plaintiff cannot be removed by the other defendant for prejudice or local influence from a state to a federal Circuit Court, since to hold otherwise would bring this provision into conflict with the rule that suits, to be removable, must be within the original jurisdiction of the Circuit Court. *Cochran v. Montgomery County*, (1905) 199 U. S. 260, 26 S. Ct. 58, 50 U. S. (L. ed.) 182, *reversing* (1904) 128 Fed. 1019, 62 C. C. A. 680.

*Boatmen's Bank v. Fritzlen*, (1905) 135 Fed. 650, 68 C. C. A. 288, *reversing* (1904) 128 Fed. 608, and *Parker v. Vanderbilt*, (1905) 136 Fed. 246, it would seem, are no longer law in so far as they conflict with the opinion in the case cited in the preceding paragraph.

The right of a foreign corporation to remove to a federal court, for prejudice or local influence, a suit brought in a court of North Carolina by a citizen of that state, is not defeated because such corporation has complied with the provisions of a local statute which declares that foreign railroad corporations shall become domestic by filing with the secretary of state duly authenticated copies of their charters and by-laws. *Southern R. Co. v. Allison*, (1903) 190 U. S. 326, 23 S. Ct. 713, 47 U. S. (L. ed.) 1078, *reversing* (1901) 129 N. C. 336, 40 S. E. 91; *Southern R. Co.*

*v. Beach*, (1904) 193 U. S. 667, 24 S. Ct. 854, 48 U. S. (L. ed.) 839, *reversing* (1902) 131 N. C. 399, 42 S. E. 856.

## 3. APPLICATION FOR REMOVAL.

**Petition for removal.**—In a petition filed in a United States Circuit Court for the removal of a cause from a state court on the ground of local prejudice, the defendant corporation alleged that it "is, and was at the commencement of this suit, a nonresident of the state of North Carolina, . . . and is not a citizen of North Carolina." On the facts admitted, the Supreme Court of the state had previously held that the defendant was a domestic corporation. It was held that in view of these previous decisions the allegation in the petition would be construed as merely a denial of the propriety of the Supreme Court's former ruling, and not as an allegation of fact. *Southern R. Co. v. Beach*, (1904) 193 U. S. 667, 24 S. Ct. 854, 48 U. S. (L. ed.) 839, *reversing* (1902) 131 N. C. 399, 42 S. E. 856.

**Requirements of petition.**—Where, under the laws of a state in which a nonresident was sued, a change of venue for prejudice or local influence was wholly within the discretion of the trial judge, such defendant was not required to show that he could not obtain justice in the counties of the state to which the cause might be removed by the state court, in order to entitle him to remove the cause to the federal court on such ground. *Parker v. Vanderbilt*, (1905) 136 Fed. 246.

**Citizenship.**—A petition for removal of a cause from a state to a federal court on account of prejudice or local influence, alleging that the defendant was at the time of the commencement of the suit, and still is, a citizen of a state other than that in which the suit was begun, and of no other state, is sufficient to show that he was a nonresident of the state where sued. *Parker v. Vanderbilt*, (1905) 136 Fed. 246.

**Verification.**—Where a removal petition on the ground of prejudice or local influence was supported by affidavits of parties who averred that they were thoroughly conversant with the facts alleged in the petition, it was held to be immaterial that the petition was not verified by petitioner, but by his duly authorized agent. *Parker v. Vanderbilt*, (1905) 136 Fed. 246.

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- I. PETITION FOR REMOVAL, 1296
- II. BOND FOR REMOVAL, 1301.
- III. RELATIVE AUTHORITY OF STATE AND CIRCUIT COURTS, 1301.
- IV. EFFECT OF PETITION AS GENERAL OR SPECIAL APPEARANCE, 1303.
- V. STATE COURT TO PROCEED NO FURTHER, 1304.
- VI. CIRCUIT COURT TO PROCEED, 1306

### I. PETITION FOR REMOVAL

"May make and file a petition in such suit in such state court."—This section author-

izes the removal of a cause on the filing of a petition disclosing a right to remove and the giving of the prescribed bond. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

The proper procedure for removing a cause from a state to a federal court, as authorized by this section, is for the defendant to file a petition for removal in the state court, together with a bond conditioned that the defendant will enter in the federal Circuit Court on the first day of its next session, a transcript of the record from the state court, and will pay costs awarded in case it shall be determined that the suit has been wrong-

fully removed. *Bryant Bros. Co. v. Robinson*, (1906) 149 Fed. 321, 79 C. C. A. 250.

The presentation of a petition and bond for removal to a judge of the state court in chambers, and the filing of the same, with his order approving the bond indorsed thereon, with the clerk of the state court, is a sufficient presentation to such court within the removal statute. *Johnson v. Computing Scale Co.*, (1905) 139 Fed. 339. See also *Remington v. Central Pac. R. Co.*, (1905) 198 U. S. 95; 25 S. Ct. 577, 49 U. S. (L. ed.) 959.

And it has been held that an oral motion in a state court for the removal of a cause is a sufficient presentation to the court of the petition and bond for removal, where they are on file with the clerk. *Mays v. Newlin*, (1906) 143 Fed. 574.

It is not necessary that the petition be presented to a judge of the state court holding or sitting in open court, or to a court in session, or that an order be made by the court permitting the filing of the petition or directing the removal; but it is sufficient if the petition is presented to a judge in chambers, with the bond, and after approval of the bond the petition and bond are filed with the clerk of the court of the county where the venue was laid. *Groton Bridge, etc., Co. v. American Bridge Co.*, (1905) 137 Fed. 284.

**Time to file petition for removal.**—This section implies that a failure to apply for removal upon the first opportunity waives the privilege, so that a defendant waives the right of removal on the ground of diverse citizenship by not filing his petition until the second day of the trial at the close of the introduction of plaintiff's evidence in chief upon the plaintiff's failure to then serve a joint defendant, which the petitioning defendant claimed showed a joinder merely to prevent the transfer of the case to the federal court, as the petition should have been filed at the opening of trial. *Golden v. Northern Pac. R. Co.*, (1909) 39 Mont. 435, 104 Pac. 549. See also *Morgan's Louisiana, etc., R., etc., Co. v. Street*, (Tex. 1909) 122 S. W. 270.

Where two defendants were sued jointly, and at the close of plaintiff's evidence a verdict was directed for one of them, a renewal of a motion made by the other to remove the case to some other court was made too late, though no verdict had been entered for the other defendant. *Diamond State Telephone Co. v. Blake*, (1907) 105 Md. 570, 66 Atl. 631.

Where, on appeal from an order denying a petition for removal, it appears that such petition was not made until after an amended complaint had been filed after answer, and the original complaint is not in the record, it will be presumed that there was no such difference between the complaints as would authorize a removal at such time. *Pennsylvania Co. v. Leeman*, (1903) 160 Ind. 16, 66 N. E. 48.

A state court having jurisdiction of a cause removable to the federal court on the ground of diverse citizenship need not surrender its jurisdiction, unless the petition and accom-

panying bond are filed in the state court within the time required. *Higson v. North River Ins. Co.*, (1910) 153 N. C. 35, 68 S. E. 920.

A petition and bond addressed to the judge of the Circuit Court and an order obtained from him for such removal are ineffective to remove the cause, though the petition and bond were subsequently filed in the office of the clerk of the state court. *Higson v. North River Ins. Co.*, (1911) 184 Fed. 165.

**The term "the rule of court."**—The rule of court referred to in the federal statute relates not to special orders granted on application or stipulation of the parties, but to a general rule fixing the date at which all defendants are required to appear in order to avoid being in default. *Wilson v. Big Joe Block Coal Co.*, (1907) 135 Ia. 531, 113 N. W. 348.

A petition must be filed by the time an affidavit of defense is required by the Pennsylvania practice, which, under the rules of the court, is an answer to the plaintiff's claim and frames the issues to be tried. *Overholt v. German-American Ins. Co.*, (1907) 155 Fed. 488.

**Filed but not presented to the court.**—A removal petition and bond must be presented in the first instance to the presiding judge of the state court in which the cause is pending, that he may first pass on their sufficiency; the mere filing of a petition and bond with the clerk is insufficient to remove the cause. *Higson v. North River Ins. Co.*, (1911) 184 Fed. 165.

**"To answer or plead to the declaration or complaint."**—An application by a defendant to remove a cause from a state court to the federal court on the ground of diversity of citizenship must be made to the state court when the answer is due, though plaintiff does not then move for judgment by default, and the fact that the original summons and complaint were destroyed by fire subsequent to the time for answering does not affect the rights of defendant. *Higson v. North River Ins. Co.*, (1910) 153 N. C. 35, 68 S. E. 920.

It has been held that in view of the language of the statute, and the evident congressional intent, as shown by prior legislation, a plea in abatement is an answer, within the statute. *Pennsylvania Co. v. Leeman*, (1903) 160 Ind. 16, 66 N. E. 48.

A petition for the removal of a cause to the federal court, filed after the time allowed by the statutes of the state for the filing of the answer to the complaint, is too late. *Midland Valley R. Co. v. Hoffman Coal Co.*, (1909) 91 Ark. 180, 120 S. W. 380; *Wilson v. Big Joe Block Coal Co.*, (1907) 135 Ia. 531, 113 N. W. 348; *Cincinnati, etc., R. Co. v. Evans*, (1908) 129 Ky. 152, 110 S. W. 844; *Chicago, etc., R. Co. v. Little Tarkio Drainage Dist. No. 1*, (Mo. 1911) 139 S. W. 572.

Where one of the heirs of a decedent appeared in a probate court and filed objections to the allowance of a claim against the estate, it was held that he had no right afterwards to file a petition for the removal of the cause. *Mayer v. Schneider*, (1904) 212 Ill. 286, 72 N. E. 436, *affirming* 112 Ill. App. 628.

But where a defendant filed a removal petition in a state court before the expiration of the time within which it was entitled to file either a demurrer or answer, it was held to be in time, though the time prescribed by the state practice within which he could have attacked the plaintiff's pleading by motion, etc., had expired. *Groton Bridge, etc., Co. v. American Bridge Co.*, (1905) 137 Fed. 284.

A petition is not insufficient to justify the removal of a cause from a state court to a federal Circuit Court because the allegation that the time had not arrived at which the defendant was required to answer or plead is an allegation of a conclusion of law. *Remington v. Central Pac. R. Co.*, (1905) 198 U. S. 95, 25 S. Ct. 577, 49 U. S. (L. ed.) 959.

**When time to file petition begins to run — Generally.** — The right to remove a cause to the federal court must be asserted as soon as a cause, not theretofore removable, assumes a removable shape; and hence where defendants, who were citizens of the state, were dismissed, leaving the action solely between corporations of different states, and hence removable, a petition to remove, presented nine days thereafter, and after judgment, with no prior notice that it would be filed, was too late. *Ætna Indemnity Co. v. Little Rock*, (1909) 89 Ark. 95, 115 S. W. 960. See also *Quilhot v. Hamer*, (1907) 158 Fed. 188; *Pennsylvania Co. v. Leeman*, (1903) 160 Ind. 16, 66 N. E. 48.

**Right to remove undisclosed.** — Where the original pleadings and record in a cause in a state court do not disclose a fact which entitled the defendant to remove the same, he may file a petition for removal after an amended pleading filed by plaintiff for the first time discloses such fact. *Robinson v. Parker-Washington Co.*, (1909) 170 Fed. 850.

A petition to remove a cause from a state to a federal court is in time when filed as soon as the petitioner learns of the filing, without notice, of additional pleadings in the state court, the effect of which is to disclose a removable controversy. *Fritzlen v. Boatmen's Bank*, (1909) 212 U. S. 364, 29 S. Ct. 366, 53 U. S. (L. ed.) 551, *affirming* (1907) 75 Kan. 479, 89 Pac. 915.

But where the defendant appeared and took no exception to an order granting the complainant ninety days to file his complaint, and granting defendant ninety days thereafter to answer, and after the complaint was filed at a term succeeding that at which the summons was returned, the defendant appeared, requested time to answer, and was granted sixty days, it was held that it was not then entitled to remove the cause to the federal courts, though it could not be known prior to the filing of the complaint that the amount demanded would be sufficient to confer jurisdiction on the federal courts. *Bryson v. Southern R. Co.*, (1906) 141 N. C. 594, 54 S. E. 434.

**Time to plead or answer.** — A petition for the removal of a cause from a court in which by a rule thereof the defendant is given four days from the service of statement on him to file any dilatory plea, and fifteen days within which to file an affidavit of defense,

must be filed within the four days, which is the time when he is required to "answer or plead," within the meaning of the removal statute. *Garrett First Nat. Bank v. Appleyard*, (1905) 138 Fed. 939.

Where a summons served on September 16th required defendant to appear and plead within twenty days, exclusive of the day of service, a petition for removal filed on October 6th was held to be in time. *South Dakota Cent. R. Co. v. Chicago, etc., R. Co.*, (1905) 141 Fed. 578, 73 C. C. A. 176.

A defendant cannot remove a cause after the hearing and determination of a demurrer by the state court. *Lantz v. Fretts*, (1909) 173 Fed. 1007.

The time for removing to a federal Circuit Court, for diversity of citizenship, a proceeding for the taking of land by eminent domain is not postponed until after the case has been taken by appeal to a state Circuit Court, where it can be tried *de novo*, where under the state statute the condemning party is entitled, even after such appeal, to pay into court the damages assessed in the County Court, and, before the case is concluded in the higher court, to take possession of the land and oust the owner. *Madisonville Traction Co. v. St. Bernard Min. Co.*, (1905) 196 U. S. 239, 25 S. Ct. 251, 49 U. S. (L. ed.) 462.

Under a state law which provides that one summoned by publication shall be deemed to plead on the return day of the summons, it was held that the day on which the notice in eminent domain proceedings, served on a non-resident, is returnable, is the day for answering; and though the law does not require the filing of a written pleading, and though no default is taken, a petition for removal not filed until after such day comes too late. *South Park Com'rs v. Ayer*, (1908) 237 Ill. 211, 86 N. E. 704.

**On bringing in new parties.** — Where, in a suit in a state court against an unincorporated association to recover lands the title to which was vested in defendant's trustees, the court held that such trustees were necessary parties, and they were thereupon brought in, it was held that the cause was removable on a petition filed by them in apt time after the service of process on them, although the time for the filing of an answer by the association had expired. *Robert v. Pineland Club*, (1905) 139 Fed. 1001.

**Extension of time — Generally.** — This section was designed to contract the jurisdiction of the federal courts and it requires the removal petition to be filed as soon as the defendant is required to make any defense in the state court, whether in abatement or to the merits, which time is not extended by a failure to take judgment by default, an extension of time to answer, either by order of the state court or by stipulation of the parties, or by a special appearance to set aside service. *Heller v. Ilwaco Mill, etc., Co.*, (1910) 178 Fed. 111.

An order extending defendant's time to answer carries with it an extension of the time to file a petition and bond for the removal of the cause to the federal court. Hig-

son v. North River Ins. Co., (1911) 184 Fed. 166.

Under a state law which requires a defendant to plead on or before the last day of the term to which the summons is returned, "unless the time therefor be extended by the judge," it was held that an order made by the court on the last day of the term, extending the time for a defendant to answer, operates to extend the time within which he may file a petition for removal. *Avent v. Deep River Lumber Co.*, (1909) 174 Fed. 298.

But it has been held that the time for the filing of a petition to remove a cause to the federal court is not extended by an extension of the statutory time in which to answer. *Midland Valley R. Co. v. Hoffman Coal Co.*, (1909) 91 Ark. 189, 120 S. W. 380.

A defendant having been served with a summons requiring an answer in the November, 1909, term of the state court, and no such term having been held, the court at the December term made a general order extending the time to answer in all cases not otherwise provided "until the next term as of this term." At the succeeding January, 1910, term, a similar order was entered, and on Feb. 23, 1910, the courthouse with the records, including the summons and complaint, was destroyed by fire. At the succeeding March term the court entered an order reciting the fact, and directing that all parties should have until the next term of court to supply papers, and that in all cases in which complaints and answers were filed it would only be necessary to file new complaints and answers without restoring the summons. In cases where no answers had been filed, the summons and complaint should be restored. It was held that such order did not extend defendant's time to answer, which had expired at the beginning of the March term, and hence the filing of a petition and bond to remove in the state court on April 23, 1910, was too late. *Higson v. North River Ins. Co.*, (1911) 184 Fed. 165.

**By stipulation.** — Where defendant was granted an extension of time to plead by stipulation as authorized by the state court rules, and within the time as extended defendant filed a petition and bond for removal of the cause to the Circuit Court of the United States, the proceedings for removal were held to be in time. *Groton Bridge, etc., Co. v. American Bridge Co.*, (1905) 137 Fed. 284; *Sanderlin v. People's Bank*, (1905) 140 Fed. 191.

A written stipulation by the parties to a suit, signed the day after it was brought, providing that no steps should be taken in the cause by either party before a stated time pending a provisional agreement for settlement, that no advantage should be taken of the time that might elapse by reason of the agreement, and in case it should not become effective defendant should have twenty days thereafter in which to make a proper defense, stops the plaintiff from objecting that a petition for removal filed within such twenty days was not in time, stipulations being recognized by a rule of the state court as a

proper and effective method of extending the time to plead. *Russell v. Harriman Land Co.*, (1906) 145 Fed. 745.

Where a rule of the state court, from which a cause was removed, provided that no agreement or consent of counsel in respect to the proceedings in a cause, the purport of which is disputed or denied, will be regarded, unless the same shall have been made or assented to in open court and entered in the minutes, or unless the evidence thereof shall be in writing, subscribed to by the party against whom the same may be alleged or by his attorney, and plaintiff's counsel stipulated in writing that defendant might have until Oct. 10, 1906, within which to plead to the complaint or file or make such motion as it might be advised, it was held that the plaintiff could not object that such stipulation did not extend defendant's time to plead for the purpose of filing a petition to remove the cause to the federal courts on or before the time so fixed. *Tevis v. Palatine Ins. Co.*, (1906) 149 Fed. 560.

**General requirements of petition for removal.** — *In general.* — A state court having jurisdiction of a cause removable to the federal court on the ground of diverse citizenship need not surrender its jurisdiction unless the petition for removal shows on its face a removable cause founded on diverse citizenship. *Higson v. North River Ins. Co.*, (1910) 153 N. C. 35, 68 S. E. 920.

The record may be examined in aid of a petition for the removal of a cause to the federal courts, where such averments do not disclose sufficient ground for jurisdiction on removal. *Gillespie v. Pochahontas Coal, etc., Co.*, (1907) 162 Fed. 742.

**Verification.** — While it is the better practice to verify a petition for removal, there is no law requiring it, and no particular form of verification is essential. A verification by the attorney for the defendant, made on belief, is sufficient, especially where the defendant is a corporation. *Porter v. Northern Pac. R. Co.*, (1908) 161 Fed. 773.

A petition for the removal of a cause to the federal court is not fatally defective for want of a verification where the ground of removal is not prejudice or local influence, or the denial of equal civil rights, and the case is not a suit or prosecution against revenue officers. *Groton Bridge, etc., Co. v. American Bridge Co.*, (1905) 137 Fed. 284. See also *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

An objection that a removal petition was sworn to on Sunday is trivial. *Bilby v. Hancock*, (Tex. 1910) 125 S. W. 370.

A petition for removal filed by an alien, which alleges positively that plaintiff is a citizen of one of the states of the United States, and on information and belief that he is a citizen and resident of the district, is sufficient to give the federal court jurisdiction on the face of the record. *Holton v. Helvetia-Swiss F. Ins. Co.*, (1908) 163 Fed. 659.

**Signing.** — Where the petitioner for the removal of a cause to the federal court signed the petition, it is not necessary that he should sign the verification, certified by the notary

public as having been sworn to before him. Groton Bridge, etc., Co. v. American Bridge Co., (1905) 137 Fed. 284.

A petition by a company to remove a cause signed by an agent on whom the bill was served is sufficiently signed. Fayette Title, etc., Co. v. Maryland, etc., Telephone, etc., Co., (1910) 180 Fed. 928.

**Allegations of fact.**—A petition for removal in order to confer jurisdiction must state facts sufficient to warrant the process, which facts must affirmatively appear of record, as jurisdiction cannot be conferred by consent, agreement, or estoppel. *Rones v. Katalla Co.*, (1910) 182 Fed. 946, *affirming* (C. C. A. 1911) 186 Fed. 30.

A petition to remove a cause to the federal court must state facts which deprive the state court of the right to proceed, and must show that the federal court has jurisdiction, together with the grounds for which the removal is asked. *Neesley v. Southern Pac. Co.*, (1909) 35 Utah 259, 99 Pac. 1067.

But the petition for removal is required to repeat facts appearing in the complaint showing grounds for removal. *Stratton's Independence v. Sterrett*, (Colo. 1911) 117 Pac. 351.

Where, in an action for injuries, the petition stated as a ground for liability against the resident defendant that he knew of the defective mold into which plaintiff was pouring molten iron at the time he was injured by such defect, and with such knowledge directed the plaintiff so to do, a petition for removal on the ground of fraudulent joinder, alleging that such defendant had nothing to do with the accident, was not present, and did not construct the mold, but which failed to deny plaintiff's allegation and to allege that it was known by plaintiff to be untrue when made, and was made to prevent removal, was insufficient. *Evansburg v. Insurance Stove, etc., Co.*, (1908) 168 Fed. 1001.

In an action on an account, where the complaint shows the original indebtedness, the payments thereon, and the balance due, which is less than \$2,000, and the petition for removal merely alleges in general terms that the petitioner is defendant in the cause, which is a suit of a civil nature involving a controversy between citizens of different states, involving more than \$2,000, exclusive of interest and costs, but there are no facts stated controverting the complaint as to the amount in controversy, no issue of fact is raised, and an order for removal is properly denied; the petitioner for removal being bound to show by the record a case within the statute. *Gibbes Machinery Co. v. Santee River Cypress Lumber Co.*, (1908) 79 S. C. 201, 60 S. E. 689.

**On allegations of petition.**—Averments of fact in a petition for removal, in the absence of some denial by answer or by comparison with the record, must be taken as admitted, and if sufficient upon their face to justify a removal, all other questions out of the way, will sustain the jurisdiction of the Circuit Court. *Atlanta, etc., R. Co. v. Southern R. Co.*, (C. C. A. 1907) 153 Fed. 122.

A petition to remove a cause must be de-

cided upon the pleadings and record as they are when the petition is filed. *Davis v. Rexford*, (1907) 146 N. C. 418, 59 S. E. 1002.

On a petition for removal of a cause to the federal court, the trial court, in determining whether the amount in controversy is sufficient, is required to look to the complaint as well as to the averments of the petition. *Springer v. Bricker*, (1905) 165 Ind. 532, 76 N. E. 114.

The right of removal to the federal court depends upon the state of the pleadings and the record at the time of the application for removal, and if upon the face of the declaration—the only pleading filed in the case—the action is joint, for the purpose of determining the right of removal, the cause of action must be deemed to be joint. *Southern R. Co. v. Miller*, (1907) 1 Ga. App. 616, 57 S. E. 1090.

**Designating wrong statute.**—Under a local statute which provides that "in pleading a private statute it shall be sufficient to refer to it by stating its title and the day on which it became a law," it was held that a petition for removal of a case to the federal court was defective which did not state the title of a private statute, nor its contents, but merely the petitioner's conclusions as to its contents. *Illinois Cent. R. Co. v. Sheegog*, (1907) 126 Ky. 252, 103 S. W. 323.

**Irregular petition.**—No stay of proceedings in a cause in a state court exists under the federal removal statute, unless the removal proceedings are valid and divest the state court of further jurisdiction and vest it in the federal court. *Tierney v. Helvetia Swiss F. Ins. Co.*, (1908) 126 App. Div. 446, 110 N. Y. S. 613.

**Prayer.**—A prayer "that said surety and bond may be accepted that his suit may be removed into the next Circuit Court of the United States" is sufficient as a prayer for a removal; a semicolon after the word "accepted" being obviously inadvertently omitted. *Gruetter v. Cumberland Telephone, etc., Co.*, (1909) 181 Fed. 248.

**Amendment.**—Where a removal petition is defective for failure to state the necessary jurisdictional facts, the omission is fatal to the right of removal, and cannot be settled or cured in the federal court by amendment. *Santa Clara County v. Goldy Mach. Co.*, (1908) 159 Fed. 750.

Where a petition for removal as filed in the state court shows that the cause was not removable, it cannot be amended to show a different state of facts in the federal court. *Healy v. McCormick*, (1907) 157 Fed. 318.

But where, in a petition for removal, counsel through misinformation erroneously stated the citizenship of the plaintiff, the federal court may permit an amendment after removal accurately stating the facts so as to show that the court has jurisdiction. *Wilbur v. Red Jacket Consol. Coal, etc., Co.*, (1907) 153 Fed. 662.

Where a removal petition was defective in alleging that, when the action was commenced and when petition was filed, petitioner was a resident of New York, instead of alleging that he was a nonresident of the state in

which the action was brought, but it also alleged that petitioner was a citizen of the republic of France, such allegation, coupled with the allegation of nonresidence in the state, gave petitioner the right to remove, and hence entitled him to amend the removal petition so as to correct the allegation of nonresidence. *De La Montanya v. De La Montanya*, (1907) 158 Fed. 117.

## II. BOND FOR REMOVAL.

**Bond as prerequisite.**—A bond capable of being enforced in case of the default of the party executing it is a prerequisite to removal. *Alexandria Nat. Bank v. Willis C. Bates Co.*, (C. C. A. 1908) 160 Fed. 839.

An undertaking to dissolve a foreign attachment, under the law of Pennsylvania, must be an absolute one for the payment of the debt or damages recovered, and constitutes "special bail" within the meaning of the Removal Act, but since a defendant is not required to enter such bail under the law of the state, but may at his option appear and contest the action, leaving the attachment in force, it is not necessary that a removal bond in such case be so conditioned, particularly where an undertaking to that effect has been given in the state court, which necessarily remains in full force and effect in the federal court after the removal. *Preston v. McNeil Lumber Co.*, (1906) 143 Fed. 555.

**Execution of bond.**—A bond by a company to remove a cause signed by an agent of the company on whom the bill was served is sufficient, though his authority does not appear. *Fayette Title, etc., Co. v. Maryland, etc., Telephone, etc., Co.*, (1910) 180 Fed. 928.

Where the local law, which authorizes the giving of surety company bonds, declares that any foreign company, empowered by its charter to issue bonds or policies of suretyship, may, with the consent and approval of the governor, comptroller-general, and secretary of state, issue such bonds within the state; and it appears that a removal bond tendered with a removal petition was signed by M. as attorney in fact for the foreign corporate surety, authorized to do business within the state, and was sealed with the seal of the corporation, and it also contained an affidavit that the affiant saw the corporate seal of the company affixed, saw M. sign as attorney in fact for such surety, and witnessed the execution and delivery thereof as the act and deed of such surety, it was held that the bond was sufficient, though it was not accompanied by a power of attorney authorizing M. to sign the bond. *Mutual L. Ins. Co. v. Langley*, (1906) 145 Fed. 415.

**Signing by petitioner.**—Where a removal bond was signed "Willis C. Bates Company, by Willis C. Bates, Treasurer," but it did not appear that Willis C. Bates as treasurer had any authority to execute the bond, and the corporate seal was not attached, and it was not shown that the person signing the bond had authority to attach the seal, the bond was void. *Alexandria Nat. Bank v.*

*Willis C. Bates Co.*, (C. C. A. 1908) 160 Fed. 839.

Where a removal bond was signed by a surety, it was not defective because it was not signed by the defendant, and because the penalty thereof was limited to \$500, as this section does not require such signature, nor that the bond shall be for an unlimited penalty. *Groton Bridge, etc., Co. v. American Bridge Co.*, (1905) 137 Fed. 284.

**Irregularities in the bond.**—Where an action was brought against the Willis C. Bates Company, a corporation, whereupon a removal bond was filed reciting that the "Willis C. Bates & Co. undertake," etc., and described the suit as one pending "wherein the Alexandria National Bank is plaintiff and said Willis C. Bates is defendant," it was held that the bond was void for failure to properly describe the action. *Alexandria Nat. Bank v. Willis C. Bates Co.*, (C. C. A. 1908) 160 Fed. 839.

A bond to remove a cause is sufficient where there is a good and sufficient surety for payment of costs. *Fayette Title, etc., Co. v. Maryland, etc., Telephone, etc., Co.*, (1910) 180 Fed. 928.

## III. RELATIVE AUTHORITY OF STATE AND CIRCUIT COURTS.

**Petition presents question of law in state court.**—A petition for removal of a case to the federal court presents to the state court a question of law as to whether, admitting the facts stated in the petition to be true, it appears on the face of the record which includes the petition, pleading, and proceedings down to that time, that petitioner has complied with the statute and is entitled to removal of the suit. *Morbeck v. Bradford-Kennedy Co.*, (1910) 19 Idaho 83, 113 Pac. 89; *Chesapeake, etc., R. Co. v. Banks*, (1911) 144 Ky. 137, 137 S. W. 1066.

A removal petition presents for the state court's consideration a question of law only as to whether, assuming the facts stated in the petition to be true, the face of the record discloses a removable cause. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

Every court has power to determine the question of its own jurisdiction subject to review of its decisions by the court having proper jurisdiction, and this rule applies to the right of a state court to determine its jurisdiction upon the filing of a petition for removal of the cause to the federal court. *Golden v. Northern Pac. R. Co.*, (1909) 39 Mont. 435, 104 Pac. 549.

The court, on the filing of a petition for the removal of a cause to the federal court, may, though a sufficient bond is filed, examine the petition, and determine whether it shows on its face that the petitioner has a right of removal. *Wilson v. Big Joe Block Coal Co.*, (1907) 135 Ia. 531, 113 N. W. 348.

Where defendant seeks to remove a case to the federal court on the ground of diverse citizenship, the allegations of his petition must be taken as true in determining the right of removal, though they contradict the

avements as to citizenship contained in plaintiff's petition. *Lane Bros. Co. v. Rickard*, (1911) 135 Ga. 650, 70 S. E. 565.

Whether there is a separable controversy so as to authorize the removal of a cause to the federal court must be determined in the first instance by the state trial court, and if it decides from the removal papers in connection with the record that the controversy is not separable, the application will be denied. *State v. Mosman*, (Mo. 1910) 133 S. W. 38.

Where a petition for the removal of a cause is demurrable on its face, the state court may properly decline to order the removal, and will not lose jurisdiction; but if the petition is not demurrable, jurisdiction thereby passes, however inartificial the petition may be. *Donovan v. Wells*, (C. C. A. 1909) 160 Fed. 363.

When the record, including the petition for removal, shows a cause to be removable from the state to the federal court for diversity of citizenship, the state court should accept the petition. *St. Louis, etc., R. Co. v. Kitchen*, (Ark. 1911) 136 S. W. 970.

When petition and bond for removal of a cause to the federal court are filed in the state court, it is its duty to determine whether, on the face of the record, including such petition, a case for removal is made out; and, if it decides in the affirmative, it merely accepts the bond and petition, without further proceedings. *Duff v. Hildreth*, (1903) 183 Mass. 440, 67 N. E. 356.

Where a petition is filed for the removal of a case to the federal court, it is the duty of the judge of the state court to determine from the petition and record, whether or not there is presented a federal case, and, if so, he should remove it to the federal court, and that court should hear the proof on the jurisdictional facts, and determine whether the state or federal court has jurisdiction. *Illinois Cent. R. Co. v. Sheegog*, (1907) 126 Ky. 262, 103 S. W. 323.

While a state court has no jurisdiction to decide the question of fact of diversity of citizenship on petition to remove a cause to the federal court on that ground, the federal courts alone having such authority, the state court does have authority to decide a question of law affecting the right of removal, which arises from the facts alleged, so that if the facts alleged in the petition for removal and in plaintiff's petition show as a matter of law that there is no diversity of citizenship, the court should deny the application for removal. *State v. Mosman*, (Mo. 1910) 133 S. W. 38.

Where a petition discloses a cause of action against both a resident and a nonresident defendant, the case may not be removed to the federal court in order that that court may determine whether the joinder of the resident is fraudulent, and made to defeat the right of the nonresident to remove the cause to the federal court; but, if that fact appears on the trial in the state court, the latter court should forthwith dismiss the action as to the resident and remove the cause to the federal court as to the nonresident. *Illinois*

*Cent. R. Co. v. Coley*, (1905) 121 Ky. 385, 89 S. W. 234, 1 L. R. A. N. S. 370.

**Refusal of state court to approve bond.**—While a removal bond should be presented to the judge of the state court for approval of the surety, the arbitrary refusal of the judge to approve a surety will not prevent the removal, the removing party then being entitled to file the bond and petition, procure the filing of the record on removal, and proceed in the federal Circuit Court, subject to a motion to remand for insufficiency of the surety. *Groton Bridge, etc., Co. v. American Bridge Co.*, (1905) 137 Fed. 284.

**Right to remove.**—A federal Circuit Court must be deemed to possess the right to determine the question of the right to remove a case from a state court independently of the jurisdiction and determination of the state courts. *Chesapeake, etc., R. Co. v. McCabe*, (1909) 213 U. S. 207, 29 S. Ct. 430, 53 U. S. (L. ed.) 765, *reversing* (1907) 100 S. W. 219, 30 Ky. L. Rep. 1009.

Where a petition for removal to the United States court and a bond are filed, and petition is denied, and the party desiring the removal files a transcript of the record in the Circuit Court of the United States, and the party opposing the removal moved in state court to remand said cause, which motion was overruled, the question of removability being a federal question, the state court should withhold further jurisdiction, on the facts being brought to its attention by the objecting party. *Bolen-Darnell Coal Co. v. Kirk*, (1909) 25 Okla. 273, 106 Pac. 813.

**Issues of fact**—*Generally.*—The state courts have no jurisdiction to pass finally upon the facts stated in a petition for the removal of a cause from a state to a federal Circuit Court, which show a cause properly removable, since that is the exclusive province of the federal court. *Texas, etc., R. Co. v. Eastin*, (1909) 214 U. S. 153, 29 S. Ct. 564, 53 U. S. (L. ed.) 946, *affirmed* (1907) 100 Tex. 556, 102 S. W. 105.

Where a petition for removal shows a removable controversy, *prima facie*, any issue as to the truth of the facts stated in the petition is to be determined by the federal court. *Illinois Cent. R. Co. v. Jones*, (1904) 118 Ky. 158, 80 S. W. 484.

A state court has no jurisdiction to try an issue of fact arising on a removal petition; but the cause must be removed, if the petition and bond are sufficient. *Wisecarver v. Chicago, etc., R. Co.*, (1908) 139 Ia. 596, 117 N. W. 961.

**Fraudulent joinder.**—A petitioner for the removal of a cause is not bound to prove an alleged fraudulent joinder of the defendants to prevent a removal, until issue has been joined on such allegation. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

On petition to remove a cause, it is for the federal court to pass upon the allegation of fraudulent joinder of defendants to prevent removal; any finding thereon by the state court not binding the federal court. *Davis v. Rexford*, (1907) 146 N. C. 418, 59 S. E. 1002.

A state court has no jurisdiction to try an issue of fact properly raised on a petition for



removal, but that can only be done by the federal court on motion to remand after removal, and so, where a petition alleges fraud in wrongfully joining two parties as defendants solely to defeat removal, the state court cannot inquire into and determine for itself the issue thus presented. *St. Louis Southwestern R. Co. v. Adams*, (1908) 87 Ark. 136, 112 S. W. 186.

Where, on an application by a noncitizen to remove a cause to the federal court, the removal petition charges that a citizen defendant was fraudulently joined merely to prevent removal, such issue is triable only in the federal court after removal. *Eastin v. Texas*, etc., R. Co., (1906) 99 Tex. 654, 92 S. W. 838, reversing (1905) 89 S. W. 440.

Where an action could not have been originally brought in the federal Circuit Court, the Removal Acts do not require the determination of a question of alleged fraudulent joinder of parties by the federal court after the filing of a removal petition and bond. *Ward v. Pullman Car Corp.*, (1908) 131 Ky. 142, 114 S. W. 754.

**Denial of application.**—Where a state court orders a removal on an insufficient petition, the party aggrieved may prosecute an appeal to the appellate court of the state to have the order reviewed. *Illinois Cent. R. Co. v. Jones*, (1904) 118 Ky. 158, 80 S. W. 484.

Where an order of the state trial court removing a cause to the federal court on the ground of diversity of citizenship is not reviewable by the state Supreme Court by appeal or writ of error, it may be reviewed on certiorari; the error, if any, appearing on the face of the record. *State v. Mosman*, (Mo. 1910) 133 S. W. 38.

But the dismissal by a state court of a petition for removal of a cause to a federal court cannot be reviewed on appeal where there is no bill of exceptions. *Louisville*, etc., R. Co. v. *Satterwhite*, (1904) 112 Tenn. 185, 79 S. W. 106. See also *Stratton's Independence v. Sterrett*, (Colo. 1911) 117 Pac. 351; *Louisville*, etc., R. Co. v. *Fort*, (1904) 112 Tenn. 432, 80 S. W. 429.

In *Pierce v. Illinois Cent. R. Co.*, (1905) 86 S. W. 703, 27 Ky. L. Rep. 801, it appears that a nonresident defendant, joined with residents in an action which, on the face of the petition, is not removable to the federal court, petitioned for its removal, but stated no ground in the petition for such removal. The court, in its orders, did not pass upon the petition for removal, but merely approved and accepted the bond, and permitted the plaintiff's answer to the petition for removal to be filed. Defendant evidently assumed that the case was *ipso facto* removed to the federal court, without any order by the state court, and plaintiff also concluded that that forum must pass upon the propriety of the removal. It was held that there was no order of the state court removing the cause to the federal court, from which plaintiff could or should have appealed in order to preserve his rights to a trial in the state court.

**Setting aside order denying application.**—Where a petition for removal of a cause is

denied, and it thereafter becomes apparent to the court at any time that the resident defendant has been joined without reasonable grounds therefor, it is the court's duty in its discretion to set aside the former order and direct a removal of the cause. *Ward v. Pullman Car Corp.*, (1908) 131 Ky. 142, 114 S. W. 754.

A state court declining to order a removal of the case to the federal court on the filing of a petition for removal may do so at the close of plaintiff's evidence or at the close of all the evidence. *Chesapeake*, etc., R. Co. v. *Banks*, (1911) 144 Ky. 137, 137 S. W. 1066.

Since no order for removal is necessary, where removal of a cause to a federal court is proper an order of removal by the judge of the state court confers no jurisdiction on the federal court. *Hubbard v. Chicago*, etc., R. Co., (1910) 176 Fed. 994.

Where a petition and bond for the removal of a cause from a state court to a federal court are sufficient under the federal statute, the cause is removed without an order of the state court. *State v. Johnston*, (1911) 234 Mo. 338, 137 S. W. 595.

On the filing of a removal petition, it becomes a part of the record, and if, on the face of the record as so constituted, the suit appears to be a removable one, the state court is bound to surrender jurisdiction. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

Where a petition and bond for the removal of a cause to the federal court is duly filed, and on the record made defendant is entitled to removal, its right is preserved, not only for review in the state court, but also in the Supreme Court of the United States. *Shohoney v. Quincy*, etc., R. Co., (1909) 223 Mo. 649, 122 S. W. 1025.

In a suit for petition in a court of North Carolina, in which, under the laws of the state, the clerk is authorized to make all necessary orders and to enter judgment, such clerk has authority to make an order for the removal of the cause on a petition filed before answer. *Sanderlin v. People's Bank*, (1905) 140 Fed. 191.

#### IV. EFFECT OF PETITION AS GENERAL OR SPECIAL APPEARANCE.

An appearance in the state court for the sole purpose of exercising a right to remove the case to the federal court should be regarded as a special appearance for such purpose, though containing no express limitation, and will not therefore constitute a waiver of an objection to the jurisdiction on the ground that the summons was not properly served. *Murphy v. Herring-Hall-Marvin Safe Co.*, (1911) 184 Fed. 495.

**Challenge to the jurisdiction.**—The removal of a cause does not preclude the defendant from challenging the jurisdiction of either the state or federal court over his person, or from claiming exemption from being sued in a state other than that of his residence. *Davis v. Cleveland*, etc., R. Co., (1906) 146 Fed. 403.

A motion to vacate the service of the summons may properly be presented to the federal court after removal of the cause, where defendant has appeared only for the purpose of such removal, whether specially so limited or not; and such motion must be determined on the facts appearing of record at the time of removal, which cannot be supplemented by evidence taken after removal. *Webster v. Iowa State Traveling Men's Assoc.*, (1904) 165 Fed. 367.

The validity of the service of process upon a foreign corporate defendant is open in a federal Circuit Court after the cause has been removed to that court from a state court on the petition of such defendant. *Mechanical Appliance Co. v. Castleman*, (1910) 215 U. S. 437, 30 S. Ct. 125, 54 U. S. (L. ed.) 272.

The return of the sheriff of the state court is not conclusive upon the question of the validity of service of process, where the cause has been removed to a federal Circuit Court by a defendant who raises by plea to the jurisdiction the objection that it was a foreign corporation not doing business within the state, and that the person served with process was not its agent at that time. *Mechanical Appliance Co. v. Castleman*, (1910) 215 U. S. 437, 30 S. Ct. 125, 54 U. S. (L. ed.) 272. See also *Murphy v. Herring-Hall-Martin Safe Co.*, (1911) 184 Fed. 495.

#### V. STATE COURT TO PROCEED NO FURTHER.

The filing of a sufficient petition and bond for removal, in a cause which is removable, *ipso facto* divests the state court of jurisdiction to proceed further therein except to pass on the sufficiency of the papers, and any further action it may take is *coram non jure* and void. While a formal order of removal is usual, it is not necessary, nor will the failure of the state court to take any action on the petition prevent the attaching of the jurisdiction of the federal court. *Boatmen's Bank v. Fritzlen*, (1905) 135 Fed. 650, 68 C. C. A. 288, *reversing* (1904) 128 Fed. 608; *Mays v. Newlin*, (1906) 143 Fed. 574; *Phillips v. Western Terra Cotta Co.*, (1909) 174 Fed. 873; *Flint v. Coffin*, (C. C. A. 1910) 176 Fed. 872; *Mannington v. Hocking Valley R. Co.*, (1910) 183 Fed. 133; *Hunter v. Illinois Cent. R. Co.*, (C. C. A. 1911) 188 Fed. 645; *Texarkana Telephone Co. v. Bridges*, (1905) 75 Ark. 116, 86 S. W. 841; *Stratton's Independence v. Sterrett*, (Colo. 1911) 117 Pac. 351; *Southern R. Co. v. Dukes*, (1910) 7 Ga. App. 784, 68 S. E. 332; *Pennsylvania Co. v. Leeman*, (1903) 160 Ind. 16, 66 N. E. 48; *Chicago, etc., R. Co. v. Stone*, (1905) 70 Kan. 708, 79 Pac. 655; *Ward v. Pullman Car Corp.*, (1908) 131 Ky. 142, 114 S. W. 754; *Chesapeake, etc., R. Co. v. Banks*, (1911) 144 Ky. 137, 137 S. W. 1066; *Chastain v. Missouri, etc., R. Co.*, (1910) 226 Mo. 94, 125 S. W. 1099; *Chastain v. Missouri, etc., R. Co.*, (1911) 152 Mo. App. 478, 133 S. W. 853; *State v. Mosman*, (Mo. 1910) 133 S. W. 38; *Higson v. North River Ins. Co.*, (1910) 153 N. C. 35, 68 S. E. 920; *Eastin v. Texas, etc., R. Co.*, (1906) 99 Tex. 654, 92 S. W. 838; *Bilby v. Hancock*, (Tex. 1910) 125 S. W. 370.

Where a cause is removed to the federal court, no part of the subject-matter thereof remains in the state court. *Holbrook v. Quinlan*, (Vt. 1911) 80 Atl. 339.

During the pendency in a United States Circuit Court, in a cause removed thereto from a state court, of a controversy over the question whether a sufficient ground for such removal exists, the state court is without jurisdiction to proceed or to make any judgment or order in the suit. *Tomson v. Iowa State Traveling Men's Assoc.*, (1907) 78 Neb. 400, 110 N. W. 997.

Since the presentation to the state court of the petition for removal of a cause, accompanied by the required bond praying for removal, is effective to deprive the state court of jurisdiction *eo instante*, if the petition on its face shows facts essential to entitle plaintiff to remove, the filing of an answer in the state court after the presentation of the petition to remove is ineffective to raise an issue as to the facts relied on for removal, since all pleading attacking the facts so alleged and the federal court's jurisdiction must be filed in and heard by the federal court to which the cause is removed. *Phillips v. Western Terra Cotta Co.*, (1909) 174 Fed. 873.

If the determination of the state court as to its right to retain jurisdiction after petition is filed for removal to the federal court is erroneous, all subsequent proceedings therein including the judgment are void, but otherwise the proceedings are valid. *Golden v. Northern Pac. R. Co.*, (1909) 39 Mont. 435, 104 Pac. 549.

An appointment of a receiver by a state court will be vacated by the federal Circuit Court as without jurisdiction where proper proceedings had been taken to remove the cause. *Fayette Title, etc., Co. v. Maryland, etc., Telephone, etc., Co.*, (1910) 180 Fed. 928.

Where, in an action against a railroad company and its receivers, appointed in a federal court, to compel the defendants to remove obstructions from a street, defendants filed a cross-bill claiming title to the part of the street in question, and removed the case to the federal court, which denied a motion to remand, and assumed jurisdiction, it was held that no proceedings could be taken in such action in the state court while it was pending and undetermined in the federal court. *Ashland v. Whitcomb*, (1904) 120 Wis. 549, 98 N. W. 531.

But see *Oishei v. Pennsylvania R. Co.*, (1905) 101 App. Div. 473, 91 N. Y. S. 1034, wherein it was held that where, after settlement of an action for injuries, the defendant removed the cause to the federal courts, it was held that such removal did not deprive the state court of jurisdiction to enforce the lien of plaintiff's attorney on the proceeds of the settlement.

And where an action was brought in a state court, and defendant petitioned for removal to a federal court, which was denied, judgment for plaintiff was reversed on appeal, on the ground that the lower court erred in denying the removal, and the cause was remanded with direction to proceed in a man-

ner not inconsistent with the opinion of the Supreme Court. It was held that the state court had jurisdiction to render judgment for costs which accrued in that court, though the petition for removal filed before the accrual of costs, or the major part of them, should have been sustained. *Wisecarver v. Chicago, etc., R. Co.*, (1909) 145 Ia. 281, 122 N. W. 909.

**Apparent defects.** — Where a defect indicating want of jurisdiction in a federal court appears on the face of a petition for removal, the state courts are not ousted of their jurisdiction; not being bound to surrender jurisdiction until a case has been made which on its face shows that petitioner has a right to transfer the cause to the federal court. *North Carolina Corp. Commission v. Southern R. Co.*, (1909) 151 N. C. 447, 66 S. E. 427.

Where an *ex parte* order was made for the removal from the state Supreme Court to the federal Circuit Court of an action on judgments, but the order was void because of the failure of the petition for removal to show the citizenship of plaintiff's assignors, and no stay of proceedings having been obtained, it was held that the state Supreme Court did not lose jurisdiction of the case, and properly entered judgment against defendant on default in serving an answer. *Tierney v. Helvetia Swiss F. Ins. Co.*, (1908) 126 App. Div. 446, 110 N. Y. S. 613.

**Dismissal of cause to prevent removal.** — Where proper application is made by a non-resident defendant for the removal of a case from the state court to the United States court, which application is refused by the state court, whose judgment is reversed on writ of error to the Supreme Court of the state, plaintiff cannot dismiss the case, so as to defeat its removal to the United States court, by an entry of dismissal before the remittitur from the Supreme Court has been formally made the judgment of the lower court. *Louisville, etc., R. Co. v. Newman*, (1909) 132 Ga. 523, 64 S. E. 541.

**Withdrawal of petition.** — Where a motion for the removal of a cause on a petition and bond on file was overruled by the state court, on the ground that the cause was still at rules and not on the court docket, and defendant acquiesced in such decision by taking no further action for removal until the next term and then again presenting the motion, it was held that such action had the effect of a temporary withdrawal of the motion, and the state court retained jurisdiction until it was again presented. *Mays v. Newlin*, (1906) 143 Fed. 574.

On the filing of the requisite petition and bond for removal to a federal court, the state court loses jurisdiction; but where a party procures a withdrawal of the petition and bond by the party filing it, and dismisses his action in the state court as to such party, and by agreement with the remaining parties prosecutes his suit in a state court, he cannot, after judgment against him, assert that the jurisdiction of the state court had not been restored. *Anderson v. United Realty Co.*, (1908) 79 Ohio St. 23, 86 N. E. 644.

**Right to begin new action on dismissal in Circuit Court.** — After the transfer of an action to the federal court, the plaintiff has the right to dismiss it in that court and renew the action in the state court; and it is not material that an action was not dismissed in the federal court until after the second one was instituted in the state court, it being sufficient that the dismissal occurred before the trial of the second action. *Dana v. Blackburn*, (1906) 121 Ky. 706, 90 S. W. 237. See also *Southern R. Co. v. Rowe*, (1907) 2 Ga. App. 557, 59 S. E. 462; *Nipp v. Chesapeake, etc., R. Co.*, (1904) 80 S. W. 796, 25 Ky. L. Rep. 2335; *Holbrook v. Quinlan*, (Vt. 1911) 80 Atl. 339.

Where an action is removed to a federal court and is there dismissed without trial or determination of the merits, plaintiff's right to sue is not affected, and he may institute a new suit on the same cause of action in the state court, as though the prior suit had not been brought. *McPherson v. Swift*, (S. D. 1911) 130 N. W. 768.

Where a suit against a foreign and domestic corporation was removed to the federal court on the ground of the amount in controversy, and because the domestic corporation had been fraudulently joined as a party, it was held that the plaintiff had the right to dismiss the case in the federal court, and subsequently institute a suit in the state courts against the foreign corporation, alone, laying damages in a sum less than \$2,000. *Pacific Express Co. v. Needham*, (1904) 37 Tex. Civ. App. 129, 83 S. W. 22.

**Dismissal without prejudice in federal court.** — Where, after the removal of a suit, the plaintiff procures an order dismissing the same without prejudice, the jurisdiction of the federal court ends; and the fact of the removal does not affect the jurisdiction of the state court to entertain a new suit on the same cause of action. *Texas Cotton Products Co. v. Starnes*, (1905) 133 Fed. 1022, 66 C. C. A. 673, *affirming* (1904) 128 Fed. 183; *Stevenson v. Illinois Cent. R. Co.*, (1904) 117 Ky. 855, 79 S. W. 767; *DeWitt v. Chesapeake, etc., R. Co.*, (1904) 79 S. W. 275, 25 Ky. L. Rep. 2019.

Where a suit in a state court has been removed by defendant to the United States court having concurrent jurisdiction, and has on application of plaintiff been dismissed without prejudice, there is no merger of the cause of action, and a new suit may be brought thereon at any time in any court of competent jurisdiction as though no previous suit had been brought. *Baltimore, etc., R. Co. v. Larwill*, (1910) 83 Ohio St. 108, 93 N. E. 619.

**Taking nonsuit in federal court.** — Where a cause is removed to the federal court, notwithstanding the refusal of the state court to grant the application for removal, and the party resisting the removal appears in the federal court and submits himself to its jurisdiction, asking that the cause be remanded, and failing in which he appears in the federal court and takes a nonsuit, and consents that a judgment be entered against him, he

cannot thereafter prosecute the same suit in the state court, but must commence a new suit in the state court. *Texas, etc., R. Co. v. Huber*, (Tex. 1906) 95 S. W. 568.

**Proceedings after remand.**—The state court, after remand of a cause removed to a federal court, cannot question the correctness of the order of remand, but must proceed to exercise jurisdiction. *Feeney v. Wabash R. Co.*, (1907) 123 Mo. App. 420, 99 S. W. 477.

Where a cause removed to a federal court is by the latter remanded, the order of remand cannot be reviewed on appeal to the Supreme Court of the state. *St. Louis, etc., R. Co. v. Neal*, (1906) 83 Ark. 591, 98 S. W. 958.

Where a case had, on defendant's petition, been transferred to a federal court, and remanded by it to the state court, the acceptance of jurisdiction by the latter does not deprive the defendant of any of its constitutional rights. *Walker v. Wabash R. Co.*, (1906) 193 Mo. 453, 92 S. W. 83.

Where a case is removed to the federal court and thereafter on motion is remanded to the state court and the clerk enters default on failure of defendant to appear or answer, the court has jurisdiction to hear proofs submitted by plaintiff and make findings and enter judgment thereon. *Morbeck v. Bradford-Kennedy Co.*, (1910) 19 Idaho 83, 113 Pac. 89.

**Second application for removal.**—An order remanding a cause to the state court whence it was removed does not control the right to make a second application for removal if it results from the subsequent pleadings or the conduct of the parties that the cause becomes a removable one. *Fritzlen v. Boatmen's Bank*, (1909) 212 U. S. 364, 29 S. Ct. 366, 53 U. S. (L. ed.) 551, *affirming* (1907) 75 Kan. 479, 89 Pac. 915.

## VI. CIRCUIT COURT TO PROCEED.

**Acquisition of federal jurisdiction.**—Where the petition for removal of a case to the federal court, and the files in the case constituting the record up to the time of filing the petition, show upon their face that the federal statute has been complied with, and that the case is one that should be removed, the jurisdiction is at once transferred to the federal court. *Morbeck v. Bradford-Kennedy Co.*, (1910) 19 Idaho 83, 113 Pac. 89.

When this section has been fully complied with, the federal court acquires jurisdiction without an order of the state court transferring the cause. *Mutual L. Ins. Co. v. Langley*, (1906) 145 Fed. 415.

It is not the order of a state court removing a cause that gives a federal court jurisdiction, but it is the application for removal in the form prescribed; and if the petition for removal, read in the light of the pleadings in the case, shows a removable cause, and the bond tendered is sufficient, the cause is removed without reference to the action of the state court. *Shohoney v. Quiney, etc., R. Co.*, (1909) 223 Mo. 649, 122 S. W. 1025.

**Conclusiveness of petition.**—The cases removed from a state court, in which the petition filed by plaintiff in the state court is conclusive in the federal court on the question of its jurisdiction, are cases in which the question depends on the legal construction of plaintiff's petition as to the joint liability of defendants, or other questions of law. *Woodson County v. Toronto Bank*, (1904) 128 Fed. 157.

**Defective petition.**—Where, under the allegations of the petition in the action and the petition for removal, the cause is not removable to the federal court, that court acquires no jurisdiction, and its orders in the premises are void, notwithstanding plaintiff's appearance and motion to remand the case, and his participation in the trial after the motion is overruled. *Pierce v. Illinois Cent. R. Co.*, (1905) 86 S. W. 703, 27 Ky. L. Rep. 801.

Where the petition filed in the state court does not show *prima facie* that there is a removable controversy, the jurisdiction of the federal court cannot be conferred by consent or by any appearance, or even by a trial therein. *Illinois Cent. R. Co. v. Jones*, (1904) 118 Ky. 158, 80 S. W. 484.

**Jurisdiction of the person.**—After a case has been removed from a state to a federal court, the defendant may move to vacate the service if a special appearance only is made for that purpose. *Cavanagh v. Manhattan Transit Co.*, (1905) 133 Fed. 818.

The filing of a petition by a defendant in a state court to remove the cause to the proper Circuit Court of the United States does not prevent him, after the case is removed, from moving in the federal court to dismiss it for want of jurisdiction of defendant's person, he having appeared specially in the federal court for that purpose. *Gebbie v. Review of Reviews Co.*, (1905) 134 Fed. 150.

Where a foreign insurance association, after suit brought in the state court, took seasonable steps to have the same removed to the federal court, it may, after such removal, appear specially for the purpose of moving to dismiss on the ground that the court had not obtained jurisdiction of defendant's person. *Greenleaf v. National Assoc. of Railway Postal Clerks*, (1904) 130 Fed. 209.

Service of process on the secretary of a foreign corporation while present in New York on business not connected with the company held insufficient to confer jurisdiction over the defendant on removal of the cause to the federal court. *Phelps v. Connecticut Co.*, (1911) 188 Fed. 765.

**Jurisdiction limited to statutory grounds.**—The jurisdiction acquired by a federal court by removal is strictly limited to the statutory grounds, and rests solely on the state of facts and controversy of record as brought from the court of original cognizance, and neither acquiescence of the parties nor the action of the state court can enlarge the statutory jurisdiction of the federal court nor divest that of the state court. *Willard v. Chicago, etc., R. Co.*, (C. C. A. 1908) 165 Fed. 181.

Where an action begun by attachment was properly removed to the federal court pending a motion to dissolve the attachment, both the principal suit and the attachment proceeding were transferred into the federal Circuit Court, which, on the filing of the transcript and docketing the cause there, was as fully possessed of the case as if it had been begun in that court. *Lebensberger v. Scofield*, (1905) 139 Fed. 380, 71 C. C. A. 476. See also *Clark v. Wells*, (1906) 203 U. S. 164, 27 S. Ct. 43, 51 U. S. (L. ed.) 138.

Where a state court has acquired jurisdiction of a suit by attachment against a foreign corporation under the state statute, a federal court has jurisdiction on removal of the cause by either the defendant or a garnishee. *Greevy v. Jacob Tome Institute*, (1904) 132 Fed. 408.

**Waiver of objection.** — By removing a cause to the federal court, defendant consents to the assumption of jurisdiction of his person by the court of the particular district to which the cause is removed. *Shawnee Nat. Bank v. Missouri, etc., R. Co.*, (1909) 175 Fed. 456.

The requirement that an action in the federal court based upon a diversity of citizenship be brought in the district of the residence of either plaintiff or defendant is waived by defendant's removal of the cause to the federal court from the state court where it is brought. *De Valle Da Costa v. Southern Pac. Co.*, (1908) 160 Fed. 216.

Where defendant, a foreign corporation, when sued by an alleged alien in the Illinois state courts, removed the cause to the federal Circuit Court for the Northern District of Illinois, it thereby waived any objection to the venue and its right to be sued in the federal district of its residence. *Cucciarre v. New York Cent., etc., R. Co.*, (C. C. A. 1908) 163 Fed. 38.

Where an action by attachment against a nonresident pending in a state court having jurisdiction, in which property has been attached and the plaintiff is proceeding in conformity to the state statute to obtain service, is removed by the defendant to the federal court on the ground of diversity of citizenship, such removal confers upon the federal court jurisdiction of the defendant's person, and that court may proceed to render a personal judgment against him, to be satisfied from the proceeds of the attached property. The removal statute cannot be so construed as to permit a defendant to oust the rightful jurisdiction of a state court by a removal, and then obtain a dismissal of the action in the federal court for want of jurisdiction. *Clark v. Wells*, (1906) 203 U. S. 164, 27 S. Ct. 43, 51 U. S. (L. ed.) 138.

**Legal and equitable remedies and defenses.** — Where a cause is removed to a federal court from a state court which was competent to grant either legal or equitable relief, the plaintiff may proceed in the federal court either at law or in equity; but if he elects to proceed in equity, and no case for equitable relief is made, such court cannot retain and try the cause as an action at law. *Union*

*Stockyards Co. v. Nashville Packing Co.*, (1905) 140 Fed. 701, 72 C. C. A. 195.

On filing in apt time a valid petition, the court's jurisdiction is determined, and defendant's remedy, as to an injunction granted in the cause, is by motion in the federal court to dissolve it. *Harbison v. Allen*, (1910) 152 N. C. 720, 68 S. E. 207.

On removal of an equitable cause, the complaint or bill should be redrafted to conform to the equity practice in the federal courts. *Thornton N. Motley Co. v. Detroit Steel, etc., Co.*, (1904) 130 Fed. 396.

When a suit in equity is removed from a state to a federal court, it must thereafter conform to the equity practice and rules in force in such court, regardless of the forms of practice in equitable proceedings in the state court. *Bryant Bros. Co. v. Robinson*, (1906) 149 Fed. 321, 79 C. C. A. 259.

But the provision of equity rule 94 that a bill by a stockholder, founded on rights of the corporation, shall be verified by oath, cannot be applied to a bill filed in a state court, and from thence removed to a federal court. *Maeder v. Buffalo Bill's Wild West Co.*, (1904) 132 Fed. 280.

**Restraining proceedings in state court.** — A bill to restrain a state court from proceeding in an action at law after jurisdiction has been removed to the federal court, until the question of removability has been determined, is maintainable as an auxiliary proceeding to protect the federal court's jurisdiction and to prevent unnecessary, embarrassing, fruitless, and expensive litigation. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

Where a cause was properly removed to a federal court, but the state court erroneously denied a motion for an order transferring the cause, the federal court has jurisdiction on the application of the party removing the cause to grant an ancillary injunction restraining the opposite party from taking further proceedings in the state court, without violating R. S. sec. 720 [4 Fed. Stat. Annot. 509] forbidding a federal court from enjoining proceedings in a state court. *Madisonville Traction Co. v. St. Bernard Min. Co.*, (1905) 196 U. S. 239, 25 S. Ct. 251, 49 U. S. (L. ed.) 462; *Mutual L. Ins. Co. v. Langley*, (1906) 145 Fed. 415.

Where a state court wrongfully attempted to exercise jurisdiction after the case had been transferred to the federal court by defendant filing a copy of the record therein after the denial of his petition to remove, such subsequent exercise of jurisdiction by the state court will be enjoined. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

Where a proceeding to acquire land for a railroad right of way was properly removed to the federal court after the report of commissioners had been filed in the state court, the state court having been deprived of jurisdiction by the removal proceedings, the federal court has jurisdiction to enjoin the plaintiff from proceeding further with the action in the state court. *Madisonville Traction Co. v. St. Bernard Min. Co.*, (1905) 196 U. S. 239, 25 S. Ct. 251, 49 U. S. (L. ed.) 462.

## Vol. IV, p. 370, sec. 4.

**Conformity to state practice — Generally.** — On removal of a cause into a federal court, that court takes it precisely as it finds it, accepting all decrees and orders of the state court as adjudications, and will not entertain a motion which had been fully presented to and finally decided by the state court before removal. *Guernsey v. Cross*, (1907) 153 Fed. 827.

**Service of foreign corporations.** — Where service on a foreign corporation is objected to after removal to the federal Circuit Court, the same rule should be applied in determining the sufficiency of the service as in a case originally brought in the Circuit Court. *West v. Cincinnati, etc., R. Co.*, (1909) 170 Fed. 349.

Where a foreign corporation is doing some substantial business in a state, and a suit commenced in a state court by service of process valid under the state statute is removed into a federal court, such court will not set aside the service. *Sleicher v. Pullman Co.*, (1909) 170 Fed. 365.

A foreign railroad corporation, which maintains offices in New York and there employs freight and passenger agents to solicit business, which also holds directors' meetings, disburses dividends, and keeps an office for the transfer of its stock there, with an assistant secretary, is doing some substantial business in the state, and is subject to service of process under the New York statute, and such service will not be set aside by a federal court, in a suit brought in a state court, after its removal. *Sleicher v. Pullman Co.*, (1909) 170 Fed. 365.

**Service by publication.** — Service by publication in the manner prescribed by the state statutes for nonresident defendants cannot be had in the federal Circuit Court to which a suit in which an attachment has issued has been removed from a state court before service of summons. *Clark v. Wells*, (1906) 203 U. S. 164, 27 S. Ct. 43, 51 U. S. (L. ed.) 138, *modifying* (1905) 136 Fed. 462. See also *infra*, this page, cases cited under *Attachments*.

But it has been held that an attachment granted by a state court in a suit in which service was made by publication cannot be vacated by the federal court on removal because the action is one in which such service is not provided for by the federal practice, but, under this section, it must stand as it would in the state court, whatever effect the failure to obtain personal service may have on its efficacy. *Blumberg v. A. B. & E. L. Shaw Co.*, (1904) 131 Fed. 608.

**Vacating service.** — The denial by an inferior state court of a motion to vacate the service of summons is not *res judicata* on the question of the validity of such service, when raised in the federal Circuit Court to which the cause has been removed. *Remington v. Central Pac. R. Co.*, (1905) 198 U. S. 95, 25 S. Ct. 577, 49 U. S. (L. ed.) 959.

But it has been held that where defendant moved in a state court to set aside the service, and on the motion being denied, without appealing from the order as it could have done, removed the case to the federal court,

it could not there renew its motion to set aside the service. *Hoyt v. Ogden Portland Cement Co.*, (1911) 185 Fed. 889.

**Power over orders of state court.** — After the removal of a cause, the federal court has authority to hear and act on a motion pending in the state court at the time of removal to modify or vacate a restraining order or preliminary injunction previously granted. *Mannington v. Hocking Valley R. Co.*, (1910) 183 Fed. 133.

**Attachments — Entering judgment.** — The want of any jurisdiction over the person of defendant in a case removed to a federal Circuit Court from a state court before service of summons, on a special appearance by defendant for that sole purpose, does not, in view of this section, prevent the federal court from entering a judgment enforceable against the real property of defendant which had been attached before the case was removed, where the state court might, but for such removal, have rendered such a judgment on giving notice to defendant. *Clark v. Wells*, (1906) 203 U. S. 164, 27 S. Ct. 43, 51 U. S. (L. ed.) 138, *modifying* (1905) 136 Fed. 462. See also *supra*, this page, cases cited under *Conformity to State Practice*.

Where, in a suit by attachment in a state court of New York, after the levy of the attachment on property within the state, an order was made for service by publication on defendant as a nonresident of the state, in strict accordance with the requirements of the state statute, such service is sufficient to give a federal court, to which the cause is removed, jurisdiction to render judgment enforceable against the attached property, although no proof was required by the state statute, or made, that defendant owns property in the state. *Mercantile Nat. Bank v. Barron*, (1908) 165 Fed. 831.

**Power to protect and enforce lien.** — When an action is removed from a state court into a federal court, the latter takes the case in the condition in which it stood at the time of removal, and a lien obtained by an attachment in the state court is not lost or terminated by the removal; but power to protect and enforce that lien after the removal exists in the federal court in like manner as if it had been obtained by a proceeding in that court. *Hatcher v. Hendrie, etc., Mfg., etc., Co.*, (1904) 133 Fed. 267, 68 C. C. A. 19.

**Condemnation proceedings.** — Where preliminary proceedings were taken for the condemnation of land for a railroad right of way without notice to the nonresident owner thereof, and no notice was given to such owner until after the report of commissioners had been filed in the state court, whereupon such owner removed the proceedings to the federal courts, the suit not having been begun until process was first issued against such owner, it was held to be proper in the federal court to contest the complainant's right to take the land, as well as the amount of compensation to be paid therefor. *Madisonville Traction Co. v. St. Bernard Min. Co.*, (1904) 130 Fed. 789.

## Vol. IV, p. 371, sec. 5.

Shall appear to the satisfaction of said Circuit Court — *Generally*. — This section covers the entire field of dismissals for defects of jurisdiction arising on the evidence, and prescribes the showing necessary to the exercise of the power which it grants. *Hill v. Walker*, (C. C. A. 1909) 167 Fed. 241.

But it has no application where the complaint to remove a cause alleges a removable controversy, and the only question in dispute is whether the case has in fact been removed. *Higson v. North River Ins. Co.*, (1911) 184 Fed. 165.

Where the federal court has no jurisdiction of the action, it must either dismiss or remand it as justice may require. *Mystic Milling Co. v. Chicago, etc., R. Co.*, (1904) 132 Fed. 289; *Kinney v. Mitchell*, (1905) 136 Fed. 773, 69 C. C. A. 493; *Pennsylvania Co. v. Bay*, (1905) 138 Fed. 203; *Risley v. Utica*, (1910) 179 Fed. 875; *Rones v. Katalla Co.*, (1910) 182 Fed. 946.

A cause improperly removed under the removal act cannot be retained by the federal court on the ground that it is an action against revenue officers of the United States which might have been brought into that court by certiorari. *People's U. S. Bank v. Goodwin*, (1908) 160 Fed. 727.

Where a suit is brought in a state court in a federal judicial district of which neither plaintiff nor defendant is a resident, it will be remanded on seasonable motion, unless the plaintiff consents to the suit proceeding in the district by appearance and pleading. *George v. Tennessee Coal, etc., Co.*, (1911) 184 Fed. 951.

Where a federal court has no jurisdiction of the subject-matter of the suit, an order overruling plaintiff's motion to remand unappealed from does not confer jurisdiction, which cannot be conferred by consent. *Shohoney v. Quincy, etc., R. Co.*, (1909) 223 Mo. 649, 122 S. W. 1025.

Where a cause is erroneously removed from a state court to the Circuit Court of the United States and thereafter remanded to the state court, all orders made in the case by the United States court, except the one remanding the case, are void for want of jurisdiction. *Floody v. Chicago, etc., R. Co.*, (1908) 104 Minn. 132, 116 N. W. 111.

*Jurisdiction doubtful*. — The general rule is that jurisdiction on removal must be clear, in order to justify the federal court in retaining the case. *Dodd v. Louisville Bridge Co.*, (1904) 130 Fed. 186.

It is the duty of a federal court to remand a cause removed from a state court when its jurisdiction is doubtful. *Dodd v. Louisville Bridge Co.*, (1904) 130 Fed. 186; *Groel v. United Electric Co.*, (1904) 132 Fed. 252; *Nash v. McNamara*, (1906) 145 Fed. 541; *Vanderbilt v. Kerr*, (1911) 188 Fed. 537.

No cause is removable unless it is concurrently cognizable by the state and federal courts, and if a defendant, having removed a cause, thereafter moves to dismiss because of lack of jurisdiction of the state court over the subject-matter, it is the duty of the fed-

eral court, at least where the question is in doubt, on seasonable motion therefor to remand the cause, that the state court may for itself determine the question of its jurisdiction. *Thacker Coal, etc., Co. v. Norfolk, etc., R. Co.*, (1909) 171 Fed. 271.

A cause removed into a federal court on the ground of diversity of citizenship will be remanded unless the jurisdiction of such court appears from the record, which includes for the purposes of such motion the petition for removal and all pleadings and other papers previously properly filed in the suit in the state court. *Helena Power Transmission Co. v. Spratt*, (1906) 146 Fed. 310.

On a motion to remand a cause commenced by a bill in a state court intended to invoke a special statutory jurisdiction of such court, which cannot be exercised by a federal court of equity, the court will not retain jurisdiction merely because the application of the statute to the facts alleged in the bill is in doubt; that being a question properly determinable by the state court on demurrer. *Mathews Slate Co. v. Mathews*, (1906) 148 Fed. 490.

Whether the amount of a counterclaim set up by a removing defendant may be added to the plaintiff's claim to give the federal court jurisdiction of the cause, is at least so doubtful under the authorities as to require that court to decline jurisdiction. *Crane Co. v. Guancia Centrale*, (1904) 132 Fed. 713.

Where an alien, residing in New York, instituted suits in New York state courts against defendant, a corporation organized and residing in New Jersey, which removed the causes to the federal court, it will be remanded for doubt as to the latter court's jurisdiction. *Kamenicky v. Catterall Printing Co.*, (1911) 188 Fed. 400.

*Merely formal defects* in a petition to remove a cause from the state to the federal court are waived by appearing in the latter court and moving to remand on the ground that the alleged cause for removal does not exist. *Tomson v. Iowa State Traveling Men's Assoc.*, (1907) 78 Neb. 400, 110 N. W. 997.

Where a cause was properly removable, and was actually removed, it will not be remanded because of an irregularity in the proceedings for removal or because such proceedings were taken under the improper statute. *Bryant Bros. Co. v. Robinson*, (1906) 149 Fed. 321, 79 C. C. A. 259.

*Allowance of amendment to cure formal defect*. — Where a removal petition averred that the controversy was between citizens of different states, and that the amount in controversy, exclusive of interest and costs, exceeded the sum of \$2,000, the federal Circuit Court to which the cause was removed has jurisdiction to permit the petitioner to amend the petition so as to disclose the citizenship of the parties. *Thompson v. Stalman*, (1904) 131 Fed. 809.

Leave to amend a petition for removal, by alleging directly the citizenship of plaintiff's assignor, may be granted by the federal court after the record on removal has been filed

therein, but before any action has been taken thereon, where the record already shows such citizenship in legal effect, and that the case is one properly removable. *Flynn v. Fidelity, etc., Co.*, (1906) 145 Fed. 265.

Where a removal petition set forth the ultimate facts required by law, but did not allege in detail the facts constituting an alleged fraudulent joinder of parties defendant, it may be amended in the federal court in that regard. *Donovan v. Wells*, (C. C. A. 1900) 169 Fed. 363.

**How question of jurisdiction raised and determined — Generally.** — The federal court may determine whether or not a cause has been properly removed to it immediately upon the filing of the record therein either by the removing defendant or the plaintiff, and to make such orders as such determination may require. *Harrington v. Great Northern R. Co.*, (1909) 169 Fed. 714.

A proper allegation of jurisdictional facts in the complaint in federal courts creates a *prima facie* case in favor of jurisdiction. *Hill v. Walker*, (C. C. A. 1909) 167 Fed. 241.

And such *prima facie* case in favor of jurisdiction by a proper allegation of jurisdictional facts in a complaint in an action in a federal court continues until it is overcome by convincing evidence. *Hill v. Walker*, (C. C. A. 1909) 167 Fed. 241.

A party removing a cause to a federal court has a right, after the removal, to the judgment of that court on any question relating to the validity of the service of process, even though such question has been passed on by the state court, since it affects the jurisdiction of the federal court itself. *Flint v. Coffin*, (C. C. A. 1910) 176 Fed. 872.

While this section permits a plaintiff, where the action has been removed to the federal court, to move in the federal court to have it remanded, and if his motion is overruled, and final judgment goes against him, he may appeal to the United States Supreme Court to have reviewed the action of the inferior federal court in overruling his motion to remand, if the cause is not in fact removable, he is also entitled to have it tried in the state court in the first instance without going in the federal court to have it remanded, and the question of whether the cause is removable is for the state trial court in the first instance to the extent of determining whether it will retain jurisdiction. *State v. Mosman*, (1910) 231 Mo. 474, 133 S. W. 38.

The action of the United States Circuit Court in remanding a cause removed from a chancery court is conclusive on the state Supreme Court. *Stockley v. Cissna*, (1907) 119 Tenn. 135, 104 S. W. 792.

**Issue.** — Plaintiff, in order to controvert the facts stated in a removal petition, must make an issue with respect thereto in the federal court in which the issue must be tried. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

**Plea to the jurisdiction.** — A petition for removal sufficient on its face gives the federal court jurisdiction only *prima facie* to try the case on its merits, and the truth of its essential allegations may be put in issue by any

appropriate pleading, the filing of a plea to the jurisdiction being the better practice. The issue should be tried by the jury, subject to the right of the court to direct a verdict thereon when proper, and the burden of proof on the issue rests on the petitioner. *Virginia v. Felts*, (1904) 133 Fed. 85.

*Neither the general denial under state codes nor the general issue at common law* is a proper method of challenging the jurisdiction of federal courts. *Hill v. Walker*, (C. C. A. 1909) 167 Fed. 241.

Where federal Circuit Courts sitting in code states wherein an objection to the jurisdiction of the court over the subject-matter may be put in on the general issue follow such practice, no presumption of jurisdiction attends their judgments or decrees, but facts showing jurisdiction must appear of record. *Peper Automobile Co. v. American Motor Car Sales Co.*, (1910) 180 Fed. 245.

**Affidavits** filed in connection with a plea to the jurisdiction, whether actually offered to be read in evidence or not, should be considered by a federal Circuit Court in deciding the question raised by a plea to the jurisdiction, setting up the objection that the defendant was a foreign corporation not doing business in the state, and that the person attempted to be served with process was not its agent at that time. *Mechanical Appliance Co. v. Castleman*, (1910) 215 U. S. 437, 30 S. Ct. 125, 54 U. S. (L. ed.) 272.

**Merits of cause.** — On a motion to remand a cause removed by one of a number of defendants, the merits of the controversy can be considered only for the purpose of ascertaining the real nature of the alleged cause or causes of action against the several defendants, and whether or not there has been a fraudulent joinder of parties defendant for the purpose of defeating the jurisdiction of the federal court. *McGuire v. Great Northern R. Co.*, (1907) 153 Fed. 434.

**Record.** — On a motion to remand, the whole record as filed in the federal court is to be taken into consideration. *Kyle v. Chicago, etc., R. Co.*, (1909) 173 Fed. 238.

A motion to remand is properly determinable on the facts appearing on the face of the record, but where it controverts allegations of fact in the petition for removal necessary to sustain the jurisdiction of the court, it may by the practice of the court be treated as a plea to the jurisdiction and the parties required to take evidence on such issues. *Harrington v. Great Northern R. Co.*, (1909) 169 Fed. 714.

In the federal courts, the record must show the facts which give the court jurisdiction; otherwise any proceedings had in the cause are void and of no force. *Atchison, etc., R. Co. v. Phillips*, (C. C. A. 1910) 176 Fed. 693.

**Proof required.** — It is not sufficient that a complaint alleges facts showing federal jurisdiction, but such facts must be established by evidence. *Plaut v. Gorham Mfg. Co.*, (1909) 174 Fed. 852.

Where, on a petition for the removal of an action of ejectment, the value of the land is traversed, it must be established by the re-



moving party by proof. This, as the matter in controversy, is a jurisdictional fact, which cannot be left in doubt, as it must be where petition and answer contradict each other. *Davies v. Wells*, (1904) 134 Fed. 139.

Where a complaint contains proper jurisdictional allegations to justify the court in dismissing an action for want of jurisdiction, evidence must be produced convincing the mind to legal certainty that such suit does not really and substantially involve a controversy within its jurisdiction. *Hill v. Walker*, (C. C. A. 1909) 167 Fed. 241.

**Burden on motion to remand or dismiss — Generally.** — Where the jurisdiction of the federal court over a case removed from a state court depends upon a question of fact, the existence of such fact must be pleaded in the petition for removal; and if issue is joined thereon, the burden of proof is on the removing party to establish the existence of such jurisdictional fact. *Woodson County v. Toronto Bank*, (1904) 128 Fed. 157.

The burden rests on a removing defendant to show diversity of citizenship, where jurisdiction of the federal court is dependent on such fact. *Fishblatt v. Atlantic City*, (1909) 174 Fed. 196.

A cause having been removed to the federal court on evidence sufficient to satisfy it at the time of removal that defendant could not obtain a fair and impartial trial in the state court, on account of local prejudice against him, the burden of proof, on a motion to remand, is on plaintiff to show that such local prejudice did not exist. *Parker v. Vanderbilt*, (1905) 136 Fed. 246.

Motions to remand and for removal should be decided by the preponderance of the facts; an erroneous affirmance of a claim to this right may be corrected by the Supreme Court on a certificate of the question of jurisdiction, while a mistaken denial of the claim is not reviewable. *Boatmen's Bank v. Fritzlen*, (1905) 135 Fed. 650, 68 C. C. A. 288, *reversing* (1904) 128 Fed. 608.

**Petition taken as true.** — Distinct and unambiguous allegations of fact in a petition for removal, not denied by any pleading filed by plaintiff, except in so far as contradicted by the record, are to be taken as true, on a motion to remand, or other proceeding challenging the jurisdiction of the federal court. *Kentucky v. Powers*, (1906) 201 U. S. 1, 26 S. Ct. 387, 50 U. S. (L. ed.) 633, *reversing* (1905) 139 Fed. 452.

**At any time — Generally.** — In a suit removed from the state to the federal courts it is the duty of the latter at any stage of the litigation to dismiss or remand the suit on a defect of federal jurisdiction being made to appear, whether the question is raised by the parties or not. *American Bridge Co. v. Hunt*, (1904) 130 Fed. 302, 64 C. C. A. 548.

**Waiver of right to remand or dismissal.** — Making up the issues on the merits without objection waives the right to object because of the nonresidence of both parties within the district, to the jurisdiction of a federal Circuit Court to which the cause has been removed from the state court for diverse citizenship. *Kreigh v. Westinghouse*, (1909) 214

U. S. 249, 29 S. Ct. 619, 53 U. S. (L. ed.) 984, *reversing* (1907) 152 Fed. 120, 81 C. C. A. 338, 11 L. R. A. N. S. 684.

So, also, where a state court erroneously permitted certain defendants to file petitions for removal, and approved bonds given thereon, and such defendants took a transcript to the federal court, and the plaintiffs appeared there, and moved to have the cause remanded, and subsequently on their motion the cause was dismissed without prejudice, it was held that the plaintiffs, by their conduct, lost their right to have the state court's action corrected. *Stephenson v. Illinois Cent. R. Co.*, (1903) 75 S. W. 260, 25 Ky. L. Rep. 442.

Plaintiff, by noticing a demurrer for argument after the removal of cause, waives his right to remand. *Enders v. Supreme Lodge, etc.*, (1910) 176 Fed. 832.

But where a federal court does not acquire jurisdiction by the removal of a cause, it cannot be conferred by any subsequent proceedings by consent or otherwise. *Lomax v. Foster Lumber Co.*, (C. C. A. 1909) 174 Fed. 959. See also *Crane Co. v. Guanica Centrale*, (1904) 132 Fed. 713.

A general appearance by the plaintiff in a federal Circuit Court after the cause has been removed from a state court does not waive an objection to the jurisdiction founded upon the total lack of any controversy of a federal nature, since in such cases consent of both parties cannot confer jurisdiction. *In re Winn*, (1909) 213 U. S. 458, 29 S. Ct. 515, 53 U. S. (L. ed.) 873.

Where, after an attempt has been made to remove a cause to the federal court, plaintiff's counsel entered a special appearance for the sole purpose of moving to retire the case from the docket, and insisting that the proceedings taken had been insufficient to remove the cause, it was held that there was no waiver of plaintiff's right on his objection being sustained to have the cause retired from the docket. *Higson v. North River Ins. Co.*, (1911) 184 Fed. 165.

The removal by one of two joint defendants of a cause which was not removable because of the absence of a separable controversy does not give the federal court jurisdiction, and the cause should be remanded at any stage, at the instance of any party or on the court's own motion, whenever such fact appears. *International, etc., R. Co. v. Hoyle*, (1906) 140 Fed. 180, 79 C. C. A. 128.

Where, on the removal of a cause to the federal court, plaintiff, simultaneously with the filing of the case in such court, moved to remand, it was held that he could not be held to have waived his right thereto by appearance or otherwise. *Pepper v. Rogers*, (1904) 128 Fed. 987.

**Order of court ex mero motu.** — It is the duty of a federal court to dismiss of its own motion, if jurisdiction does not affirmatively appear. *Newcomb v. Burbank*, (C. C. A. 1910) 181 Fed. 334.

In every case the question with which a federal court is first confronted is that of its jurisdiction both over the subject-matter and of the party, and this jurisdiction must affirmatively appear upon the record. Central

Grain, etc., *Exch. v. Chicago Board of Trade*, (1903) 125 Fed. 463, 80 C. C. A. 299.

A federal court is not only permitted, but is bound, to examine an action and refuse relief, unless jurisdictional elements affirmatively appear. *A. B. Andrews Co. v. Puncture Proof Footwear Co.*, (1909) 168 Fed. 762.

**Prior to the term of court.**—A motion to remand to the state court an indictment removed to a federal court can be made prior to the first day of the then next term of the federal court on production of copies of the proceeding. *New Jersey v. Corrigan*, (1905) 139 Fed. 758.

**Effect of amendment.**—Where, after a cause had been erroneously removed to the federal court over plaintiff's objection, that court sustained a demurrer to the complaint in so far as it affected the resident defendant, it was held that the plaintiff, by amending his complaint and proceeding as against the nonresident defendant in the federal court, did not waive his objection that the cause had been erroneously removed. *Thomas v. Great Northern R. Co.*, (C. C. A. 1906) 147 Fed. 83.

On the removal of a cause to obtain both equitable and legal relief, complainant filed amended pleadings, as required by Circuit Court rule 19, splitting the cause into two, one an action at law, and the other a suit in equity, after which it was decided in the law action that the cause was improperly removed. On appeal it was held that the bill in equity so filed did not constitute the commencement of a separate and distinct suit, and hence on the reversal of a decree therein the suit should be remanded to the state court. *Utah-Nevada Co. v. De Lamar*, (1906) 145 Fed. 505, 75 C. C. A. 1.

**Diverse citizenship.**—Where defendant removed a cause to the federal court on the ground of diverse citizenship, it was not entitled to a dismissal on its subsequently appearing that plaintiff was an alien. *Rones v. Katalla Co.*, (1910) 182 Fed. 946, *affirming* (C. C. A. 1911) 186 Fed. 30.

A suit against a corporation of another state cannot be maintained in a federal court in the district of the plaintiff's residence, where jurisdiction depends on diversity of citizenship alone, where service was not made within the district of suit, and defendant has no place of business therein, although it may have such place of business and be served in another district in the same state; and where such a suit has been properly removed into a federal court the service will be quashed. *Wange v. Public Service R. Co.*, (1908) 150 Fed. 189.

**Parties collusively made or joined**—*Generally.*—Where the arrangement of parties to a suit in a federal court is merely a contrivance between friends having no real antagonism, to give the court jurisdiction and avoid the effect of state decisions, the suit will be dismissed as collusive, although, if the controversy were real, it would have jurisdiction. *Stephens v. Smartt*, (1909) 172 Fed. 466.

Where a petition for removal alleges

fraudulent joinder of defendants, it is the plaintiff's duty to appear and submit to the jurisdiction of the court on the merits or to plead in abatement, putting in issue the allegations of fact on which the removability of the cause depends, in which case the federal court would acquire jurisdiction to hear and determine the issue of such joinder. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

The rule that federal courts must take notice of a want of jurisdiction whenever it appears does not apply when such want of jurisdiction depends, not on a single uncontroverted fact, but on a finding of an issue of fact as to the fraudulent joinder of defendants to prevent a removal, which is determinable only after a hearing on the facts. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

**Cases wherein collusiveness was found to exist.**—An action brought by a South Dakota corporation against a citizen of Georgia, in a federal Circuit Court sitting in the latter state, will be dismissed as collusive, where such corporation is merely the agent of Georgia attorneys, who brought it into existence as a corporation that individual citizens of Georgia having controversies with other individual citizens of that state might, in their discretion, have the use of its corporate name in order to create cases apparently within the jurisdiction of the federal court. *Southern Realty Invest. Co. v. Walker*, (1909) 211 U. S. 603, 29 S. Ct. 211, 53 U. S. (L. ed.) 346.

A federal Circuit Court has no jurisdiction, on the ground of diversity of citizenship, of a suit brought against a municipality by the mortgagee of a waterworks company, to enforce the municipality's contract with that company, where there is no diversity of citizenship between the municipality and the waterworks company, and the interests of the latter and its mortgages are not antagonistic, it obviously being made a defendant instead of plaintiff solely for the purpose of reopening, in the federal courts, a controversy which had been decided against the waterworks company in the state court. *Dawson v. Columbia Ave. Sav. Fund, etc., Co.*, (1905) 197 U. S. 178, 25 S. Ct. 420, 49 U. S. (L. ed.) 713.

To establish the claim that a suit brought in a federal court by a nonresident stockholder in a local corporation against the corporation and a city to enjoin the enforcement of an ordinance of the city is collusive and a fraud on the jurisdiction of the court, it is not sufficient that the company would be benefited by the success of the complainant, which is the theory upon which all suits are brought, nor that its officers express a desire for his success, nor that his counsel represented the company in a prior suit brought by it in the same behalf; but an agreement between complainant and the company, pursuant to which the suit was brought, must be shown either directly or inferentially. *Chicago v. Mills*, (1907) 204 U. S. 321, 27 S. Ct. 286, 51 U. S. (L. ed.) 504, *affirming* (1906) 143 Fed. 430.

A corporation, being a citizen of the same

state as the defendants, and therefore incapable of suing in the federal courts to restrain defendants from inducing its employees to strike, brought a suit for such relief in the state courts, pending which complainants, who were nonresident stockholders, made a demand on the officers of the corporation to bring suit in the federal courts, knowing that the corporation could not do so, and, on the corporation's refusal, themselves filed a bill for such relief in the federal court. It was held that such acts did not constitute a compliance with equity rule 94, relating to stockholders' bills, and requiring that such suit shall not be collusive to confer federal jurisdiction, and that the court had no jurisdiction. *Kemmerer v. Haggerty*, (1905) 139 Fed. 693.

Uncontradicted testimony that a resident employee sued jointly in tort with his nonresident employer was merely a draftsman, whose work was confined to making the necessary drawings based on the plans and ideas of others, and that he had nothing to do with planning the apparatus which was alleged to have been so defectively constructed as to have caused the injury complained of, is sufficient to support a conclusion of law that such employee was made a defendant for the sole purpose of preventing the exercise of the right of removal by the nonresident defendant. *Wecker v. National Enameling, etc., Co.*, (1907) 204 U. S. 176, 27 S. Ct. 184, 51 U. S. (L. ed.) 430.

Whether or not allegations of fact in a complaint intended to show a joint cause of action against two defendants are true may be put in issue by a petition for removal which alleges that the joinder was solely for the fraudulent purpose of preventing a removal, and may be inquired into and determined on a motion to remand; and if it is found that they were untrue, and that such fact was or could have been known to the pleader, the court is justified in drawing the conclusion, as a matter of law, that the purpose was to prevent the exercise of the right of removal by the nonresident defendant. *Gustafson v. Chicago, etc., R. Co.*, (1904) 128 Fed. 85.

*Cases decided not to have been collusively brought.* — Where a suit in a federal court is between citizens of different states, and presents a *bona fide* cause of action involving the statutory amount, there is no collusion in a legal sense which will defeat the jurisdiction of the court because the parties agreed that the suit should be brought therein, and that the averments of the bill should be admitted by the answer. *Pennsylvania Steel Co. v. New York City R. Co.*, (1907) 157 Fed. 440.

Where two persons, entitled to separable though precisely similar claims charged on real estate, joined in a bill to enforce the same, and the bill was amended by omitting one of them, that it might not fail for want of requisite diversity of citizenship, and was prosecuted by the other on her own claim, the amended bill stating that the person omitted consents to the relief sought and to

all proceedings had or decree made or that may be made in the case, it was held that the circumstances did not disclose collusion, so as to render the amended bill demurrable. *Mathieson v. Craven*, (1908) 164 Fed. 471.

In a suit by a stockholder of a gas company against the company and a city to restrain the enforcement of an ordinance fixing rates to be charged by the company to consumers, the fact that the company is incorporated in the same state as the city does not deprive a federal court of jurisdiction. *Mills v. Chicago*, (1904) 127 Fed. 731.

Where a petition for removal filed by one of two defendants shows that its codefendant has not been served with the summons, and affirmatively alleges that he in no manner contributed to the injury sued for, and that it is not the plaintiff's intention to prosecute the action against him in good faith, but that he was fraudulently joined as a defendant for the sole purpose of defeating the jurisdiction of the federal court, if no issue is joined upon such allegations they are to be taken as true; and a motion to remand, which raises only the legal question of the sufficiency of the petition, should be overruled where the petition is otherwise sufficient. *Dishon v. Cincinnati, etc., R. Co.*, (1904) 133 Fed. 471, 66 C. C. A. 345, *affirming* (1903) 126 Fed. 194.

Where the complaint in an action in a state court states a joint cause of action in tort against two defendants, one a citizen of the state and the other of another state, allegations in a petition for removal filed by the nonresident defendant, which are in substance merely denials of allegations of fact made in the complaint, are not sufficient to justify a conclusion of a fraudulent joinder, and cannot be considered on the merits by the federal court as to the issues so tendered on a motion to remand after removal, but the allegations of the complaint must be taken as true for the purposes of such motion. *Thresher v. Western Union Tel. Co.*, (1906) 148 Fed. 649.

Where, in a suit by stockholders of a corporation, brought in a state court, relief was granted to the plaintiffs, their right to which was affirmed on appeal by the highest court of the state, on a subsequent removal of the cause, after the filing of supplemental pleadings, it will be assumed by the federal court, *prima facie*, at least, and for the purposes of a motion to remand, that, under the laws of the state, plaintiffs had the right to maintain the suit in their own names to enforce the rights asserted in their pleadings, and that the pleadings they were permitted to file in the state court were appropriate under the state practice. *Dodd v. Louisville Bridge Co.*, (1904) 130 Fed. 186.

The jurisdiction of the Circuit Court of the United States for the Northern District of Illinois, of a suit brought by a California stockholder of an Illinois gas company, after the company's refusal to sue, to enjoin the city of Chicago from enforcing an ordinance regulating gas rates, on the ground of want of power in the municipality to pass the

ordinance, cannot be regarded as collusively or fraudulently invoked because of complainant's motive in preferring a federal tribunal, or because subsequent events made it to the interest of the company to make common cause with him against the enforcement of the ordinance, or because an officer and large stockholder in such company personally contributed to the expenses of the suit, or because complainant's counsel was afterwards retained in a suit then pending between the company and the municipality. *Chicago v. Mills*, (1907) 204 U. S. 321, 27 S. Ct. 286, 51 U. S. (L. ed.) 504, *affirming* (1906) 143 Fed. 430.

The jurisdiction of a federal court of a suit in equity by a nonresident stockholder to enjoin an alleged breach of trust by the directors of the corporation, or other violation of corporate duty, is not affected by the fact that he is acting in concert with other stockholders, who are citizens of the same state as the corporation, or that such stockholders contribute to the expenses of the suit, where the controlling majority in the stockholders and directors is opposed to the objects of the suit; and there is therefore no collusion, in the sense of the statute, or within the meaning of equity rule 94. *New Albany Waterworks v. Louisville Banking Co.*, (1903) 122 Fed. 776, 58 C. C. A. 576; *Consumers' Gas Trust Co. v. Quinby*, (1905) 137 Fed. 882, 70 C. C. A. 220.

*Time of making objection.* — Objection to the jurisdiction of a federal court in a suit on the ground that a collusive transfer of the property which is the subject of the suit was made for the purpose of conferring such jurisdiction cannot be taken for the first time in a bill of review after final decree has been entered and the term has ended. *Acord v. Western Pocahontas Corp.*, (C. C. A. 1909) 174 Fed. 1019, *affirming* (1907) 156 Fed. 989.

*Title to property made collusively.* — The facts that a domestic corporation permitted a mortgage on lands owned by it to be foreclosed, and that another corporation having in part the same officers and stockholders was organized in another state, which purchased such lands at the sale and also the stock of the former corporation, which was thereafter dissolved, are not sufficient to establish a collusive transfer of the lands, for the purpose of enabling a suit in respect thereto to be brought in a federal court, such as deprived it of jurisdiction of such suit. *Acord v. Western Pocahontas Corp.*, (C. C. A. 1909) 174 Fed. 1019, *affirming* (1907) 156 Fed. 989.

The conveyance of all of the property of a partnership to a corporation organized for the purpose by the partners and the division between them of the stock of the corporation, a small part of such property consisting of lands in controversy in a subsequent action brought by the corporation in a federal court, cannot be held a simulated or sham transfer which will oust such court of jurisdiction because the partnership could not have sued therein, where the conveyance was *bona fide* and no conveyance was contemplated. *Slaugh-*

*ter v. Mallet Land, etc., Co.*, (1905) 141 Fed. 282, 72 C. C. A. 430.

A trial judge may properly dismiss a suit, where he is satisfied from the evidence produced on the trial that the property involved as the subject-matter of the action was collusively transferred to plaintiff, who was a citizen of another state, to enable a suit to be brought in the federal court and in fraud of its jurisdiction, notwithstanding the fact that he had previously overruled a motion to dismiss on that ground; and such dismissal may be made by the Circuit Court of Appeals on the same grounds. *Turnbull v. Ross*, (1905) 141 Fed. 649, 72 C. C. A. 609.

*Assigned demands.* — Where persons largely interested in a Pennsylvania corporation, desiring to institute a suit in the federal courts of Pennsylvania for the appointment of a receiver, caused certain bonds and stock of little or no value to be assigned to a citizen of New Jersey, who was a mere stenographer in the office of one of the corporation's attorneys, for no other consideration than that he should sign the bill, which the corporation's attorneys thereafter filed, it was held that such transaction constituted a fraud on the court's jurisdiction sufficient to defeat it, though the assignment was absolute. *Kreider v. Cole*, (1907) 149 Fed. 647, 79 C. C. A. 339, *reversing* (1905) 140 Fed. 944.

Where it appears that a cause of action has been assigned in order to confer jurisdiction on a federal court, it is the court's duty to dismiss or demand a suit *sua sponte*. *Consolidated Rubber Tire Co. v. Ferguson*, (C. C. A. 1910) 183 Fed. 756.

*On appeal to the Circuit Court of Appeals* in an action removed from the state court it is the duty of the Court of Appeals to determine whether the record exhibits a case properly removable, regardless of whether any objection was taken to the jurisdiction of the federal court either in the court below or on appeal. *Fred Macey Co. v. Macey*, (1905) 135 Fed. 725, 68 C. C. A. 363.

A Circuit Court of Appeals may properly permit the amendment in that court of a petition for removal by supplying an averment of citizenship requisite to give jurisdiction, where it appears that its omission was inadvertent and it is shown by stipulation of the parties that the requisite diversity of citizenship in fact existed. *Kansas City Southern R. Co. v. Prunty*, (1904) 133 Fed. 13, 66 C. C. A. 163.

*Review.* — Where a case was erroneously removed from a state to a federal court, the federal court acquires no jurisdiction, and a judgment therein will be reversed on a writ of error, and the cause remanded, with directions to remand the cause to the state court. *Juillard v. Barr*, (C. C. A. 1910) 177 Fed. 921.

Mandamus, rather than prohibition, is the proper remedy where the Circuit Court of the United States refuses to remand to the state court from which it was removed a case over which the federal court has no jurisdiction. *Ex p. Wisner*, (1906) 203 U. S. 449, 27 S. Ct. 150, 51 U. S. (L. ed.) 264.

## Vol. IV, p. 378, sec. 6.

**Effect of proceedings in state court.**—Where, at the time a petition for removal of a cause was filed, a motion to make the complaint more definite and certain was pending and undetermined in the state court, such motion was transferred to the federal court with the record to be there determined. *Bryce v. Southern R. Co.*, (1904) 129 Fed. 966.

After the removal of a cause into a federal court in a district in which the defendant could not originally have been sued in such court, and the filing of a motion to remand, the defendant cannot improve his position by entering a general appearance. *Tierney v. Helvetia Swiss F. Ins. Co.*, (1908) 163 Fed. 82.

**The time for answering a complaint in a case removed to the federal courts from a state court** is fixed by ascertaining the number of days which had elapsed between the service of the complaint in the state court and the date of the removal, suspending the time between such removal and the date the record reaches the federal court, which then begins to run from the day of the entry in such court, and, as provided by the Circuit Court rules (Fourth Circuit), the defendant will be in time if he serves his answer on a rule day within twenty days thereafter. *Bryce v. Southern R. Co.*, (1904) 129 Fed. 966.

Where, after the removal of a cause to the federal court, a motion to remand is made, such motion extends the time to answer until the rule day next succeeding the determination thereof. *Bryce v. Southern R. Co.*, (1904) 129 Fed. 966.

**Pleading.**—The right of removal not being determined by the form of action in the state court, but by the essential character of the case, and, regardless of form, the cause is removable if the federal court has jurisdiction upon either its equity or law side, and it may require the plaintiff to replead accordingly. *Stockton v. Oregon Short Line R. Co.*, (1909) 170 Fed. 627.

Where a state court had jurisdiction in equity of a suit by a tontine policy holder against the insurer for an accounting which was not possessed by a federal court sitting in equity in such state, and complainant cannot obtain adequate relief in a suit at law in the federal court, he will not be ordered to replead on the removal of the cause for diversity of citizenship, but the cause will be remanded to the state court. *Peters v. Equitable L. Assur. Soc.*, (1906) 149 Fed. 290.

**Amendment to cure defective service.**—After removal of an action from a state to a federal court, and the setting aside of the service of summons in the latter court on motion of the defendant, the court may permit the plaintiff to file an amended petition and order a summons to issue thereon. *U. S. Fidelity, etc., Co. v. Woodson County*, (1906) 145 Fed. 144, 76 C. C. A. 114.

Where a proceeding to condemn real estate, or an easement therein, under the power of eminent domain, is removed from a state court into a Circuit Court of the United States, and after compensation has been as-

certained a writ of error is prosecuted from the judgment, any supersedeas obtained should be modified so that the petitioner shall have the same rights as though the proceedings had remained in the state court; and, where the state statute provides that the proposed work shall not be delayed by appellate proceedings in case the amount of compensation awarded is paid into court, the supersedeas in the federal court will be modified to conform to such provision. *Broadmoor Land Co. v. Curr*, (1904) 133 Fed. 37, 66 C. C. A. 143.

**A judgment of a federal court, rendered in a cause removed from a state court, is not void because of the insufficiency of averment of jurisdictional facts in the petition for removal, where the plaintiff on a motion to remand has by his answer put in issue the truth of the allegations made in the petition for removal and upon the answer and the evidence the issue was decided against him.** *Illinois Cent. R. Co. v. Sheegog*, (1910) 177 Fed. 756.

**Costs.**—Where the judgment of a Circuit Court is reversed by the Circuit Court of Appeals on the ground that the cause was improperly removed from a state court, costs should be awarded against the removing party. *Kansas City Southern R. Co. v. Prunty*, (1904) 133 Fed. 13, 66 C. C. A. 163.

Where, after removal from the state court, a rule was granted on the plaintiff in the federal court to show cause why the case should not be proceeded with, though plaintiff's counsel has been negligent, the federal court is not authorized to enter an order of nonsuit and dismissal and award defendant costs, with judgment and execution against the plaintiff for the same, but can only dismiss the proceedings and remand them to the state court. *Dawson v. Kinney*, (1906) 144 Fed. 710.

**Criminal prosecutions.**—Where a defendant in a criminal prosecution, removed into the federal court, is convicted and sentenced in that court in accordance with the state law, either to be executed or imprisoned, he should be delivered to the proper officer of the state for the execution of the sentence; if a fine is imposed, which is paid, it should be transmitted to the clerk of the court from which the cause was removed. *Virginia v. Felts*, (1904) 133 Fed. 85.

On the trial of a defendant in a criminal prosecution, no procedure is prescribed by the statute; but the offense charged being against the state law, and prosecuted by the state, the state practice should be followed in substantive matters, at least in felony cases, such as in the impaneling and charging of the jury, the number of challenges allowed, in determining the competency of witnesses, and in confining the jurors during the trial, where that is required by the law of the state. *Virginia v. Felts*, (1904) 133 Fed. 85.

Where the state fails or refuses to prosecute in such a cause after its removal, the proper course is for the court to impanel a jury and direct a verdict of not guilty. *Virginia v. Felts*, (1904) 133 Fed. 85.

## Vol. IV, p. 378, sec. 7.

**Proceedings between removal and time for filing record.**—Though the filing of a petition to remove a cause to the federal court operates as a removal and vests complete jurisdiction over the cause for all purposes in the federal court, the regular course of proceedings is suspended until the return day for the filing of the transcript in the federal court, though such court has jurisdiction in the interim to take any extraordinary proceedings required for the protection of any party to the cause. *Goldberg v. German Ins. Co.*, (1907) 152 Fed. 831.

**Effect of filing record.**—Where, upon the face of the record, including a petition for removal duly filed, a cause appears to be removable, on the filing of such record and the docketing of the case in the federal court that court acquires jurisdiction at least for the purpose of determining that question, and, as ancillary to such jurisdiction, may enjoin the plaintiff from proceeding in the state court until it shall hear and determine the question of its own jurisdiction. *McAlister v. Chesapeake, etc., R. Co.*, (C. C. A. 1907) 157 Fed. 740.

Where a state court refuses to order the removal of a cause, the defendant, within the prescribed time, may file a copy of the record in the proper federal court and have the cause docketed there, after which the federal court is required to proceed in the exercise of the jurisdiction lost by the state court, which can be regained only by an order of the federal court remanding the cause. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

But where the state court refused to remove a cause to the federal court, it has been held that the defendant's act in having the record copied and filing the same with the clerk of the federal court does not carry the case into the federal court in such a sense as to render it a pending action there. *Cincinnati, etc., R. Co. v. Curd*, (1905) 89 S. W. 140, 28 Ky. L. Rep. 177.

Where a state court, after denying a petition to remove an action at law to the federal court, continued to exercise jurisdiction notwithstanding the cause was removed by the filing of a certified transcript of the record, whereupon the removing party obtained an injunction restraining plaintiff from proceeding in the state court until the federal court could pass on the issue determinative of its jurisdiction, it was held that the determination of such issue should have been by the federal court having jurisdiction of the action at law, and not as a part of the injunction suit. *Donovan v. Wells*, (C. C. A. 1909) 169 Fed. 363.

**Time for filing record.**—Where a term of the federal Circuit Court was in session at the time an application for removal of a

cause was made, it was held that the applicant was not in default for failure to file the record within twenty days, but was entitled to file the same on or before the first day of the next succeeding term. *Goldberg v. German Ins. Co.*, (1907) 152 Fed. 831.

In *Finney v. American Bonding Co.*, (1907) 13 Idaho 534, 99 Pac. 859, it appears that an attempt was made to remove a case from a state court to the United States court and judgment was rendered in favor of plaintiff in the latter court. The United States Court of Appeals remanded the case to the state court without trial; in the meantime the action had been tried by the state court in opposition to the wishes of defendant, and a judgment rendered Feb. 19, 1905, and an appeal taken April 17, 1905. The order remanding the case to the state court was filed in the state court March 20, 1907, after which transcript on appeal was filed. It was held that the party undertaking the removal must take the consequences of the same, and his failure to file a transcript on appeal from the judgment of the state court within the time required by statute rendered dismissal of the appeal necessary.

**Record in prosecution against revenue officer.**—Where a prosecution against a revenue officer has been commenced by *capias* or other process of arrest, the federal court, on the filing of the petition for removal, issues a writ of *habeas corpus cum causa*, which, in case the defendant has given bail, may be addressed to the marshal, a duplicate to be served upon the clerk of the state court. It is the duty of the petitioner, and not of the state, to procure the indictment and proceedings of the state court; and where the clerk has been tendered his proper fees therefor, and fails or refuses to furnish a certified copy of the record, a writ of *certiorari* should issue from the federal court, or the record may be supplied by affidavit, which course may also be taken when the petitioner is unable to pay the clerk's fees. *Virginia v. Felts*, (1904) 133 Fed. 85.

**Attachment record.**—Under a statute which provides that an attachment against a non-resident of the state may be made returnable to the Superior Court of any county where an attachment is sued out in one county, and executed by serving summons of garnishment in another county on filing in the court therein a certified copy of the original affidavit and bond, it has been held that the proceedings in the court where the service is made are ancillary to, and a part of, the original suit, and on a removal of such suit, the record required to be filed in the federal court includes such proceedings. *Woodward Lumber Co. v. Vizard*, (1906) 144 Fed. 982.

## Vol. IV, p. 380, sec. 8.

**General application of section.**—This section evidently applies to suits local in character, and there may be cases where it is a

matter of indifference whether the suit be regarded as brought under this section or under R. S. sec. 742, 4 Fed. Stat. Annot. 555,

See *Horn v. Pere Marquette R. Co.*, (1907) 151 Fed. 626, 632.

This statute clearly does not enlarge the right of the individual to bring suit, where before he had no right to sue, but simply allows him, if he has right of action, to bring it in *loco rei sitæ*. *Canton Roll, etc., Co. v. Rolling Mill Co.*, (1907) 155 Fed. 321, holding that this section confers no right upon a simple contract creditor to maintain a creditors' suit in a federal court to set aside an alleged fraudulent conveyance of property by the debtor, nor does the fact that complainant has an alleged mechanic's lien upon the property afford basis for such a general creditor's suit, since such lien, if valid, may be enforced *in rem* against the property, regardless of conveyances, whether prior or subsequent.

**Strictly construed.**—The requirements of this section are not met by an order merely directing the service of process on a defendant by the marshal of another district, and such service of a subpoena in the usual form does not confer jurisdiction. *Jennings v. Johnson*, (C. C. A. 1906) 148 Fed. 337, where the court said: "The statute clearly intends that the court should set the time within which the defendant should plead, answer, or demur. In many cases it would be proper to give a much longer time than would be allowed by the terms of a subpoena in equity issued in the usual form. Besides, there is nothing in the statute to indicate that Congress intended to confer the authority to issue process to, and serve it on, defendants without the territorial jurisdiction of the court. Statutes conferring jurisdiction to proceed against absent parties are strictly construed. In such cases, to permit the court to assume jurisdiction without conforming to the statute would be to dispense with the forms of law prescribed by Congress for the security of absent parties."

**"A claim to" real property.**—The asserted right of citizens of New York and West Virginia, as owners of timber lands in Georgia, near the Tennessee boundary line, to protection against the destruction of their forests by the discharge of deleterious fumes and gases from the works of a New Jersey corporation situated within the territorial jurisdiction of the federal circuit for the Eastern District of Tennessee, is not a claim to real property within the district, within the meaning of this section. *Ladew v. Tennessee Copper Co.*, (1910) 218 U. S. 357, 31 S. Ct. 81, 54 U. S. (L. ed.) 1060, affirming 179 Fed. 245.

**Letting in absent defendants.**—This section gives to absent defendants an absolute right to appear in and defend within a year after final judgment a suit to enforce a lien or to remove a cloud on title to property within the district, whenever the jurisdiction of the federal Circuit Court over them rested upon publication, even though they may in fact have had knowledge of the suit. *Perez v. Fernandez*, (1911) 220 U. S. 224, 31 S. Ct. 412, 55 U. S. (L. ed.) 443.

**No other terms than the payment of costs** can be imposed by the court in opening a decree to permit absent defendants to appear

and defend. *Perez v. Fernandez*, (1911) 220 U. S. 224, 31 S. Ct. 412, 55 U. S. (L. ed.) 443.

**Property not wholly in one district.**—Suit may be brought within either district, where the property against which the proceeding shall be taken lies partly in one district and partly in another, and both districts are within the state. *Horn v. Pere Marquette R. Co.*, (1907) 151 Fed. 626, 632.

**Indispensable parties.**—The relief provided for in this section cannot be granted in a suit in equity in the absence of an indispensable party. *Mathieson v. Craven*, (1908) 164 Fed. 471.

**Special appearance and motion to quash service.**—The filing by the defendant, who was a citizen and resident of another state and was there served, of a motion to quash the service on the ground that it appeared from the face of the bill of complaint that the relief sought was of such a nature that he could not lawfully be called upon to defend against the same in that district, does not invoke the exercise of the jurisdiction of the court on the merits, so as to constitute a general appearance; the question raised being whether the case made by the bill was one of a local nature within this section so as to authorize the court to obtain jurisdiction of the defendant by publication or by service of process without the district, which necessarily required the court to look into the bill. *Jones v. Gould*, (C. C. A. 1906) 149 Fed. 153. See also *York County Sav. Bank v. Abbot*, (1905) 139 Fed. 988.

**On motion to vacate an order for substituted service** under this section the court must examine the bill in order to ascertain whether or not the case is within the statute; and in respect to the scope and extent of such examination it is not sufficient for the complainant, with such facts alleged in his bill as indicate his good faith and relieve the case from a charge of frivolousness, to pray for one or more of the objects enumerated in the section, but he must also show himself entitled to such relief. *Gage v. Riverside Trust Co.*, (1906) 156 Fed. 1002.

**To what suits applicable.**—Under this section the federal court has no jurisdiction of a suit in equity by a lessee against a nonresident lessor to enforce alleged rights under the terms of the lease by requiring the defendant, who has not appeared, to elect either to sell the land to, or to buy the building thereon from, complainant at an appraised value, or to have the court make such election and carry the same into effect through a master or trustee appointed for the purpose. *York County Sav. Bank v. Abbot*, (1905) 139 Fed. 988.

Where a minority stockholders' bill sought the appointment of a receiver for the corporation, with authority to appear in an action in a state court and there obtain relief against a judgment rendered against the corporation with an injunction against further interference with the corporation's property, and an accounting as to certain stock alleged to have been pledged for the indemnity of the corporation, it was held that the suit was not

local in character, warranting service on defendants, not citizens of the state, by publication. *Schultz v. Highland Gold Mines Co.*, (1907) 158 Fed. 337.

*A suit by a receiver to adjust equities* existing between himself, as such receiver, and nonresident defendants, in whose behalf in part another defendant has obtained a judgment in his own name which he is seeking to enforce against a fund in the receiver's hands, is one to remove an incumbrance or lien or cloud within the meaning of this section. *Brown v. Pegram*, (1906) 143 Fed. 701.

*Title to real or personal property.* — The statutory language imports a localized subject. It does not concern the rights to property which is intangible and transitory, choses in action and the like, adhering to the person of the owner, who may be here to-day and abroad to-morrow. In strictness, the word "title" is applicable only to real estate. But it is also sometimes used to denote a similar attribute of personal property. When so used it has a kindred meaning, and contemplates some specific tangible thing, having some resemblance to real property in its characteristics which justifies the borrowing of the term. *Jones v. Gould*, (C. C. A. 1906) 149 Fed. 153.

*Suit to wind up partnership, etc.* — A suit by a member of a syndicate, which was in effect a partnership, to wind up its affairs and for the appointment of a receiver on the ground of mismanagement by the managers, is not within this section, especially where the only allegation in the bill with respect to property within the district is that the syndicate is the owner of stock in certain railroads therein. *Jones v. Gould*, (C. C. A. 1906) 149 Fed. 153.

*A bill to set aside a deed and enforce a claim to certain land.* For such a case see *Miller v. Ahrens*, (1907) 150 Fed. 644.

*Ejectment* is an action within the provisions of this section. *Elk Garden Co. v. T. W. Thayer Co.*, (1910) 179 Fed. 556.

*Suit to set aside judgments.* — Under this section a federal Circuit Court has jurisdiction of a suit in equity brought by citizens of the state in which it sits, against citizens of other states, to set aside, as fraudulently obtained, judgments of a probate court against an intestate's estate, which are a lien on his property situated within the district and inherited by complainants. *McDaniel v. Traylor*, (1905) 196 U. S. 415, 25 S. Ct. 369, 49 U. S. (L. ed.) 533.

*A suit to cancel and annul certain deeds and leases* of the property of a railway company lying wholly within the Eastern District of Illinois may be brought and maintained in the federal Circuit Court for that district against defendants who are inhabitants of the Northern District of Illinois, as being a suit to remove an incumbrance, etc., within the meaning of this section. *Citizens' Sav., etc., Co. v. Illinois Cent. R. Co.*, (1907) 205 U. S. 46, 27 S. Ct. 425, 51 U. S. (L. ed.) 703.

*Suit to enjoin diversion of stream.* — A suit brought to enjoin a defendant from wrongfully diverting, in California, the waters naturally flowing down a river having its source in that state, and flowing into and through the state of Nevada, where complainant's lands are situated, he being the lowest proprietor on the river, is an action transitory in its nature, so that a court in Nevada, having acquired jurisdiction of defendant's person, has jurisdiction to try the same. *Miller v. Rickey*, (1904) 127 Fed. 573.

*A suit for partition* comes within the class of cases specified in this section, and one in which any question between any of the parties, plaintiffs or defendants, affecting their rights or interests in the land, may be put in issue and determined; and a federal court is not without jurisdiction because questions may arise between plaintiffs who are citizens of the same state, nor will it make a realignment of parties to defeat its jurisdiction because such questions may arise, where the bill, although properly setting out the interest of each party in the premises, does not disclose any controversy which renders it necessary. *German Sav., etc., Soc. v. Tull*, (C. C. A. 1905) 136 Fed. 1.

*Residence in the district.* — This section confers a privilege upon the plaintiff of joining in local actions defendants who are non-residents of the district. *Miller v. Ahrens*, (1907) 150 Fed. 644.

This section gives jurisdiction to a Circuit Court over an action brought by a resident of one state against a corporation organized under the laws of another state and stockholders of that corporation, for the purpose of removing incumbrances from the property of the corporation in the district in which the suit is brought, even if some of the stockholders are not residents of the district in which they are sued. *Schultz v. Diehl*, (1910) 217 U. S. 594, 30 S. Ct. 694, following *Jelenik v. Huron Copper Min. Co.*, (1900) 177 U. S. 1, 20 S. Ct. 559, 44 U. S. (L. ed.) 647.

### Vol. IV, p. 387, sec. 3.

This section is re-enacted without change in Judicial Code, sec. 66, *ante*, title JUDICIARY, p. 159 of this Supplement.

Prior to the enactment of this statute a receiver could not be sued without leave of the court by which he was appointed. This was a rule of universal application in so far as the federal courts were concerned. *Willcox v. Jones*, (C. C. A. 1910) 177 Fed. 870.

This Act abrogated the rule that a receiver

could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts and to have the justice and amount of his demand determined by the verdict of a jury. He ceased to be compelled to litigate at a distance or in any other forum or according to any other course of justice than he would be entitled to if the property or business were not being administered by



the federal court. *Gableman v. Peoria, etc., R. Co.*, (1900) 179 U. S. 335, 21 S. Ct. 171, 45 U. S. (L. ed.) 220.

**Service of process on receiver sued in state court.**—Under this section a federal receiver in charge of corporate property who is sued in a state court may be served with process in the manner prescribed by the law of such state for service of like process upon the corporation. *Peterson v. Baker*, (1908) 78 Kan. 337, 97 Pac. 373.

**Trustee in bankruptcy sued as "manager."**—A trustee in bankruptcy is appointed by a "court of the United States," and is a "manager" of property within the meaning of this section and may be sued in a state court in respect to an act or transaction described in the section. *Gardner v. Planters' Nat. Bank*, (Tex. 1909) 118 S. W. 1146.

**Receiver in bankruptcy.**—Under this section a temporary receiver in bankruptcy, appointed by a federal District Court, may be sued in trover in a state court, without leave of the bankruptcy court. *In re Kanter*, (C. C. A. 1903) 121 Fed. 984.

**Acts and transactions in carrying on business.**—Where the cause of action alleged in a suit against a receiver is primarily one for the recovery of land and to remove cloud from title, and incidentally to recover for the removal of timber from the land by the receiver and his employees, it is not a suit within the description of this section. *Morse v. Tackaberry*, (Tex. 1911) 134 S. W. 273.

A federal Circuit Court appointed a receiver for a railroad, and thereafter entered an order in the receivership proceedings appointing a commissioner to hear garnishment suits against employees of the railroad and provided how such claims could be adjusted. A garnishment suit was filed with the commissioner, and the receiver, in pursuance of the order, certified the amount due the employee, and the garnishment was satisfied. The employee then sued the receiver in the state court without leave of the federal court to recover the full amount of the wages due. It was held that the employer could not maintain the suit without leave of court, since the commissioner and receiver in satisfying the garnishment acted only under order of the court, and the transaction did not amount to a carrying on of business connected with the property. *Harmon v. Best*, (Ind. 1910) 91 N. E. 19.

As to what are acts or transactions "in carrying on the business connected with such property" see further *Wrightsville Hardware Co. v. Hardware, etc., Mfg. Co.*, (1910) 180 Fed. 586; *Wrightsville Hardware Co. v. Colwell*, (1910) 180 Fed. 589.

**A person injured by the operation of a street railway by a receiver** appointed in mortgage foreclosure proceedings in a federal court is not bound to apply for an allowance of damages in such proceedings, but may reduce his claim to judgment in a state or other court having jurisdiction. *Nashville R., etc., Co. v. Bunn*, (C. C. A. 1909) 168 Fed. 862.

**Prior demands.**—This section is limited to suits arising out of transactions of the receiver after his appointment and assumption

of control of the property, and does not apply to causes of action against the corporation arising, but not sued on, prior to the receiver's appointment. *Harmon v. Perkins*, (1909) 45 Ind. App. 83, 88 N. E. 961.

Where the cause of action in a suit in a state court against a receiver is one against a railroad for loss of freight before the appointment of the receiver, the failure to obtain leave to sue justifies the court in dismissing the receiver from the proceedings. *Galveston, etc., R. Co. v. Pennefather*, (Tex. 1910) 126 S. W. 948.

**Implied leave to sue receiver.**—Where the federal court appointing a receiver for a railroad expressly authorized him to defend all actions theretofore brought, seeking to establish any claim against the property in his hands, including the demands of plaintiff for damages for personal injuries, such order was ample authority for the maintenance of plaintiff's action against the receiver regardless of whether this section would authorize such a suit without leave. *International, etc., R. Co. v. Wynne*, (Tex. 1909) 122 S. W. 50.

**Interference with property in receiver's custody.**—This section does not authorize the bringing of a suit to condemn a crossing over the right of way of a railroad company in the hands of a receiver appointed by a federal court without leave thereof. *Buckhannon, etc., R. Co. v. Davis*, (1905) 135 Fed. 707, 68 C. C. A. 345, *affirming* (1904) 131 Fed. 115, the court saying: "The statute in question cannot be construed to mean that suits may be brought against a receiver to establish any right to the property which may be placed in his custody without the permission of the court. The property being at all times under the control of the court of administration, it would be absurd to permit the institution of suits in another forum to recover such property or diminish its value."

**"Subject to the general equity jurisdiction."**—Where plaintiff sued the receiver of a corporation for loss because of inability of the receiver to complete deliveries on an executory contract for future delivery of goods without the fault of the receiver, an affidavit of defense is insufficient which fails to show equities in favor of others superior to those of a purchaser, and especially where the receiver has not applied, as provided in this section, for equitable relief to the federal court which appointed him. *Hallowell v. Williams*, (1907) 217 Pa. St. 501, 66 Atl. 864.

**A judgment rendered against a federal receiver by a state court** in an action brought against him for the death of an employee is conclusive on the federal court as to the right to recover, and the amount that should be recovered, but the time and manner of payment is within the control of the federal court. *Willeox v. Jones*, (C. C. A. 1910) 177 Fed. 870, where the court said: "This statute is framed so as to permit the United States courts to fully administer estates that may be placed in the hands of receivers, and while permission is granted to institute suits against receivers, still there is nothing in the

statute which in the slightest degree authorizes the doing of any act calculated to hinder, delay, or embarrass a court of equity in the exercise of its functions. In *Street's Federal Equity Practice*, sec. 2688, in referring to the reservation contained in the second clause of this section, it is said: 'The most important feature of this statute, so far as regards equity practice, is found in the reservation contained in the second clause. This reservation has at least two important effects, namely: (1) it prevents the creditor who is thus permitted to sue from obtaining any undue advantage over other creditors and

claimants, and (2) it prevents such creditor from depriving the receiver, and through the receiver, the court, of the possession or control of any property in his hands by virtue of the receivership'" (the distinguished author citing *In re Tyler*, (1893) 149 U. S. 164, 13 S. Ct. 785, 37 U. S. (L. ed.) 689; *Comer v. Felton*, (1894) 61 Fed. 791, 10 C. C. A. 28; *J. I. Case Plow Works v. Finks*, (1897) 81 Fed. 529, 26 C. C. A. 46; *Dillingham v. Hawk*, (1894) 60 Fed. 497, 9 C. C. A. 101; *St. Louis Southwestern R. Co. v. Holbrook*, (1896) 73 Fed. 112, 19 C. C. A. 385).

## Vol. IV, p. 389, sec. 648.

Precisely what is the status of this section after Jan. 1, 1912, in respect of waiver of a jury trial, is matter for consideration, in view of the fact that R. S. sec. 566, 4 Fed. Stat. Annot. 236, and sections 648, 649, 700, 4 Fed. Stat. Annot. 389, 393, 450, are not repealed by Judicial Code, sec. 297, *ante*, p. 250, of this Supplement, nor any provisions substituted therefor, and yet the Circuit Courts are abolished by Judicial Code, sec. 289, *ante*, p. 249, and Judicial Code, sec. 292, *ante*, p. 249, is perhaps a disturbing factor.

Jury trial in bankruptcy proceedings. — See section 19a of the Bankruptcy Act, p. 586, of this Supplement, and 1 Fed. Stat. Annot. 586.

Right to jury trial generally. — The presumptions are all unfavorable to the waiver of the right of trial by jury. *Swift v. Jones*, (C. C. A. 1906) 145 Fed. 489.

By force of this section and provisions in the Hawaiian statutes, and because Congress has not itself provided a peculiar mode of trial in proceedings for the condemnation of lands for public use, it was held that an issue of fact as to the value of land in such a proceeding by the United States in the District Court of the United States for the District of Hawaii is triable by jury. *U. S. v. Honolulu Plantation Co.*, (C. C. A. 1903) 122 Fed. 581.

A plea to the jurisdiction, with a replication raising an issue of fact, should be submitted to the jury, subject to the right of the court to direct a verdict on the issue when proper. *Virginia v. Felts*, (1904) 133 Fed. 85, where the conflicting authorities are cited.

But on a motion to quash service on a foreign corporation defendant, it was held not

to be entitled to a jury trial of the issues whether it was doing business within the state, and whether the person on whom service was made was its representative. *Peper Automobile Co. v. American Motor Car Sales Co.*, (1910) 180 Fed. 245, citing numerous cases.

Assessment of damages on default or confession in certain cases. See R. S. sec. 961, 4 Fed. Stat. Annot. 604.

Assessment of damages for wrongful attachment may be enforced in Porto Rico pursuant to the special procedure expressly provided in the Porto Rican Code, regardless of section 648. *Perez v. Fernandez*, (1906) 202 U. S. 80, 26 S. Ct. 561, 50 U. S. (L. ed.) 942.

Trial by referee. — Findings of fact by a consent referee are not reviewable on a writ of error further than to ascertain if they are sufficient to warrant the judgment of the court. *U. S. Fidelity, etc., Co. v. Hampton*, (1905) 134 Fed. 734, 67 C. C. A. 638.

The question of following the state practice in matters of reference to referees and auditors has quite frequently been under review by the federal courts, and the general trend of the decisions is to the effect that such statutes will not be followed, and that in said courts trial by jury is the only prescribed method for the ascertainment of facts, unless the same be waived, as contemplated by the Act, except in cases of equity, admiralty, and bankruptcy. *Swift v. Jones*, (C. C. A. 1906) 145 Fed. 489. See *U. S. v. Ramsey*, (1907) 158 Fed. 488, and the note to R. S. sec. 700, 4 Fed. Stat. Annot. 450, and the note to the same section, *infra*, this title, in this Supplement.

## Vol. IV, p. 393, sec. 650.

This section is expressly repealed by Judicial Code, sec. 297, *infra*, p. 250, of this Supplement.

The Act of 1891 superseded the existing provisions as to a certificate of difference of opinion. *U. S. v. Dickinson*, (1909) 213 U. S. 92, 29 S. Ct. 485, 53 U. S. (L. ed.) 711.

For a history of the legislation touching review on certificate of difference of opinion,

see *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1909) 215 U. S. 216, 222 note, 30 S. Ct. 86 note, 54 U. S. (L. ed.) 164 note.

Cases brought under Anti-trust Act of 1890 reviewed on certificate or difference of opinion, see Act of Feb. 11, 1903, ch. 544, 32 Stat. L. 823, 10 Fed. Stat. Annot. 199, annotations, *infra*, this title.

**Vol. IV, p. 395, sec. 657.**

This section is expressly repealed by Judicial Code, sec. 297, *ante*, p. 250 of this Supplement. And see Judicial Code, sec. 97, *ante*, p. 177.

The words "northern district of said state" must be construed as meaning the territory comprised within said district when the section was enacted; and the division of

said district into the Northern and Western Districts by Act of May 12, 1900, ch. 391, 31 Stat. L. 175, 4 Fed. Stat. Annot. 42, 43, did not have the effect of enlarging the jurisdiction of the Circuit Court for the Southern District to include causes of action arising in the Western District. *Hartford F. Ins. Co. v. Erie R. Co.*, (1909) 172 Fed. 899.

**Vol. IV, p. 396, sec. 2.**

**Form of appellate remedy.**—A decree in equity cannot be reviewed by a writ of error. *Thomson v. Travelers' Ins. Co.*, (C. C. A. 1908) 161 Fed. 867, citing this section for the statement that it "preserves the same distinction in the appellate jurisdiction."

**Printing of transcripts.**—In *In re Bradford*, (C. C. A. 1905) 139 Fed. 518, the Circuit Court of Appeals for the 6th Circuit denied an application to dispense with its rule 23 requiring the printing of all transcripts from the court, since the cost of printing is, under the rule, a part of the taxable costs of

the cause, including the supervising fee to the clerk, all of which costs and fees are required to be accounted for and paid over to the treasury department in the same manner as is provided in respect to other costs by the second section of the Circuit Court of Appeals Act of 1891.

As to printed transcripts of record to be filed in the Circuit Court of Appeals or Supreme Court in cases carried there by appeal or writ of error, see the Act of Feb. 13, 1911, ch. 47, 36 Stat. L. 901, *ante*, p. 255 of this Supplement.

**Vol. IV, p. 396, sec. 3.**

With slight verbal changes this section is re-enacted in, and evidently superseded by, Judicial Code, sec. 120, *ante*, title JUDICIARY, p. 192, of this Supplement.

**Constitution of the court.**—In the absence of the chief justice or an associate justice of the Supreme Court or a circuit judge, a Cir-

cuit Court of Appeals is legally constituted where made up of three district judges of the circuit, regularly designated by particular assignments to attend as members for the term. *Peters v. Hanger*, (C. C. A. 1905) 136 Fed. 181, one judge dissenting.

**Vol. IV, p. 397, sec. 4.**

**Pecuniary limit.**—The provision of R. S. sec. 631, 4 Fed. Stat. Annot. 251, limiting appeals from the District to the Circuit Court in equity and admiralty to cases where the sum in dispute exceeded fifty dollars, is not applicable to appeals to the Circuit Court of

Appeals, but was superseded by the Act establishing such courts, which created a new appellate jurisdiction without any pecuniary limitation. *The Joseph B. Thomas*, (C. C. A. 1906) 148 Fed. 762.

**Vol. IV, p. 398, sec. 5.**

This section, with the exception of clause [3] as to criminal cases, is substantially re-enacted in Judicial Code, sec. 238, *ante*, title JUDICIARY, p. 231, of this Supplement. And see the note to that Judicial Code section.

Jurisdiction of the Supreme Court in cases not capital was withdrawn by the Act of Jan. 20, 1897, ch. 68, 29 Stat. L. 492, 4 Fed. Stat. Annot. 433; and now by Judicial Code, sec. 238, *ante*, title JUDICIARY, p. 231, of this Supplement, it has no jurisdiction in any criminal case.

**SECTION 5 IN GENERAL.**

**Only final decisions reviewable.**—Appeals or writs of error can be allowed under this section only in cases in which there has been a final judgment; "a case cannot be brought here by piecemeal." *Heike v. U. S.*, (1910) 217 U. S. 423, 30 S. Ct. 539, 54 U. S. (L. ed.) 821.

**No pecuniary limit is imposed upon the appellate jurisdiction under this section.** *The Paquete Habana*, (1900) 175 U. S. 677, 683, 20 S. Ct. 290, 293, 44 U. S. (L. ed.) 320, 322; *Kirby v. American Soda Fountain Co.*, (1904) 194 U. S. 141, 24 S. Ct. 610, 48 U. S. (L. ed.) 911.

**The time limit for appeals or writs of error under this section is two years, as provided in R. S. sec. 1008, 4 Fed. Stat. Annot. 623.** *Holt v. Indiana Mfg. Co.*, (1900) 176 U. S. 68, 20 S. Ct. 272, 44 U. S. (L. ed.) 374; *Frederic L. Grant Shoe Co. v. W. M. Laird Co.*, (1909) 212 U. S. 445, 29 S. Ct. 332, 53 U. S. (L. ed.) 591.

**Appeals in habeas corpus cases, however, under this section, must be taken within six months, as provided in R. S. sec. 706, as amended by the Act of March 3, 1893, ch. 226, 27 Stat. L. 751, 3 Fed. Stat. Annot. 179.** *Ex p. Lennon*, (1893) 150 U. S. 393, 14 S. Ct. 123, 37 U. S. (L. ed.) 1120.

A party may appeal on more than one ground specified in this section. *North American Cold Storage Co. v. Chicago*, (1908) 211 U. S. 306, 29 S. Ct. 101, 53 U. S. (L. ed.) 195; an appeal on the ground of a question of jurisdiction involved and also a constitutional question. See also *Anglo-American Provision Co. v. Davis Provision Co.*, (1903) 191 U. S. 376, 24 S. Ct. 93, 48 U. S. (L. ed.) 228; *Bien v. Robinson*, (1908) 208 U. S. 423, 28 S. Ct. 379, 52 U. S. (L. ed.) 556.

**Habeas corpus cases.**—Appeals in habeas corpus cases cannot now be taken direct to the Supreme Court unless they are of the kind specified in some of the enumerations in this section. Otherwise they are reviewable only by the Circuit Court of Appeals. *Pierce v. Creedy*, (1908) 210 U. S. 387, 28 S. Ct. 714, 52 U. S. (L. ed.) 1113.

**CLAUSE 1. IN ANY CASE IN WHICH THE JURISDICTION OF THE COURT IS IN ISSUE.**

Clause [1] of section 5 authorizing cases "in which the jurisdiction of the court is in issue" to be taken "direct to the Supreme Court" is re-enacted in Judicial Code, sec. 238, *ante*, title JUDICIARY, p. 231, of this Supplement; and a similar provision is in Judicial Code, sec. 250, *ante*, p. 235, of this Supplement, prescribing the appellate jurisdiction of the United States Supreme Court to review judgments and decrees of the Court of Appeals of the District of Columbia. The clause is also applicable, in proper cases, to appellate review by the Supreme Court under section 24a of the Bankruptcy Act of 1898, as annotated in title BANKRUPTCY, *ante*, p. 603, of this Supplement.

The predecessor of this clause in the Circuit Court of Appeals Act of 1891 is a provision in section 1 of the Act of Feb. 25, 1889, ch. 236, 25 Stat. L. 693, 4 Fed. Stat. Annot. 492.

"Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require." *The Resolute*, (1897) 168 U. S. 437, 18 S. Ct. 112, 42 U. S. (L. ed.) 533.

The jurisdiction here referred to.—See *infra*, this note, p. 1324, *When Jurisdiction Is in Issue*.

The action of the court is not reviewable where its jurisdiction was questioned merely in respect to its general authority as a judicial tribunal or its power as a court of equity. *Courtney v. Pradt*, (1905) 196 U. S. 89, 25 S. Ct. 208, 49 U. S. (L. ed.) 398; *U. S. v. Larkin*, (1908) 208 U. S. 333, 28 S. Ct. 417, 52 U. S. (L. ed.) 517; *Bien v. Robinson*, (1908) 208 U. S. 423, 28 S. Ct. 379, 52 U. S. (L. ed.) 556.

"The statute means to give a review, not of the jurisdiction of the court upon general grounds of law or procedure, but of the jurisdiction of the court as a federal court." *Fore River Shipbuilding Co. v. Hagg*, (1911) 219 U. S. 175, 31 S. Ct. 185, 55 U. S. (L. ed.) 163.

"Whether the bill presented a case for equitable relief does not present a question of the jurisdiction of the court as a court of

the United States." *Scully v. Bird*, (1908) 209 U. S. 481, 28 S. Ct. 597, 52 U. S. (L. ed.) 899.

"Whether a remedy should be sought at law or in equity, or which of two courts having concurrent jurisdiction first acquired jurisdiction, or which of two federal courts of equal rank but in different localities has jurisdiction" would not be appealable questions of jurisdiction within the meaning of the statute. *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (C. C. A. 1910) 183 Fed. 929.

Where jurisdiction is the sole question in issue the Supreme Court and not the Circuit Court of Appeals has appellate jurisdiction; and the dismissal of a prior writ of error by the Circuit Court of Appeals for want of jurisdiction is no bar to a writ of error in the Supreme Court. *Davis v. Cleveland, etc.*, R. Co., (1910) 217 U. S. 157, 30 S. Ct. 463, 54 U. S. (L. ed.) 708.

Where jurisdiction is the sole question in issue, whereby no other question can be considered, the jurisdiction of the Supreme Court is exclusive. *U. S. v. Larkin*, (1908) 208 U. S. 333, 28 S. Ct. 417, 52 U. S. (L. ed.) 517, citing *American Sugar Refining Co. v. New Orleans*, (1901) 181 U. S. 277, 21 S. Ct. 646, 45 U. S. (L. ed.) 859. To the same point see *St. Louis Cotton Compress Co. v. American Cotton Co.*, (1903) 125 Fed. 196, 60 C. C. A. 80, dismissing a writ of error; *Halpin v. Amerman*, (1905) 138 Fed. 548, 70 C. C. A. 462 *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (C. C. A. 1910) 183 Fed. 929.

"If the jurisdiction of the Circuit Court is in issue and decided in favor of the defendant, the Circuit Court of Appeals has no jurisdiction to review the decision, because it disposes of the case, and the plaintiff must have the question certified and take his appeal or writ of error to the Supreme Court. *U. S. v. Jahn*, (1894) 155 U. S. 109, 15 S. Ct. 39, 39 U. S. (L. ed.) 87." *Campbell v. Golden Cycle Min. Co.*, (1905) 141 Fed. 610, 73 C. C. A. 260.

Where a demurrer to a bill in a Circuit Court assigned as grounds want of jurisdiction in the court as a federal court, because neither diversity of citizenship nor any federal question was disclosed, and also want of "jurisdiction" as a court of equity for lack of equity in the bill, a decree sustaining the demurrer and dismissing the bill "for want of jurisdiction" must be construed to refer to the real jurisdictional grounds, and an appeal therefrom lies to the Supreme Court and not to the Circuit Court of Appeals. *Crawford v. McCarthy*, (1906) 148 Fed. 198, 78 C. C. A. 356, dismissing an appeal.

Where the jurisdiction of the court below depended entirely on the fact that a constitutional question was in issue, the Circuit Court of Appeals had no jurisdiction of an appeal therein. *Wright v. MacFarlane*, (1903) 122 Fed. 770, 58 C. C. A. 570.

Where the power of a Circuit Court to proceed to the trial of an action against a nonresident defendant depends on whether there has been a general appearance by de-

fendant, or, if not, upon the validity of attachments and garnishments of property within the district, both such questions are jurisdictional, and a decision of the court determining them in favor of the defendant and dismissing the action for want of jurisdiction is reviewable only by the Supreme Court. *Davis v. Cleveland, etc., R. Co.*, (1907) 156 Fed. 775, 84 C. C. A. 453.

Where a Circuit Court found that an attachment was fraudulently sued out by the plaintiff and levied on property of the defendants, who were nonresidents of the state, without a substantial bond being given as required by law, for the purpose of compelling the defendants to come within the jurisdiction, and dismissed the action for want of jurisdiction, without determining any other question, the judgment was not reviewable by the Circuit Court of Appeals, but only by the Supreme Court. *Hays v. Richardson*, (1903) 121 Fed. 536, 57 C. C. A. 598, dismissing a writ of error.

Jurisdiction of an appeal in an ancillary suit where the only question presented by the assignments of error is the jurisdiction of the court below in the principal suit is exclusively vested in the Supreme Court. *Kentucky State Board of Control v. Lewis*, (C. C. A. 1910) 176 Fed. 556, dismissing the appeal.

Where other questions are involved. — Where the jurisdiction of the Circuit Court attached on the ground of diverse citizenship, and also upon a separate and independent constitutional ground, the defeated party may take a direct appeal to the Supreme Court, or at his option to the Circuit Court of Appeals. *Mississippi R. Commission v. Illinois Cent. R. Co.*, (1906) 203 U. S. 335, 27 S. Ct. 90, 51 U. S. (L. ed.) 209.

In a case which had been removed from a Kentucky court to the federal Circuit Court solely upon diversity of citizenship, the court said: "That the defendants subsequently claimed that there was no jurisdiction over their persons, because the Kentucky statute allowing constructive service was in contravention of the Constitution of the United States, presented, in one aspect, a question as to the jurisdiction of the court below. When that was decided against them they went to trial upon the merits. They lost the case upon this line of defense. They then had to elect whether they would abandon the merits and go to the Supreme Court upon the jurisdiction, or to the Court of Appeals upon both questions. They elected to come to this court, and this court has decided for itself the question of jurisdiction as well as the questions upon the merits. It was under no obligation to certify the question of jurisdiction, being clear in the opinion that the court below had jurisdiction. No right to a writ of error from the judgment of the Circuit Court of Appeals now exists." *Weber v. Kentucky Grand Lodge*, (C. C. A. 1909) 171 Fed. 839, denying an application for a writ of error.

Where the question of jurisdiction is in issue, and the jurisdiction is sustained, and a judgment or decree is rendered in favor of the defendant upon the merits, the Circuit

Court of Appeals has jurisdiction to review it. *Campbell v. Golden Cycle Min. Co.*, (1905) 141 Fed. 610, 73 C. C. A. 260, holding that a general decree of dismissal without more is a decree that the court has jurisdiction, but that there are no merits in the case.

An order of the Circuit Court made on an application for leave to file a bill of review for the purpose of setting aside a decree in favor of a bank, which quashed the service of notice of the application on the ground that the bank had become defunct as a corporation, but which also denied leave to file the bill on the merits, although for the same reason, did not relate wholly to matters of jurisdiction, and an appeal therefrom was within the jurisdiction of the Circuit Court of Appeals. *Frankfort v. Deposit Bank*, (1903) 124 Fed. 18, 59 C. C. A. 538.

Where a District Court for the district of Alaska, on dismissal of an appeal from a conviction in a justice court which had been superseded by the giving of an appeal bond, entered judgment "as it was given in the court below," as required by Code Crim. Pro. Alaska, sec. 450, 1 Fed. Stat. Annot. 404, it was held that the whole case might be taken for review by writ of error to the Circuit Court of Appeals, even though the motion to dismiss was based on want of jurisdiction. *Cartier v. U. S.*, (1906) 148 Fed. 804, 78 C. C. A. 494.

Where other questions are involved which are within the jurisdiction of the Circuit Court of Appeals, the latter may determine them all, even if it had power to certify the sole question of jurisdiction of the court below to the Supreme Court. *Boston, etc., R. Co. v. Gokey*, (1908) 210 U. S. 155, 28 S. Ct. 657, 52 U. S. (L. ed.) 1002; *Wirgman v. Persons*, (1903) 126 Fed. 449, 62 C. C. A. 63; *Grand Trunk Western R. Co. v. Reddick*, (C. C. A. 1908) 160 Fed. 898; *Meeker v. Lehigh Valley R. Co.*, (C. C. A. 1910) 183 Fed. 548. See also *Seattle Electric Co. v. Seattle, etc., R. Co.*, (C. C. A. 1911) 185 Fed. 365. It seems to have been held otherwise by a majority of the court in the earlier case of *Waterford v. Elson*, (1906) 149 Fed. 91, 78 C. C. A. 675, and in *Sun Printing, etc., Assoc. v. Edwards*, (1903) 121 Fed. 826, 58 C. C. A. 162. As to certification of questions by the Circuit Court of Appeals, see *infra*, p. 1339, note to section 6 of the Circuit Court of Appeals Act of 1891.

"If a case in a District or Circuit Court goes to trial or hearing on a question of jurisdiction and on the merits, and the question of jurisdiction is one concerning either the jurisdiction of the parties or the power of the court as a federal court to take jurisdiction of the subject-matter, the party dissatisfied with the final judgment or decree, whether he be plaintiff or defendant, may waive all errors on the merits, and take the case directly to the Supreme Court, on appeal or error, with a certificate from the lower court of the question of jurisdiction; or he may assign errors on the question of jurisdiction, and take the whole case, on appeal or error, to the proper Circuit Court of Appeals. In the latter proceeding the Circuit

Court of Appeals may certify the question of jurisdiction to the Supreme Court, and defer decision upon the other questions until the answer of the Supreme Court shall have been received." *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (C. C. A. 1910) 183 Fed. 929, 942, sustaining jurisdiction of a writ of error where an action at law was tried on the merits before a jury and a special verdict rendered, subject to the determination of the law by the court, and pending a motion for judgment on the verdict the defendant filed a motion to dismiss on the ground that the court was without jurisdiction of the subject-matter of the action, which motion was sustained and judgment rendered thereon for the defendant; both parties arguing at length in the Circuit Court of Appeals both the question of jurisdiction and the questions concerning the merits, all of which were presented by the assignments of error.

*A Circuit Court of Appeals has no power to interfere by mandamus with the action of a Circuit Court where the question involved relates to its jurisdiction as a Circuit Court of the United States; but such want of power does not exist where the question involved relates to the jurisdiction of a Circuit Court as a judicial tribunal of original jurisdiction, having no relation to its limitation as a national court.* *Dowagiac Mfg. Co. v. McSherry Mfg. Co.*, (1907) 155 Fed. 524, 84 C. C. A. 38.

**When jurisdiction is in issue.**—See cases cited *supra*, this note, 1322, *The Jurisdiction Here Referred To, and Where Jurisdiction Is the Sole Question*.

The jurisdiction challenged must be that of the court rendering the decree appealed from, not merely that of the court rendering a former decree, which is set up in the complaint as the basis of the title sued upon. *Empire State-Idaho Min., etc., Co. v. Hanley*, (1907) 205 U. S. 225, 27 S. Ct. 476, 51 U. S. (L. ed.) 779.

The question whether the federal Circuit Court in Massachusetts could entertain an action for damages under the Employers' Liability Act of that state did not involve the jurisdiction of the court within the meaning of this section. "Whether other sovereignties would enforce penal actions of the character alleged to arise under the Massachusetts statute was not a question peculiar to the federal jurisdiction of the court. It was general in its nature, and to be determined upon principles controlling in other courts as well as those of federal creation." *Fore River Shipbuilding Co. v. Hagg*, (1911) 219 U. S. 175, 31 S. Ct. 185, 55 U. S. (L. ed.) 163. See also *Mexican Cent. R. Co. v. Eckman*, (1903) 187 U. S. 429, 23 S. Ct. 211, 47 U. S. (L. ed.) 245.

The contention that under R. S. sec. 1342, art. 62, 1 Fed. Stat. Annot. 495, a court-martial has exclusive jurisdiction over the crimes committed by a military officer which are cognizable by courts-martial under the provisions of that article was too clearly unfounded to serve as the basis of a writ of error to review a conviction in the Circuit Court. *Franklin v. U. S.*, (1910) 216 U. S.

559, 30 S. Ct. 434, 54 U. S. (L. ed.) 615, dismissing a writ of error.

The question whether or not one District Court acquired jurisdiction of an information for forfeiture of smuggled property by lawful seizure in that district or whether another District Court alone had jurisdiction thereof is not reviewable under this section, for "District Courts are the proper courts of the United States to adjudicate forfeiture, and the question involved was not the jurisdiction of the United States courts as such." *U. S. v. Larkin*, (1908) 208 U. S. 333, 28 S. Ct. 417, 52 U. S. (L. ed.) 517.

But where a suit is brought in a federal court solely on the ground of diverse citizenship of the parties, but in the district of which neither party is a resident, the question whether the defendant could waive and had waived the objection is an appealable question of jurisdiction, although "the suit is cognizable in some Circuit Court." *Western Loan, etc., Co. v. Butte, etc., Consol. Min. Co.*, (1908) 210 U. S. 368, 28 S. Ct. 720, 52 U. S. (L. ed.) 1113.

Since the federal courts have exclusive jurisdiction of cases arising under the copyright laws, the question whether, by construction of federal statutes, the court below could entertain a suit to recover damages for an alleged infringement of the copyright of a map, is a question of jurisdiction of a federal court as such, and a decree involving the question is appealable. *Globe Newspaper Co. v. Walker*, (1908) 210 U. S. 356, 28 S. Ct. 726, 52 U. S. (L. ed.) 1096.

A contention in the court below that it had no jurisdiction of a case removed from a state court, for the reason that the state court had none, has nothing to do with the jurisdiction of the federal court as such, but is to be determined on principles of general application, and therefore does not present an appealable question. *Kansas City Northwestern R. Co. v. Zimmerman*, (1908) 210 U. S. 336, 28 S. Ct. 730, 52 U. S. (L. ed.) 1084.

"If a case in a District or Circuit Court is dismissed by final judgment or decree for want of jurisdiction, either after a hearing on a question of jurisdiction only or after a hearing or a trial on a question of jurisdiction and the merits, and the question of jurisdiction is not one concerning jurisdiction of the parties or concerning the power of the court as a federal court to take jurisdiction of the subject-matter of the action, but is a question of jurisdiction relating to the general authority of the court as a judicial tribunal, the party dissatisfied with the judgment or decree, whether he be plaintiff or defendant, may have the judgment or decree reviewed, on appeal or error, by the proper Circuit Court of Appeals only." *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (C. C. A. 1910) 183 Fed. 929, 943.

On a decree against a defendant under section 10 of the Food and Drugs Act of Congress of June 30, 1906, 1909 Supp. Fed. Stat. Annot. 141, "whether a personal judgment for costs can be rendered, may be said to be simply a question of the construction of the

section, and not one which involves the jurisdiction of the court. In other words, the rulings of the court may be error only, not in excess of its power." *Hipolite Egg Co. v. U. S.*, (1911) 220 U. S. 45, 31 S. Ct. 364, 55 U. S. (L. ed.) 364.

The dismissal by the court below of a suit against a foreign executor for the want of jurisdiction in the state court, from which it had been removed for diversity of citizenship, does not present an appealable question of jurisdiction of the federal court. "The court had power to so adjudicate." *Courtney v. Pradt*, (1905) 196 U. S. 89, 25 S. Ct. 208, 49 U. S. (L. ed.) 398.

Dismissal of a bill "for want of jurisdiction" on a demurrer which does not put in issue the jurisdiction of the court under its federal limitations alone does not present an appealable question of jurisdiction, and an appeal may therefore be taken to the Circuit Court of Appeals. *Alton Water Co. v. Brown*, (1908) 166 Fed. 840, 92 C. C. A. 598.

Exercise of a power incident to the court's unquestioned jurisdiction over the parties to and the subject-matter of the suit will not give rise to an appealable question of jurisdiction. *Chapman v. Atlantic Trust Co.*, (1902) 119 Fed. 257, 86 C. C. A. 61.

Jurisdiction of the court is not in issue where "the established rules of practice as to bringing in parties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves," are alone involved. *Bache v. Hunt*, (1904) 193 U. S. 523, 24 S. Ct. 547, 48 U. S. (L. ed.) 774.

The question "whether the Circuit Court had power to allow the amendment" of plaintiff's complaint, after verdict and judgment thereon, and on plaintiff's affidavit, without further proceedings taken, by inserting a necessary allegation of diverse citizenship, and to retain the judgment after such amendment, was treated as an appealable question of jurisdiction in *Mexican Cent. R. Co. v. Duthie*, (1903) 189 U. S. 76, 23 S. Ct. 610, 47 U. S. (L. ed.) 715.

Denial of a motion to remand a cause removed from a state court does not present an appealable question of the federal court's jurisdiction where such motion did not, in terms, put in issue the power of the federal court as a court of the United States to hear and determine the cause. *Courtney v. Pradt*, (1905) 196 U. S. 89, 25 S. Ct. 208, 49 U. S. (L. ed.) 398.

Objection that an attachment suit in aid of an action at law was not cognizable in a federal Circuit Court to which it had been removed from the state court for diversity of citizenship, because the proceeding was equitable in form, did not create an appealable question of jurisdiction. *Courtney v. Pradt*, (1905) 196 U. S. 89, 25 S. Ct. 208, 49 U. S. (L. ed.) 398.

"It is very doubtful" whether the authority of the court to vacate and set aside its previous decree, after the lapse of the term, does not involve a power to exercise a jurisdiction already vested, rather than a question of jurisdiction itself. *Van Wagenen v.*

*Sewall*, (1896) 160 U. S. 369, 16 S. Ct. 370, 40 U. S. (L. ed.) 460.

Whether the court erred in refusing leave to file a plea during the progress of the trial on the question of the plaintiff's citizenship, and in refusing to permit issue to be joined thereon, are not appealable questions of jurisdiction. *Mexican Cent. R. Co. v. Pinkney*, (1893) 149 U. S. 194, 13 S. Ct. 859, 37 U. S. (L. ed.) 699.

Where an appeal was taken from the Circuit Court to the Circuit Court of Appeals, which reversed the decree and remanded the case, and the Circuit Court entered a decree in conformity to the mandate, no appealable question can arise out of a contention that the Circuit Court did not have jurisdiction to make its first decree or that the Circuit Court of Appeals did not have jurisdiction of the appeal. *Aspen Min., etc., Co. v. Billings*, (1893) 150 U. S. 31, 14 S. Ct. 4, 37 U. S. (L. ed.) 986.

Jurisdiction is in issue in a judgment dismissing a suit on the ground of the invalidity of the attachment and garnishment of the property of the nonresident defendant, and upon the lack of a general appearance by such defendant. *Davis v. Cleveland, etc., R. Co.*, (1910) 217 U. S. 157, 30 S. Ct. 463, 54 U. S. (L. ed.) 708.

The question whether a case removed from a state court to a federal court was removed at a proper stage of the case under the removal statutes seems to have been regarded as an appealable question of jurisdiction. *Madisonville Traction Co. v. St. Bernard Min. Co.*, (1905) 196 U. S. 239, 25 S. Ct. 251, 49 U. S. (L. ed.) 462. See also *Powers v. Chesapeake, etc., R. Co.*, (1898) 169 U. S. 92, 18 S. Ct. 264, 42 U. S. (L. ed.) 673; *McDonnell v. Jordan*, (1900) 178 U. S. 229, 20 S. Ct. 886, 44 U. S. (L. ed.) 1048; *Remington v. Central Pac. R. Co.*, (1905) 198 U. S. 95, 25 S. Ct. 577, 49 U. S. (L. ed.) 959.

The contention that there was no valid service of process upon a foreign corporation in a suit removed by it from a state court, because the corporation was not doing business in the state and the person attempted to be served was not its agent at that time, presents an appealable question of jurisdiction. *Mechanical Appliance Co. v. Castleman*, (1910) 215 U. S. 437, 30 S. Ct. 125, 54 U. S. (L. ed.) 272, citing *Remington v. Central Pac. R. Co.*, (1905) 198 U. S. 95, 25 S. Ct. 577, 49 U. S. (L. ed.) 959, in which latter case it was also held, however, that the question whether the denial by a state court of a motion to vacate the summons is *res judicata* on the question of the validity of such service, when raised in the federal court to which the cause has been removed, is one of practice and not of jurisdiction of the federal court.

The question of jurisdiction is fairly presented, despite the indefiniteness of allegations in a plea to the jurisdiction, where the certificate states that the defendant raised by such plea the objection that it was a foreign corporation not doing business in the state, and that the person attempted to be served was not its agent at the time, and

shows that the court did not consider the affidavits which the bill of exceptions states were filed, but overruled the plea on the sole ground that the facts stated in the return of the sheriff to the summons were conclusive, and also recites that when the case was filed for trial the same objection was made and overruled for the same reason. *Mechanical Appliance Co. v. Castleman*, (1910) 215 U. S. 437, 30 S. Ct. 125, 54 U. S. (L. ed.) 272.

The question of the validity of the service of process of a federal Circuit Court on certain persons as the agents of a foreign corporation involves an appealable question of jurisdiction, as against the contention that the case rests upon grounds alike applicable to any other judicial tribunal, state or federal, under the same circumstances. *Chicago Board of Trade v. Hammond Elevator Co.*, (1905) 198 U. S. 424, 25 S. Ct. 740, 49 U. S. (L. ed.) 1111; *Kendall v. American Automatic Loom Co.*, (1905) 198 U. S. 477, 25 S. Ct. 768, 49 U. S. (L. ed.) 1133. Likewise, a judgment of dismissal of an action removed from a state court, where the ground of the judgment was lack of a valid service of process on the defendant, and the plaintiff had moved to remand the cause. *Remington v. Central Pac. R. Co.*, (1905) 198 U. S. 95, 25 S. Ct. 577, 49 U. S. (L. ed.) 959. To the same point see *Peterson v. Chicago, etc., R. Co.*, (1907) 205 U. S. 364, 27 S. Ct. 513, 51 U. S. (L. ed.) 841, and *Green v. Chicago, etc., R. Co.*, (1907) 205 U. S. 530, 27 S. Ct. 595, 51 U. S. (L. ed.) 916, deciding, as a matter of law and fact, that a foreign corporation was not doing business in a state so that valid service of process could be made upon it there.

"All admiralty jurisdiction belongs to courts of the United States as such," and therefore a decree dismissing a libel for contribution on the ground that the court sitting as a court of admiralty had no jurisdiction to enforce contribution between the parties on the facts is not a decree on the merits, but appealable as going to the jurisdiction. *The Ira M. Hedges*, (1910) 218 U. S. 264, 31 S. Ct. 17, 54 U. S. (L. ed.) 1039, reversing the decree. See also *The Blackheath*, (1904) 195 U. S. 361, 25 S. Ct. 46, 49 U. S. (L. ed.) 236, holding that admiralty jurisdiction extends to a libel *in rem* against a vessel for negligently colliding with and destroying a beacon owned by the government and standing some fifteen or twenty feet from the channel, in water fifteen or twenty feet deep, though it is built upon piles driven firmly into the bottom. *Cleveland Terminal, etc., R. Co. v. Cleveland Steamship Co.*, (1908) 208 U. S. 316, 28 S. Ct. 414, 52 U. S. (L. ed.) 508, affirming a decree dismissing for want of jurisdiction a libel *in rem* against a vessel for injuries inflicted to a railroad bridge and a dock or wharf. *Followed in The Troy*, (1908) 208 U. S. 321, 28 S. Ct. 416, 52 U. S. (L. ed.) 512, holding that redress cannot be afforded in admiralty for injuries inflicted by a colliding vessel upon the draw of a bridge over a navigable stream, and to its centre pier protection.

Where the exceptions to a libel and inter-

vening petition claiming salvage for services rendered to a vessel in a dry dock challenged the jurisdiction because, from the situation of the vessel, the place where the services were rendered, and their nature and character, they afforded no basis for the jurisdiction of the court as a federal court of admiralty, and this was the conception upon which that court acted in dismissing such libel and intervening petition, the decree was appealable. *The Steamship Jefferson*, (1909) 215 U. S. 130, 30 S. Ct. 54, 54 U. S. (L. ed.) 125.

A contention that the relief sought will violate R. S. sec. 720, 4 Fed. Stat. Annot. 509, forbidding the granting of an injunction to stay proceedings in a state court, presents a question of jurisdiction. *Hunt v. New York Cotton Exch.*, (1907) 205 U. S. 322, 27 S. Ct. 529, 51 U. S. (L. ed.) 821.

Where the lower court decides that the case does not involve the construction or application of the Federal Constitution or other federal question, and upon that ground dismisses a suit for want of jurisdiction, its judgment is properly appealable on a certified question of jurisdiction. See among other reported cases *Mercantile Trust, etc., Co. v. Columbus*, (1906) 203 U. S. 311, 27 S. Ct. 83, 51 U. S. (L. ed.) 198.

For the purpose of appeal, the question whether a suit is one against a state, and therefore forbidden by the Eleventh Amendment to the Constitution, is a question of jurisdiction and not a question on the merits. *Scully v. Bird*, (1908) 209 U. S. 481, 28 S. Ct. 597, 52 U. S. (L. ed.) 899. See also *Illinois Cent. R. Co. v. Adams*, (1901) 180 U. S. 28, 21 S. Ct. 251, 45 U. S. (L. ed.) 410.

For a case holding that the jurisdiction of the District Court for the district of Alaska in a criminal case was not in issue within the meaning of the statute, see *Cartier v. U. S.*, (1906) 148 Fed. 804, 78 C. C. A. 494.

What are appealable questions of jurisdiction is also indicated by the following cases, wherein review was had on direct appeal or error, being all the reported cases other than those elsewhere cited in this note or cited in the note 4 Fed. Stat. Annot. 399-404, or in the note to section 24a of the Bankruptcy Act of 1898, *ante*, p. 603, of this Supplement.

*Hipolite Egg Co. v. U. S.*, (1911) 220 U. S. 45, 31 S. Ct. 364, 55 U. S. (L. ed.) 364, affirming a decree for the government in libel proceedings under section 10 of the Food and Drugs Acts of Congress of June 30, 1906, 1909 Supp. Fed. Stat. Annot. 141.

*Ladew v. Tennessee Copper Co.*, (1910) 218 U. S. 357, 31 S. Ct. 81, 54 U. S. (L. ed.) 1069, and *Wetmore v. Tennessee Copper Co.*, (1910) 218 U. S. 369, 31 S. Ct. 84, 54 U. S. (L. ed.) 1073, affirming a decree which dismissed, for want of jurisdiction as to a non-resident corporate defendant, a suit by a nonresident owner of lands within the district, seeking protection against the injury to his property from the discharge of deleterious fumes and gases from the works of such nonresident defendant, situated within the same district.

*H. C. Cook Co. v. Beecher*, (1910) 217 U. S. 497, 30 S. Ct. 601, 54 U. S. (L. ed.) 855,



affirming a dismissal of a suit by the owner of a patent to make the directors of a corporation answerable for a judgment previously recovered against it for infringing the patent, there being no claim of diverse citizenship between the parties.

*Woodside v. Beckham*, (1910) 216 U. S. 117, 30 S. Ct. 367, 54 U. S. (L. ed.) 393, affirming a dismissal for want of the jurisdictional amount in controversy.

*Conley v. Ballinger*, (1910) 216 U. S. 84, 30 S. Ct. 224, 54 U. S. (L. ed.) 393, ordering dismissal of a bill to enjoin the secretary of the interior and commissioners appointed by him from selling or disturbing an Indian cemetery.

*Lathrop, etc., Co. v. Interior Constr., etc., Co.*, (1909) 215 U. S. 246, 30 S. Ct. 76, 54 U. S. (L. ed.) 177, involving the question of jurisdiction of a cause by removal thereof from a state court.

*Waterman v. Canal-Louisiana Bank, etc., Co.*, (1909) 215 U. S. 33, 30 S. Ct. 10, 54 U. S. (L. ed.) 80, determining that a nonresident heir was not an indispensable party defendant whose absence created a want of jurisdiction in the federal court in equity to proceed without him.

*Waterman v. Canal-Louisiana Bank, etc., Co.*, (1909) 215 U. S. 33, 30 S. Ct. 10, 54 U. S. (L. ed.) 80, considering how far the jurisdiction in equity of federal courts to entertain suits against administrators and executors for the purpose of establishing claims against estates, or to have a determination of the rights of persons claiming an interest therein, may be affected by the statutes of the states providing for courts of probate for the establishment of wills and the settlement of estates.

*Commercial Mut. Acc. Co. v. Davis*, (1909) 213 U. S. 245, 29 S. Ct. 445, 53 U. S. (L. ed.) 782, affirming a judgment involving the question of sufficiency of service of process on a foreign insurance company.

*McDaniel v. Traylor*, (1909) 212 U. S. 428, 29 S. Ct. 343, 53 U. S. (L. ed.) 584, affirming a dismissal for want of a jurisdictional amount in dispute.

*Davidson Bros. Marble Co. v. U. S.*, (1909) 213 U. S. 10, 29 S. Ct. 324, 53 U. S. (L. ed.) 675, holding that the Circuit Court erred in exercising jurisdiction of an action against the defendant in a district of which he was not an inhabitant.

*Moyer v. Peabody*, (1909) 212 U. S. 78, 29 S. Ct. 235, 53 U. S. (L. ed.) 410, affirming a judgment dismissing a complaint on the ground that no federal question was involved so as to give the court jurisdiction.

*Southern Realty Invest. Co. v. Walker*, (1909) 211 U. S. 603, 29 S. Ct. 211, 53 U. S. (L. ed.) 346, affirming a judgment which dismissed as collusive a suit by a corporation of one state against a citizen of another state.

*North American Cold Storage Co. v. Chicago*, (1908) 211 U. S. 306, 29 S. Ct. 101, 53 U. S. (L. ed.) 195, determining that the Circuit Court had jurisdiction on the ground of a federal question presented.

*Miller v. East Side Canal, etc., Co.*, (1908) 211 U. S. 293, 29 S. Ct. 111, 53 U. S. (L. ed.)

189, affirming a decree dismissing the bill in a suit between corporations of different states because of the collusive incorporation of the complainant.

*Patch v. Wabash R. Co.*, (1907) 207 U. S. 277, 28 S. Ct. 80, 52 U. S. (L. ed.) 204, reversing a judgment which involved the question of diverse citizenship of a corporation defendant which had removed a case from a state to the federal court.

*Venner v. Great Northern R. Co.*, (1908) 209 U. S. 24, 28 S. Ct. 328, 52 U. S. (L. ed.) 666, affirming a decree involving the question of diverse citizenship of parties in a case removed from a state court, and a question of jurisdiction of a federal court over the subject-matter of the suit.

*Hunt v. New York Cotton Exch.*, (1907) 205 U. S. 322, 27 S. Ct. 529, 51 U. S. (L. ed.) 821, deciding, on the evidence, that a jurisdictional amount was in dispute.

*Citizens' Sav., etc., Co. v. Illinois Cent. R. Co.*, (1907) 205 U. S. 46, 27 S. Ct. 425, 51 U. S. (L. ed.) 703, as to proper district for suit, bringing in absent defendants, etc.

*U. S. Fidelity, etc., Co. v. U. S.*, (1907) 204 U. S. 349, 27 S. Ct. 381, 51 U. S. (L. ed.) 516, determining that the United States was the real, and not merely the nominal, plaintiff, so as to sustain the jurisdiction.

*Smithers v. Smith*, (1907) 204 U. S. 632, 27 S. Ct. 297, 51 U. S. (L. ed.) 656, determining whether, on the law and facts, the jurisdictional amount was involved.

*Chicago v. Mills*, (1907) 204 U. S. 321, 27 S. Ct. 286, 51 U. S. (L. ed.) 504, determining, on the evidence in the record, the question of the collusive character of the alleged diverse citizenship of the parties.

*Merchants' Heat, etc., Co. v. Clow*, (1907) 204 U. S. 286, 27 S. Ct. 285, 51 U. S. (L. ed.) 488, determining the validity of service of process upon a foreign corporation defendant, and, if not valid, whether the defendant submitted to the jurisdiction.

*Wecker v. National Enameling, etc., Co.*, (1907) 204 U. S. 176, 27 S. Ct. 184, 51 U. S. (L. ed.) 430, affirming an order refusing to remand to a state court a case removed therefrom, it appearing to the court below that defendants had been fraudulently joined to prevent a removal.

*C. H. Nichols Lumber Co. v. Franson*, (1906) 203 U. S. 278, 27 S. Ct. 102, 51 U. S. (L. ed.) 181, considering the question whether the plaintiff's complaint sufficiently alleged his alienage.

*Clark v. Wells*, (1906) 203 U. S. 164, 27 S. Ct. 43, 51 U. S. (L. ed.) 138, presenting the question of the power of the Circuit Court to enter a judgment *in personam* against the defendant in a case removed from a state court, where there was no personal service of process before or after removal nor waiver thereof.

*Moore v. McGuire*, (1907) 205 U. S. 214, 27 S. Ct. 483, 51 U. S. (L. ed.) 776, and *Joy v. St. Louis*, (1906) 201 U. S. 332, 26 S. Ct. 478, 50 U. S. (L. ed.) 776, determining whether the court below had jurisdiction by reason of an alleged federal question involved; *Owensboro Waterworks Co. v. Owens-*

boró, (1906) 200 U. S. 38, 26 S. Ct. 249, 50 U. S. (L. ed.) 361; *Devine v. Los Angeles*, (1906) 202 U. S. 313, 26 S. Ct. 652, 50 U. S. (L. ed.) 1046; and *Montana Catholic Missions v. Missoula County*, (1906) 200 U. S. 118, 26 S. Ct. 197, 50 U. S. (L. ed.) 398, holding that the complaint in the court below presented no federal question.

*Petri v. F. E. Creelman Lumber Co.*, (1905) 199 U. S. 487, 26 S. Ct. 133, 50 U. S. (L. ed.) 281, deciding as to the district in which a suit could be brought between parties of diverse citizenship.

*Sweeney v. Carter Oil Co.*, (1905) 199 U. S. 252, 26 S. Ct. 55, 50 U. S. (L. ed.) 178, determining in what federal district a suit was maintainable between several plaintiffs and one defendant, all of diverse citizenship.

*Knapp v. Lake Shore, etc., R. Co.*, (1905) 197 U. S. 536, 25 S. Ct. 538, 49 U. S. (L. ed.) 870, holding that the Circuit Court had no jurisdiction of original proceedings seeking relief by mandamus.

*Stillman v. Combe*, (1905) 197 U. S. 436, 25 S. Ct. 480, 49 U. S. (L. ed.) 822, holding that the court below did not have jurisdiction of the bill as ancillary to an action at law.

*McDaniel v. Traylor*, (1905) 196 U. S. 415, 25 S. Ct. 369, 49 U. S. (L. ed.) 533, holding that a jurisdictional amount was in dispute in the court below.

*Doctor v. Harrington*, (1905) 196 U. S. 579, 25 S. Ct. 355, 49 U. S. (L. ed.) 606, sustaining federal jurisdiction on the ground of diverse citizenship, of a suit by stockholders of a corporation against the corporation and other stockholders thereof.

*Madisonville Traction Co. v. St. Bernard Min. Co.*, (1905) 196 U. S. 239, 25 S. Ct. 251, 49 U. S. (L. ed.) 462, holding that the federal court had jurisdiction by removal from a state court of a proceeding to take property by eminent domain.

*Raphael v. Trask*, (1904) 194 U. S. 272, 24 S. Ct. 647, 48 U. S. (L. ed.) 973, holding that necessary diversity of citizenship was absent and also that the bill was not an ancillary bill.

*Kirby v. American Soda Fountain Co.*, (1904) 194 U. S. 141, 24 S. Ct. 619, 48 U. S. (L. ed.) 911, holding that a jurisdictional amount was in dispute in the court below.

*Barney v. New York*, (1904) 193 U. S. 430, 24 S. Ct. 502, 48 U. S. (L. ed.) 737, holding that no federal question was presented as a ground of jurisdiction.

*New York Underground R. Co. v. New York*, (1904) 193 U. S. 416, 24 S. Ct. 494, 48 U. S. (L. ed.) 733, holding that plaintiff's bill, dismissed on demurrer, did not present a federal question.

*Kinney v. Columbia Sav., etc., Assoc.*, (1903) 191 U. S. 78, 24 S. Ct. 30, 48 U. S. (L. ed.) 103, holding that the federal court had power to permit the amendment of a petition for removal, where the right to remove existed, but the petition was defective.

*Geer v. Mathieson Alkali Works*, (1903) 190 U. S. 428, 23 S. Ct. 807, 47 U. S. (L. ed.) 1122, determining that there was a separable controversy justifying removal of a case from the state to the federal court.

*Globe Refining Co. v. Landa Cotton Oil Co.*, (1903) 190 U. S. 540, 23 S. Ct. 754, 47 U. S. (L. ed.) 1171, determining whether a jurisdictional amount was in dispute.

*Conley v. Mathieson Alkali Works*, (1903) 190 U. S. 408, 23 S. Ct. 728, 47 U. S. (L. ed.) 1113, holding that, on the evidence in the record on a writ of error, service of process on a foreign corporation in a case afterward removed to the federal court was insufficient to give jurisdiction, as it was not doing business in the state. To the same point is *Geer v. Mathieson Alkali Works*, (1903) 190 U. S. 428, 23 S. Ct. 807, 47 U. S. (L. ed.) 1122.

*Boston, etc., Consol. Copper, etc., Min. Co. v. Montana Ore Purchasing Co.*, (1903) 188 U. S. 632, 645, 23 S. Ct. 434, 440, 47 U. S. (L. ed.) 626, holding that the court below had no jurisdiction on the ground of an alleged federal question. To the same point see *Union, etc., Bank v. Memphis*, (1903) 189 U. S. 71, 23 S. Ct. 604, 47 U. S. (L. ed.) 712; *Giles v. Harris*, (1903) 189 U. S. 475, 23 S. Ct. 639, 47 U. S. (L. ed.) 909.

*Bigby v. U. S.*, (1903) 188 U. S. 400, 23 S. Ct. 468, 47 U. S. (L. ed.) 519, question of jurisdiction under the Tucker Act of March 3, 1887, 2 Fed. Stat. Annot. 80.

*Prout v. Starr*, (1903) 188 U. S. 537, 23 S. Ct. 398, 47 U. S. (L. ed.) 584, holding that the suit was not against a state and therefore not in violation of the Eleventh Amendment of the Constitution.

*American Colortype Co. v. Continental Colortype Co.*, (1903) 188 U. S. 164, 23 S. Ct. 265, 47 U. S. (L. ed.) 404, jurisdiction of suit by assignee.

*Mexican Cent. R. Co. v. Eckman*, (1903) 187 U. S. 429, 23 S. Ct. 211, 47 U. S. (L. ed.) 245, holding that the guardian's citizenship in his suit for a ward determines the jurisdiction.

*Vicksburg Waterworks Co. v. Vicksburg*, (1902) 185 U. S. 65, 22 S. Ct. 585, 46 U. S. (L. ed.) 808, holding that the court below had jurisdiction on the ground of a federal question presented.

*Arkansas v. Kansas, etc., Coal Co.*, (1901) 183 U. S. 185, 22 S. Ct. 47, 46 U. S. (L. ed.) 144, deciding that a suit by the state is not removable from a state to a federal court, and also that the court below had no jurisdiction on the alleged ground of a federal question involved.

*De Lima v. Bidwell*, (1901) 182 U. S. 1, 21 S. Ct. 743, 45 U. S. (L. ed.) 1041, holding that the state court from which the cause was removed had jurisdiction and also the federal court by the removal.

*Put-in-Bay Waterworks, etc., Co. v. Ryan*, (1901) 181 U. S. 409, 21 S. Ct. 709, 45 U. S. (L. ed.) 927, holding that a jurisdictional amount was in dispute in the court below.

*Wheless v. St. Louis*, (1901) 180 U. S. 379, 21 S. Ct. 402, 45 U. S. (L. ed.) 583, as to amount in dispute sufficient for federal jurisdiction.

*Illinois Cent. R. Co. v. Adams*, (1901) 180 U. S. 28, 21 S. Ct. 251, 45 U. S. (L. ed.) 410, holding that the court below had jurisdiction both on the ground of diverse citizenship and of a federal question presented, that the

amount in controversy was sufficient, and that it was not a suit against a state.

*North American Transp., etc., Co. v. Morrison*, (1900) 178 U. S. 262, 20 S. Ct. 869, 44 U. S. (L. ed.) 1061, holding that a jurisdictional amount was not in dispute in the court below.

*Chrystal Springs Land, etc., Co. v. Los Angeles*, (1900) 177 U. S. 160, 20 S. Ct. 573, 44 U. S. (L. ed.) 720, holding that no federal question was presented in court below as ground of jurisdiction.

*Jellenik v. Huron Copper Min. Co.*, (1900) 177 U. S. 1, 20 S. Ct. 559, 44 U. S. (L. ed.) 647, holding that there was jurisdiction of absent parties.

*Glass v. Concordia Parish Police Jury*, (1900) 176 U. S. 207, 20 S. Ct. 346, 44 U. S. (L. ed.) 436, holding in a suit by an assignee that there was no diverse citizenship.

*Blackburn v. Portland Gold Min. Co.*, (1900) 175 U. S. 571, 20 S. Ct. 222, 44 U. S. (L. ed.) 276, holding that a jurisdictional amount was in dispute in the court below, but that there was no diverse citizenship and no federal question.

*Bienville Water-Supply Co. v. Mobile*, (1899) 175 U. S. 109, 20 S. Ct. 40, 44 U. S. (L. ed.) 92, holding that a federal question was not presented in the court below.

*McCain v. Des Moines*, (1899) 174 U. S. 168, 19 S. Ct. 644, 43 U. S. (L. ed.) 936, holding that the court below had no jurisdiction on the ground of a federal question.

*New Orleans v. Quinlan*, (1899) 173 U. S. 191, 19 S. Ct. 329, 43 U. S. (L. ed.) 664, holding that there was jurisdiction on the ground of diverse citizenship of a suit by an assignee.

*The William M. Hoag*, (1897) 168 U. S. 443, 18 S. Ct. 114, 42 U. S. (L. ed.) 537, and *The Resolute*, (1897) 168 U. S. 437, 18 S. Ct. 112, 42 U. S. (L. ed.) 533, holding that the court below had admiralty jurisdiction of the suit *in rem*.

*Hooe v. Jamieson*, (1897) 166 U. S. 395, 17 S. Ct. 596, 41 U. S. (L. ed.) 1049, holding that there was no diverse citizenship to sustain jurisdiction below.

*Citizens' Bank v. Cannon*, (1896) 164 U. S. 319, 17 S. Ct. 89, 41 U. S. (L. ed.) 451, and *Fishback v. Western Union Tel. Co.*, (1896) 161 U. S. 96, 16 S. Ct. 506, 40 U. S. (L. ed.) 630, holding that a jurisdictional amount was not in dispute in the court below.

*Edwards v. Bates County*, (1896) 163 U. S. 269, 16 S. Ct. 967, 41 U. S. (L. ed.) 155, holding that a jurisdictional amount was in dispute.

*U. S. v. Sayward*, (1895) 160 U. S. 493, 16 S. Ct. 371, 40 U. S. (L. ed.) 508, holding that the amount in dispute was not jurisdictional in a suit by the United States.

*Lehigh Min., etc., Co. v. Kelly*, (1895) 160 U. S. 327, 16 S. Ct. 307, 40 U. S. (L. ed.) 444, holding that one of the parties had not a *bona fide* existence.

*Postal Tel. Cable Co. v. Alabama*, (1894) 155 U. S. 462, 15 S. Ct. 192, 39 U. S. (L. ed.) 231, holding that the court below in a removed case had no jurisdiction on the alleged ground of a federal question.

*U. S. v. Klingenberg*, (1894) 153 U. S. 93.

14 S. Ct. 790, 38 U. S. (L. ed.) 647, as to jurisdiction of Circuit Court to review decision of general board of appraisers. See also *U. S. v. Jahn*, (1894) 155 U. S. 109, 15 S. Ct. 39, 39 U. S. (L. ed.) 87.

*Schoenfeld v. Hendricks*, (1894) 152 U. S. 691, 14 S. Ct. 754, 38 U. S. (L. ed.) 601, as to jurisdiction of action at law against collector to recover excessive duties paid.

*Central Trust Co. v. McGeorge*, (1894) 151 U. S. 129, 14 S. Ct. 286, 38 U. S. (L. ed.) 98, question whether suit between diverse citizens was brought in the proper federal district. See also *Galveston, etc., R. Co. v. Gonzales*, (1894) 151 U. S. 496, 14 S. Ct. 401, 38 U. S. (L. ed.) 248.

*Mexican Cent. R. Co. v. Pinkney*, (1893) 149 U. S. 194, 13 S. Ct. 859, 37 U. S. (L. ed.) 699, as to validity of service of process on a foreign corporation.

*Passavant v. U. S.*, (1893) 148 U. S. 214, 13 S. Ct. 572, 37 U. S. (L. ed.) 426, as to jurisdiction of Circuit Court on appeal from decision of board of general appraisers.

*Walter v. Northeastern R. Co.*, (1893) 147 U. S. 370, 13 S. Ct. 348, 37 U. S. (L. ed.) 206, holding jurisdictional amount not in dispute below.

**Appeal cannot be taken before final judgment.**—A judgment of the court below, rendered after the plaintiff, having unsuccessfully moved to remand the cause to the state court whence it was removed, had elected to stand upon his motion to remand, and refused to recognize the jurisdiction of the federal court, that plaintiff take nothing of the suit, and that the defendants go hence without day and recover their costs against the plaintiff, is final for the purpose of appeal on the question of jurisdiction, regardless of whether such judgment would be a bar to another action. *Wecker v. National Enameling, etc., Co.*, (1907) 204 U. S. 176, 27 S. Ct. 184, 51 U. S. (L. ed.) 480.

**Separate appeals in the same case and at the same time to the Supreme Court and to the Circuit Court of Appeals are not contemplated by the Act.** After final judgment, "the party against whom it is rendered must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the Circuit Court of Appeals upon the whole case; if the latter, then the Circuit Court of Appeals may, if it deem proper, certify the question of jurisdiction to this court." *McLish v. Roff*, (1891) 141 U. S. 661, 12 S. Ct. 118, 35 U. S. (L. ed.) 898. See also *U. S. v. Larkin*, (1908) 208 U. S. 333, 28 S. Ct. 417, 52 U. S. (L. ed.) 517.

Where two cases were submitted, one a direct appeal from the Circuit Court, the other an appeal from the Circuit Court of Appeals to which the same case had been taken, the court said: "Diversity of citizenship did not exist, and the jurisdiction of the Circuit Court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under section 5 of the Judiciary Act of March 3, 1891, . . . and not to the Circuit Court of Appeals. *American Sugar*

*Refining Co. v. New Orleans*, (1901) 181 U. S. 277, 21 S. Ct. 646, 45 U. S. (L. ed.) 859. Nevertheless, an appeal having been prosecuted to the latter court, and having there gone to decree, an appeal was allowed to this court because the judgment was not made final in that court by section 6 of the Act. But the case being here, and the jurisdiction of the Circuit Court having depended on the sole ground that it arose under the Constitution, we are constrained to reverse the decree of the Circuit Court of Appeals, not on the merits, but by reason of the want of jurisdiction in that court. If this were not so, the right to two appeals would exist in every similar case, notwithstanding, as we have repeatedly held, that such was not the intention of the Act." *Union, etc., Bank v. Memphis*, (1903) 189 U. S. 71, 23 S. Ct. 604, 47 U. S. (L. ed.) 712, citing cases and *distinguishing Pullman's Palace-Car Co. v. Central Transp. Co.*, (1898) 171 U. S. 138, 18 S. Ct. 808, 43 U. S. (L. ed.) 108.

Where the Circuit Court dismissed a declaration on sustaining a demurrer for want of jurisdiction, and on the plaintiff's writ of error the Circuit Court of Appeals reversed the judgment and the case proceeded to trial below, the defendant still objecting, the latter was not debarred from taking a judgment against him direct to the Supreme Court on a writ of error on the question of jurisdiction. *Globe Newspaper Co. v. Walker*, (1908) 210 U. S. 356, 28 S. Ct. 726, 52 U. S. (L. ed.) 1096.

But in a case similar to the foregoing, except that the defendant had not confined its defense to a denial of jurisdiction, it was held that the defendant could not, after a decree against it pursuant to a judgment of the Circuit Court of Appeals on the plaintiff's appeal, take the case direct from the Circuit Court to the Supreme Court on the question of jurisdiction. *Kansas City Northwestern R. Co. v. Zimmerman*, (1908) 210 U. S. 336, 28 S. Ct. 730, 52 U. S. (L. ed.) 1084.

In *Petri v. F. E. Creelman Co.*, (1905) 190 U. S. 487, 26 S. Ct. 133, 50 U. S. (L. ed.) 281, where the court entertained jurisdiction of the appeal, the case had been previously taken to the Circuit Court of Appeals and dismissed by that court.

Affirmance by the Circuit Court of Appeals of an interlocutory decree appointing a receiver, and issuing a preliminary injunction, does not prejudice a subsequent appeal by another party, who appeared later in the action, from a decree made thereafter involving the question of jurisdiction. *Stillman v. Combe*, (1905) 197 U. S. 436, 25 S. Ct. 480, 49 U. S. (L. ed.) 822.

If an appeal is taken to and determined by the Circuit Court of Appeals in a case which does not really involve the jurisdiction of the District Court as a federal court, and subsequently an appeal is taken in the same case direct from the District Court to the Supreme Court, obviously the correctness of the judgment of the Circuit Court of Appeals is not open to consideration. *U. S. v. Larkin*, (1908) 208 U. S. 333, 28 S. Ct. 417, 52 U. S. (L. ed.) 517.

**Second appeal.**—After a decree of dismissal on sustaining a demurrer for want of a jurisdictional amount in controversy has been reversed by the Supreme Court with direction for further proceedings, and the court below, after hearing evidence, again dismisses for failure to prove a jurisdictional amount, a second appeal to the Supreme Court may be taken on the jurisdictional question. *McDaniel v. Traylor*, (1908) 212 U. S. 428, 29 S. Ct. 343, 53 U. S. (L. ed.) 584.

**Necessity of certificate.**—In the absence of a certificate or its equivalent an appeal will be dismissed, unless the appeal is sustainable on another ground. *Colvin v. Jacksonville*, (1895) 157 U. S. 368, 15 S. Ct. 634, 39 U. S. (L. ed.) 736; *Courtney v. Pratt*, (1905) 196 U. S. 89, 25 S. Ct. 208, 49 U. S. (L. ed.) 398.

But "it would be our duty, without action of the trial court or of the parties, to look at the record to determine whether or not the court below had jurisdiction of the action." *C. H. Nichols Lumber Co. v. Franson*, (1906) 203 U. S. 278, 27 S. Ct. 102, 51 U. S. (L. ed.) 181, citing *Thomas v. Ohio State University*, (1904) 195 U. S. 211, 25 S. Ct. 24, 49 U. S. (L. ed.) 164. See also *Mattingly v. Northwestern Virginia R. Co.*, (1895) 158 U. S. 53, 15 S. Ct. 725, 39 U. S. (L. ed.) 894.

There may be on the face of the record "a question of jurisdiction paramount to that passed on by the Circuit Court" and certified by it, which may necessitate reversal of a decree of the Circuit Court determining that it had jurisdiction. *Lathrop, etc., Co. v. Interior Constr., etc., Co.*, (1909) 215 U. S. 246, 30 S. Ct. 76, 54 U. S. (L. ed.) 177.

Where there is no certificate, and the case is appealed to the Supreme Court only upon the ground of a constitutional question involved, if the record shows that the court below had no jurisdiction the Supreme Court will take notice of the fact, and decree accordingly. *Shawnee Sewerage, etc., Co. v. Stearns*, (1911) 220 U. S. 462, 31 S. Ct. 452, 55 U. S. (L. ed.) 544.

If the record should disclose that there was a want of jurisdictional amount involved in the court below, even if that was not one of the questions certified, it seems that the Supreme Court would take notice of it, provided there was jurisdiction of the appeal. *Illinois Cent. R. Co. v. Adams*, (1901) 180 U. S. 28, 21 S. Ct. 251, 45 U. S. (L. ed.) 410.

**Formal certificate, when necessary.**—"Ordinarily a formal certificate is essential.

But where the record shows that the only matter tried and decided in the [court below] was one of jurisdiction, and the petition upon which the writ of error was allowed asked only for a review of the judgment that the court had no jurisdiction of the action, the question of jurisdiction alone is sufficiently certified." *U. S. v. Larkin*, (1908) 208 U. S. 333, 28 S. Ct. 417, 52 U. S. (L. ed.) 517.

A certificate is unnecessary, where, upon the face of the record, irrespective of the recitals in the order made on the allowance of the appeal, it is apparent that the only question which was decided below was one of ju-

isdiction, and the decree on its face shows that the cause was dismissed for want of jurisdiction. *The Steamship Jefferson*, (1909) 215 U. S. 130, 30 S. Ct. 54, 54 U. S. (L. ed.) 125.

In *Petri v. F. E. Creelman Lumber Co.*, (1905) 199 U. S. 487, 26 S. Ct. 133, 50 U. S. (L. ed.) 281, the bill of exceptions filed below and the certificate made as to the question of jurisdiction were authenticated by a judge other than the trial judge, and moreover, the certificate was not made at the term at which the judgment complained of was entered. But the court said: "We are relieved, however, from the necessity of considering these objections, for the reason that the judgment of dismissal and the prior proceedings clearly exhibit the ground upon which the judgment was based, and plainly make apparent on the record the fact that the only matter tried and decided in the Circuit Court were demurrers to pleas to the jurisdiction, and that the petition upon which the writ of error was allowed asked only for the review of the judgment, which decided that the court had no jurisdiction of the action. This being the state of the record, no bill of exceptions or formal certificate in respect to the matter decided was required, and the question of jurisdiction alone was sufficiently certified to this court."

If the certificate of the court below fails to show the exact ground of federal jurisdiction that was in question, it may sufficiently appear by examination of the record, aided by the opinion of the court contained therein, and made part thereof. *Chicago v. Mills*, (1907) 204 U. S. 321, 27 S. Ct. 286, 51 U. S. (L. ed.) 504, citing as in point *Smith v. McKay*, (1896) 161 U. S. 355, 16 S. Ct. 490, 40 U. S. (L. ed.) 731, which cited *with approval* *Shields v. Coleman*, (1895) 157 U. S. 168, 15 S. Ct. 570, 39 U. S. (L. ed.) 660, and *In re Lehigh Min., etc., Co.*, (1895) 156 U. S. 322, 15 S. Ct. 375, 39 U. S. (L. ed.) 438.

The record does not show an equivalent of the certificate of jurisdiction to review a judgment dismissing a complaint for want of jurisdiction, where the assignment of errors is directed both to the jurisdiction and the merits, and the petition for the writ of error, which was allowed generally and without any limitation or specification, prays for a review to the end that the rulings and judgment of the court below may be reversed. *Filhiol v. Torney*, (1904) 194 U. S. 356, 24 S. Ct. 698, 48 U. S. (L. ed.) 1014.

In *Chicago v. Mills*, (1907) 204 U. S. 321, 27 S. Ct. 286, 51 U. S. (L. ed.) 504, an appeal in equity, portions of the proceedings, including the testimony on the question of jurisdiction, duly signed and sealed and made part of the record, were certified to the Supreme Court in the form of a bill of exceptions.

**Form and frame of certificate.**—Supreme Court rule 37, 210 U. S. 501, 29 S. Ct. xxii, does not control in appellate proceedings under the section to which this note is devoted. See *Bowker v. U. S.*, (1902) 186 U. S. 135, 22 S. Ct. 802, 46 U. S. (L. ed.) 1090.

In *Woodside v. Beckham*, (1910) 216 U. S. 117, 30 S. Ct. 367, 54 U. S. (L. ed.) 408, the

certificate referred to the reasons stated in the opinion filed in the case, which opinion was, by the terms of the certificate, made a part of the record directed to be certified and sent up as such.

The Supreme Court will accept a precise statement in the certificate as to the grounds of the decision of the court below, notwithstanding a contention that there is an inconsistency between the opinion and order of the court below and its certificate. *Scully v. Bird*, (1908) 209 U. S. 481, 28 S. Ct. 597, 52 U. S. (L. ed.) 899.

If a certificate does not state in proper form any facts or propositions of law, it is nevertheless sufficient where the record clearly shows that the only matter tried and decided was one of jurisdiction. *Davis v. Cleveland, etc., R. Co.*, (1910) 217 U. S. 157, 30 S. Ct. 463, 54 U. S. (L. ed.) 708.

"The question of jurisdiction alone shall be certified," reads the statute. But this may be divided into a number of specific questions, as in some of the following cases where certificates are quoted in full, or nearly in full: *Hooe v. Jamieson*, (1897) 166 U. S. 395, 17 S. Ct. 596, 41 U. S. (L. ed.) 1049; *Glass v. Concordia Parish Police Jury*, (1900) 176 U. S. 207, 20 S. Ct. 346, 44 U. S. (L. ed.) 436; *Huntington v. Laidley*, (1900) 176 U. S. 668, 20 S. Ct. 526, 44 U. S. (L. ed.) 630; *McDonnell v. Jordan*, (1900) 178 U. S. 229, 20 S. Ct. 886, 44 U. S. (L. ed.) 1048; *North American Transp., etc., Co. v. Morrison*, (1900) 178 U. S. 262, 20 S. Ct. 869, 44 U. S. (L. ed.) 1061; *Illinois Cent. R. Co. v. Adams*, (1901) 180 U. S. 28, 21 S. Ct. 251, 45 U. S. (L. ed.) 410; *Put-in-Bay Waterworks, etc., Co. v. Ryan*, (1901) 181 U. S. 409, 21 S. Ct. 709, 45 U. S. (L. ed.) 927; *Mexican Cent. R. Co. v. Eckman*, (1903) 187 U. S. 429, 23 S. Ct. 211, 47 U. S. (L. ed.) 245; *Bigby v. U. S.*, (1903) 188 U. S. 400, 23 S. Ct. 468, 47 U. S. (L. ed.) 519; *Doctor v. Harrington*, (1905) 196 U. S. 579, 25 S. Ct. 354, 49 U. S. (L. ed.) 606; *Sweeney v. Carter Oil Co.*, (1905) 199 U. S. 252, 26 S. Ct. 55, 50 U. S. (L. ed.) 178; *Venner v. Great Northern R. Co.*, (1908) 209 U. S. 24, 28 S. Ct. 328, 52 U. S. (L. ed.) 666; *Scully v. Bird*, (1908) 209 U. S. 481, 28 S. Ct. 597, 52 U. S. (L. ed.) 899; *Lathrop, etc., Co. v. Interior Constr., etc., Co.*, (1909) 215 U. S. 246, 30 S. Ct. 76, 54 U. S. (L. ed.) 177; *Mechanical Appliance Co. v. Castleman*, (1910) 215 U. S. 437, 30 S. Ct. 125, 54 U. S. (L. ed.) 272.

**Time of granting certificate.**—To the point that the certificate must be granted during the term at which the judgment was rendered, see *Davis v. Cleveland, etc., R. Co.*, (1910) 217 U. S. 157, 30 S. Ct. 463, 54 U. S. (L. ed.) 708.

But if a certificate was not made at the term at which judgment was rendered, and therefore comes too late, it is not fatal to the appellate jurisdiction in a case where no formal certificate was necessary. *U. S. v. Larkin*, (1908) 208 U. S. 333, 28 S. Ct. 417, 52 U. S. (L. ed.) 517.

"The question of jurisdiction was certified before the adjournment of the term of the Circuit Court of the United States for the

Northern District and Northern Division of Alabama, at which term the judgment was entered; and we decline, under the circumstances disclosed, to discuss what the effect might have been if the certificate had shown on its face that it was in fact signed in the Southern Division of the district within which the presiding judge had jurisdiction." *McDonnell v. Jordan*, (1900) 178 U. S. 229, 20 S. Ct. 886, 44 U. S. (L. ed.) 1048.

The certificate, if otherwise in time, may be granted after one of the justices of the Supreme Court has allowed the appeal, as in *Aspen Min., etc., Co. v. Billings*, (1893) 150 U. S. 31, 14 S. Ct. 4, 37 U. S. (L. ed.) 986.

**Amendment of certificate.** — It is "extremely questionable" whether the lower court, having granted a certificate presenting the question of jurisdiction during the term at which the judgment was rendered, has power to amend the same after the lapse of the term and in a material respect, to cure an alleged error not clerical. *Patch v. Wabash R. Co.*, (1907) 207 U. S. 277, 28 S. Ct. 80, 52 U. S. (L. ed.) 204, holding it to be doubtful whether such amendment of the certificate, without leave of the Supreme Court, could be considered on a writ of error.

A bill of exceptions is not necessary where the question of jurisdiction is susceptible of determination by what appears on the face of the record. *C. H. Nichols Lumber Co. v. Franson*, (1906) 203 U. S. 278, 27 S. Ct. 102, 51 U. S. (L. ed.) 181.

In *Smithers v. Smith*, (1907) 204 U. S. 632, 27 S. Ct. 297, 51 U. S. (L. ed.) 656, there was a bill of exceptions containing the evidence taken on the question of jurisdiction. So in *Peterson v. Chicago, etc., R. Co.*, (1907) 205 U. S. 364, 27 S. Ct. 513, 51 U. S. (L. ed.) 841. See also conclusion of opinion in *C. H. Nichols Lumber Co. v. Franson*, (1906) 203 U. S. 278, 27 S. Ct. 102, 51 U. S. (L. ed.) 181.

While the Supreme Court must consider the record for the purpose of determining the question of jurisdiction which the certificate shows adequately to have been raised, it cannot consider, in passing upon the question, in the absence of a bill of exceptions, extraneous matter which forms no part of the record, such as the testimony of witnesses. *C. H. Nichols Lumber Co. v. Franson*, (1906) 203 U. S. 278, 27 S. Ct. 102, 51 U. S. (L. ed.) 181.

**Who may allege error.** — The question of jurisdiction must have been decided against the appellant, in order to authorize an appeal. *Carey v. Houston, etc., R. Co.*, (1893) 150 U. S. 170, 14 S. Ct. 63, 37 U. S. (L. ed.) 1041.

When a bill was dismissed for want of equity as specified in a demurrer, but at the same time held sufficient as against a specified want of jurisdiction in the demurrer, "the decree did not injure defendant, but sustained its contention, and defendant is in no position to complain that it is aggrieved by its own success." *New Orleans v. Emsheimer*, (1901) 181 U. S. 153, 21 S. Ct. 584, 45 U. S. (L. ed.) 794.

"It is no infringement upon the ancient maxim of the law, that consent cannot confer

jurisdiction, to hold that where a party has procured the removal of a cause from a state court upon the ground that he is lawfully entitled to a trial in a federal court, he is estopped to deny that such removal was lawful if the federal court could take jurisdiction of the case, or that the federal court did not have the same right to pass upon the questions at issue that the state court would have had if the cause had remained there." *De Lima v. Bidwell*, (1901) 182 U. S. 1, 174, 21 S. Ct. 743, 45 U. S. (L. ed.) 1041.

If the jurisdiction is sustained — by overruling a demurrer to the bill, for example — and then a judgment or decree is rendered in favor of the defendant, the plaintiff cannot appeal to the Supreme Court on the jurisdictional question. *Anglo-American Provision Co. v. Davis Provision Co.*, (1903) 191 U. S. 376, 24 S. Ct. 93, 48 U. S. (L. ed.) 228.

**Case advanced for hearing in Supreme Court — motion to dismiss or affirm.** — Supreme Court rule 32. (1892) 146 U. S. 707, 13 S. Ct. iii, provides for advancement, on motion, of appeals on the question of jurisdiction. A motion to dismiss or affirm under Supreme Court rule 6 may be treated as equivalent to submission under said rule 32. *Kirby v. American Soda Fountain Co.*, (1904) 194 U. S. 141, 24 S. Ct. 619, 48 U. S. (L. ed.) 911.

An order to advance is unnecessary and would be superfluous where a motion to dismiss coupled with a motion to affirm is filed, and it is evident that the case will be dismissed on the motion. *Aspen Min., etc., Co. Billings*, (1893) 150 U. S. 31, 14 S. Ct. 4, 37 U. S. (L. ed.) 986.

On motion to dismiss or affirm, it is only necessary to print so much of the record as will enable the court to act understandingly without reference to the transcript. *Carey v. Houston, etc., R. Co.*, (1893) 150 U. S. 170, 14 S. Ct. 63, 37 U. S. (L. ed.) 1041.

Oral argument is not allowed on motions to dismiss appeals or writs of error, as a general rule. *Aspen Min., etc., Co. v. Billings*, (1893) 150 U. S. 31, 14 S. Ct. 4, 37 U. S. (L. ed.) 986; *Carey v. Houston, etc., R. Co.*, (1893) 150 U. S. 170, 14 S. Ct. 63, 37 U. S. (L. ed.) 1041.

**Questions reviewable** — The question whether the Circuit Court in a case removed from a state court was without jurisdiction because the removal was improper is not open where the certificate and the record on appeal show that the jurisdiction of the Circuit Court was denied solely on the ground that the state court wherein the cause originated had no jurisdiction. *Kansas City Northwestern R. Co. v. Zimmerman*, (1908) 210 U. S. 336, 28 S. Ct. 730, 52 U. S. (L. ed.) 1084.

**Review limited to question of jurisdiction — exceptions.** — The Supreme Court is concerned only with the correctness of the conclusion reached in the court below as to the question of jurisdiction. *Chicago v. Mills*, (1907) 204 U. S. 321, 27 S. Ct. 286, 51 U. S. (L. ed.) 504.

"The whole case is not open to us, but only the question of jurisdiction." *Mexican Cent.*

R. Co. v. Eckman, (1903) 187 U. S. 429, 23 S. Ct. 211, 47 U. S. (L. ed.) 245.

"We have not to consider how far the injunction should go in case the plaintiff succeeds, or anything except the objection" to the jurisdiction. *American Colortype Co. v. Continental Colortype Co.*, (1903) 188 U. S. 104, 23 S. Ct. 265, 47 U. S. (L. ed.) 404.

The Supreme Court is not concerned with the merits of the controversy as disclosed by the pleadings further than the allegations concerning the same are necessary to be considered in determining the question of jurisdiction of the court below. *Whitney v. Wenman*, (1905) 198 U. S. 539, 25 S. Ct. 778, 49 U. S. (L. ed.) 1157.

Where the appeal is taken on a certified question whether the court below had jurisdiction on the ground of a federal question, other matters of law or fact are not considered, and the function of the Supreme Court "is restricted to the inquiry whether, upon the allegations of the bill of complaint, assuming them to be true in point of fact, a federal question is disclosed so as to give the Circuit Court jurisdiction." *Vicksburg Waterworks Co. v. Vicksburg*, (1902) 185 U. S. 65, 22 S. Ct. 585, 46 U. S. (L. ed.) 808.

Where an appeal is based on the question whether a jurisdictional amount was in dispute in a cross-bill, no question of error in matter of equity procedure in the retaining of the cross-bill after the dismissal of the bill is open for consideration. *Kirby v. American Soda Fountain Co.*, (1904) 194 U. S. 141, 24 S. Ct. 619, 48 U. S. (L. ed.) 911.

Exercise of discretion to grant or refuse leave to file a supplemental bill is not reviewable on appeals of this character. *Raphael v. Trask*, (1904) 194 U. S. 272, 24 S. Ct. 647, 48 U. S. (L. ed.) 973.

An "appeal, although general in form, does not and could not bring up for review anything more than the question of jurisdiction certified by the lower court," *Passavant v. U. S.*, (1893) 148 U. S. 214, 13 S. Ct. 572, 37 U. S. (L. ed.) 426, except, however, when a general appeal is taken in a case involving matters that are appealable under other clauses of the text section.

In the case of a general appeal with a sole question of jurisdiction certified, if the Supreme Court decides that the court below had jurisdiction, it may proceed to determine an appealable constitutional question in the record, since "the appeal opens the whole case" and "the certificate was unnecessary to found the jurisdiction of this court, and could not narrow it." *Giles v. Harris*, (1903) 189 U. S. 475, 23 S. Ct. 639, 47 U. S. (L. ed.) 909, followed in *North American Cold Storage Co. v. Chicago*, (1908) 211 U. S. 306, 29 S. Ct. 101, 53 U. S. (L. ed.) 195.

If the appellate jurisdiction fails, so far as the question of the jurisdiction of the court below is concerned, the Supreme Court may, under some circumstances, consider the appeal as taken on the ground of a constitutional question involved. *Filhiol v. Torney*, (1904) 194 U. S. 256, 24 S. Ct. 698, 48 U. S. (L. ed.) 1014, quoting *Chappell v. U. S.*,

(1906) 160 U. S. 509, 16 S. Ct. 400, 40 U. S. (L. ed.) 514.

"As the writ of error was allowed upon assignments claimed to present questions as to the jurisdiction of the Circuit Court, and the circuit judge certified the question of jurisdiction, the writ might well be treated as bringing up only jurisdictional questions. Inasmuch, however, as the right to bring a case direct to this court exists when constitutional questions are raised and decided in the Circuit Court, we will briefly notice the assignments not stated as jurisdictional." *Bien v. Robinson*, (1908) 208 U. S. 423, 28 S. Ct. 379, 52 U. S. (L. ed.) 556, dismissing the writ altogether.

A question of fact necessarily involved in a decision on the question of jurisdiction, the record containing the evidence thereon, is before the Supreme Court for review on a writ of error as well as on appeal. *Wetmore v. Rymer*, (1898) 169 U. S. 115, 18 S. Ct. 293, 42 U. S. (L. ed.) 682; *Chicago v. Mills*, (1907) 204 U. S. 321, 27 S. Ct. 286, 51 U. S. (L. ed.) 504; *Commercial Mut. Acc. Co. v. Davis*, (1909) 213 U. S. 245, 29 S. Ct. 445, 53 U. S. (L. ed.) 782.

Evidence bearing on the question of the citizenship of the respective parties to a suit in a federal court must be examined on appeal, although the motion to dismiss for want of jurisdiction in the court below did not distinctly raise any question concerning the absence of diverse citizenship, but only stated that the parties were "residents" of the same state, where the court below treated the question of jurisdiction as raised, and passed upon it. *Steigleder v. McQuesten*, (1905) 198 U. S. 141, 25 S. Ct. 616, 49 U. S. (L. ed.) 986.

The grounds of a finding by the court below, on evidence taken without a jury on the question whether a jurisdictional amount was in dispute, are re-examinable by the Supreme Court. *Globe Refining Co. v. Landa Cotton Oil Co.*, (1903) 190 U. S. 540, 23 S. Ct. 754, 47 U. S. (L. ed.) 1171.

A finding of a Circuit Court that a foreign insurance company was not induced by fraud or artifice to send its medical representative into the state, so as to permit service of process on him in an action against the company, will not be set aside by the Supreme Court on a writ of error where the lower court might have found on the testimony in the record that there was a *bona fide* attempt to settle the controversy between the parties, and that it was only upon failure to reach a settlement that service of summons was made upon such representative as the agent of the company. *Commercial Mut. Acc. Co. v. Davis*, (1909) 213 U. S. 245, 29 S. Ct. 445, 53 U. S. (L. ed.) 782.

**Determination and disposition.** — "The power to certify to this court other than jurisdictional questions is vested only in the Circuit Court of Appeals." Hence if the question certified as one of jurisdiction of the court appears by the record to have been one of a different character, and the appeal is not sustainable on other grounds, it will be dismissed. *Arkansas v. Schlierholz*, (1900) 179 U. S. 598, 21 S. Ct. 229, 45 U. S. (L. ed.)

335. See also *Fore River Shipbuilding Co. v. Hagg*, (1911) 219 U. S. 175, 31 S. Ct. 185, 55 U. S. (L. ed.) 163.

Questions certified are not answered *seriatim* when the record discloses to the Supreme Court a want of jurisdiction in the court below which justified the latter in dismissing the cause. *Cleveland Terminal, etc., R. Co. v. Cleveland Steamship Co.*, (1908) 208 U. S. 316, 28 S. Ct. 414, 52 U. S. (L. ed.) 508.

If the Supreme Court decides that the jurisdiction of the lower court was not in issue within the meaning of the statutory provision for appeal, the appeal will be dismissed, as in *Lucius v. Cawthon-Coleman Co.*, (1905) 196 U. S. 149, 25 S. Ct. 214, 49 U. S. (L. ed.) 425. If it adjudges that the jurisdiction was in issue, it affirms, modifies, or reverses the judgment or decree of the court below, according as the decision of the Supreme Court on the question of jurisdiction may require.

Where an appeal was properly taken, both on the ground of a certified question of jurisdiction and on the ground of a federal question involved, and it was determined that the court erred in dismissing a bill on the former ground, but that the dismissal would be correct on the merits of the federal question, the decree was modified by striking out the ground for dismissal as being for want of jurisdiction, and, as so modified, affirmed. *North American Cold Storage Co. v. Chicago*, (1908) 211 U. S. 306, 29 S. Ct. 101, 53 U. S. (L. ed.) 195.

"The rule is without exception that the facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them." Hence if an appeal be taken on a question of jurisdiction, decided by the court below in favor of its jurisdiction, the judgment may be reversed for a fatal defect of jurisdiction on another ground. *Fishback v. Western Union Tel. Co.*, (1896) 161 U. S. 96, 16 S. Ct. 506, 40 U. S. (L. ed.) 630.

Where the Supreme Court decided that the lower court exceeded its jurisdiction in rendering a personal judgment absolute in terms, the judgment to that extent was modified by making it collectible only from attached property. *Clark v. Wells*, (1906) 203 U. S. 164, 27 S. Ct. 43, 51 U. S. (L. ed.) 138.

The decision of the court below on a question of jurisdiction may be so plainly right that the Supreme Court, instead of affirming the decree, may dismiss the appeal as frivolous. *Steele v. Culver*, (1908) 211 U. S. 26, 29 S. Ct. 9, 53 U. S. (L. ed.) 74, where the court below had properly dismissed a bill on demurrer for want of the requisite diversity of citizenship.

In order to decide the question of jurisdiction properly shown to have been raised, the Supreme Court cannot resort to the statements in the certificate for the purpose of supplying elements of decision which could not properly be considered in an action at law without a bill of exceptions; but "when the record does not otherwise show when and how the question of jurisdiction was raised,

the certificate of the Circuit Court may be considered for the purpose of supplying such deficiency when the elements necessary to decide the question are in the record," although it is "the better practice in every case of direct review on a question of jurisdiction to make apparent on the record, by a bill of exceptions or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon, and the elements upon which the decision of the question was based." *C. H. Nichols Lumber Co. v. Franston*, (1906) 203 U. S. 278, 27 S. Ct. 102, 51 U. S. (L. ed.) 181.

**Moot case.**—An appeal or writ of error will be dismissed where it is properly shown that there is nothing but a moot case remaining and an adjudication would be ineffectual. *Jones v. Montague*, (1904) 194 U. S. 147, 24 S. Ct. 611, 48 U. S. (L. ed.) 913; *Selden v. Montague*, (1904) 194 U. S. 153, 24 S. Ct. 613, 48 U. S. (L. ed.) 915.

#### CLAUSES 4-6. QUESTIONS UNDER THE CONSTITUTION AND TREATIES OF THE UNITED STATES.

**Issue must appear of record.**—"If a case is brought up from the Circuit Court on the ground that it involves the construction or application of the Constitution of the United States, the record must show that the question was raised for the consideration of the court below." *Paraiso v. U. S.*, (1907) 207 U. S. 368, 28 S. Ct. 127, 52 U. S. (L. ed.) 249.

**Exclusive jurisdiction of Supreme Court.**—Where the jurisdiction of the court below depends entirely upon the question whether a constitutional question is involved—the parties being citizens of the same state, for example—and other questions involved concern the merits, "an appeal lies only to the Supreme Court." *Paducah v. East Tennessee Telephone Co.*, (C. C. A. 1910) 182 Fed. 625, dismissing an appeal and *citing* *Union, etc., Bank v. Memphis*, (1903) 189 U. S. 71, 23 S. Ct. 604, 47 U. S. (L. ed.) 712; *MacFadden v. U. S.*, (1909) 213 U. S. 288, 29 S. Ct. 490, 53 U. S. (L. ed.) 801, and *Owensboro v. Owensboro Waterworks Co.*, (1902) 115 Fed. 318, 53 C. C. A. 146. Compare cases cited *supra*, this note, p. 1322. And observe, as in the cases cited *supra*, p. 1326, under *What are appealable questions of jurisdiction*, and some of the cases cited in 4 Fed. Stat. Annot. 405, under *Exclusive jurisdiction of Supreme Court*, that the question whether a federal question is sufficiently presented in a plaintiff's pleading is a question of "jurisdiction of the court."

Where a case involves the constitutionality of an Act of Congress, or the construction or application of the Constitution of the United States, and nothing else, the Supreme Court has exclusive appellate jurisdiction. *Spreckels Sugar Refining Co. v. McClain*, (1904) 192 U. S. 397, 24 S. Ct. 376, 48 U. S. (L. ed.) 496. But where the case also involves questions not exclusively cognizable on appeal by the Supreme Court, such as the construction and effect of state statutes, and the



regularity and effect of proceedings under a federal statute, the defeated party may, at his election, take it for review to the Circuit Court of Appeals. *Hooper v. Rimmel*, (1908) 165 Fed. 336, 91 C. C. A. 598.

A suit, although not one of diversity of citizenship, which, according to the complainant's bill, depends not only upon the construction and application of the Constitution of the United States and the constitutional validity of an Act of Congress, but also upon the proper construction of the Act of Congress, is one in respect of which the appellate jurisdiction of the Supreme Court is not exclusive, and an appeal from the final decree may be taken to the Circuit Court of Appeals. *Harris v. Rosenberger*, (1906) 145 Fed. 449, 76 C. C. A. 225, certiorari denied 203 U. S. 591, 27 S. Ct. 778, 51 U. S. (L. ed.) 331.

The fact that constitutional questions were involved in a case in the District Court does not deprive the Circuit Court of Appeals of jurisdiction to entertain an appeal therefrom, where other questions also were involved and determined. *In re Can Pon*, (C. C. A. 1909) 168 Fed. 479.

On appeal to the Circuit Court of Appeals in a habeas corpus proceeding, the judgment of that court is not appealable to the Supreme Court on the contention that a right under the Constitution was involved, for "it is settled that, having elected to go to the Circuit Court of Appeals for a review of the judgment, the appellant must abide by the judgment of that court." *MacKenzie v. Pease*, (1906) 146 Fed. 743, 77 C. C. A. 233.

An appeal lies to the Circuit Court of Appeals under this section where diversity of citizenship is duly alleged as the basis for the jurisdiction of the court below and the substantial question involved is the validity and proper construction of a state statute, which is alleged to be void as in violation of the Federal Constitution. *Love v. Busch*, (1906) 142 Fed. 429, 73 C. C. A. 545.

Prior to the Act of April 14, 1906, ch. 1627, § 34 Stat. L. 116, 1909 Supp. Fed. Stat. Annot. 291, now embraced in Judicial Code, sec. 129, *ante*, vol. 1, p. 195, of this Supplement, there was no appeal to the Circuit Court of Appeals from an order or decree of a federal court, or judge thereof, granting or continuing an injunction or appointing a receiver if a constitutional question was alleged in the bill of complaint, and the only hearing in such a case was in the Supreme Court upon an appeal from final decree. Since the Act above cited, however, an appeal may be taken from such interlocutory decree, though a constitutional question be involved, and the constitutional question may be determined by the Circuit Court of Appeals. *Seattle Electric Co. v. Seattle, etc., R. Co.*, (C. C. A. 1911) 185 Fed. 365.

A suit in a Circuit Court by an Indian to determine his rights under a patent conveying land to him in severalty in accordance with the provisions of a treaty between his tribe and the United States, on whatever ground the jurisdiction of the court is invoked, is one involving the construction of a treaty, and an appeal therein can be taken only

to the Supreme Court. *Terry v. Bird*, (1904) 129 Fed. 592, 64 C. C. A. 160, dismissing an appeal.

**Separate appeals.**—As to the classes of cases enumerated in this section other than a "case in which the jurisdiction of the court is in issue" alone, the jurisdiction of the Supreme Court is not necessarily exclusive. But "as to these [other] classes it has been repeatedly held that the Act of 1891 did not contemplate several separate appeals or writs of error on the merits in the same case and at the same time to two appellate courts." *U. S. v. Larkin*, (1908) 208 U. S. 333, 28 S. Ct. 417, 52 U. S. (L. ed.) 517, citing numerous cases.

**Waiver of appeal to Supreme Court.**—If a defendant convicted in a criminal case in the District Court where a constitutional question was involved, so that he could have sued out a writ of error direct to the Supreme Court, takes the case to the Circuit Court of Appeals instead, the right of direct appeal to the Supreme Court is lost. *MacFadden v. U. S.*, (1909) 213 U. S. 288, 29 S. Ct. 490, 53 U. S. (L. ed.) 801.

"As said in more than one case, a party who might have carried his case to the Supreme Court, and does not choose to do so, cannot, after a final judgment in the Circuit Court of Appeals, have a second determination upon another writ of error." *Weber v. Kentucky Grand Lodge*, (C. C. A. 1909) 171 Fed. 839.

**Scope of review.**—If the Supreme Court acquires jurisdiction of an appeal on the ground of a constitutional question involved, it "has the power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits." *Chappell v. U. S.*, (1896) 160 U. S. 499, 16 S. Ct. 397, 40 U. S. (L. ed.) 510.

On appeal or writ of error upon the ground that a constitutional question is involved, the Supreme Court may decide the case without being restricted to the constitutional question. *Field v. Barber Asphalt Paving Co.*, (1904) 194 U. S. 618, 24 S. Ct. 784, 48 U. S. (L. ed.) 1142; *Burton v. U. S.*, (1905) 196 U. S. 283, 25 S. Ct. 243, 49 U. S. (L. ed.) 482.

On appeal from a decree on the merits because of a constitutional question involved, "in this, as in all cases, if it appears that the Circuit Court had no jurisdiction, it is the duty of this court to so declare and enter judgment accordingly." *Holt v. Indiana Mfg. Co.*, (1900) 176 U. S. 68, 20 S. Ct. 272, 44 U. S. (L. ed.) 374.

"If the record does not affirmatively show jurisdiction in the Circuit Court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute." *Minnesota v. Northern Securities Co.*, (1904) 194 U. S. 48, 24 S. Ct. 598, 600, 48 U. S. (L. ed.) 870. See also *Vance v. W. A. Vandercok Co.*, (1898) 170 U. S. 468, 18 S. Ct. 645, 42 U. S. (L. ed.) 1111.

Where an appeal is taken to the Supreme Court on the ground of a constitutional ques-

tion being involved and not on a certified question of jurisdiction, the Supreme Court will take notice of the want of jurisdiction of the court below and enter a decree appropriate to the circumstances. *Covington, etc., Bridge Co. v. Hager*, (1906) 203 U. S. 109, 27 S. Ct. 24, 51 U. S. (L. ed.) 111, modifying a decree of dismissal on the merits by ordering that it be a dismissal for want of jurisdiction.

Where an appeal is properly taken from a decree because of a constitutional question involved, if the Supreme Court finds that the lower court had no jurisdiction, it will reverse the decree with direction to dismiss for want of jurisdiction. *Dawson v. Columbia Ave. Sav. Fund, etc., Co.*, (1905) 197 U. S. 178, 25 S. Ct. 420, 49 U. S. (L. ed.) 713, citing for that practice, *Newburyport Water Co. v. Newburyport*, (1904) 193 U. S. 501, 576, 24 S. Ct. 553, 48 U. S. (L. ed.) 795, 799.

That a decision of a constitutional question may be had on appeal directed to that question, although the court below dismissed the case for want of jurisdiction and certified the question of jurisdiction alone to the Supreme Court, see cases cited *supra*, p. 1332, under *Review limited to question of jurisdiction — exceptions*.

#### CLAUSE 4. CONSTRUCTION OR APPLICATION OF CONSTITUTION.

Not every assertion of a right under some claimed construction or application of the Constitution, nor every claim that a pertinent Act of Congress is violative of the Constitution, is efficient to establish a right to a direct appeal to the Supreme Court. The claim must be real and substantial, not merely colorable or without reasonable foundation. Whether the question of the construction or application of the Constitution, or of the constitutional validity of an Act of Congress, is real and substantial, or is merely colorable and without reasonable foundation, depends, *inter alia*, upon whether it is an open one in the Supreme Court, or has been solemnly and directly determined by that court. If it has been so determined, it no longer constitutes a ground for a direct appeal to that court. *Harris v. Rosenberger*, (1906) 145 Fed. 449, 76 C. C. A. 225, certiorari denied 203 U. S. 591, 27 S. Ct. 778, 51 U. S. (L. ed.) 331.

A writ of error was dismissed where it was based upon a contention that merchandise coming into the United States from the canal zone in the Isthmus of Panama could not be subjected, as is attempted by the Act of March 2, 1905, ch. 1311, 33 Stat. L. 843, 10 Fed. Stat. Annot. 71, to the duties imposed on merchandise imported from foreign countries. *David Kaufman, etc., Co. v. Smith*, (1910) 216 U. S. 610, 30 S. Ct. 419, the Supreme Court deeming that the constitutional question was not real and substantial, inasmuch as it was clearly controlled by the principles laid down in *Downes v. Bidwell*, (1901) 182 U. S. 244, 21 S. Ct. 776, 45 U. S. (L. ed.) 1088.

A defendant's constitutional right to a

speedy trial is not involved where the court below permitted the entry of a *nolle prosequi*, and overruled his motion to set it aside, nor is he legally aggrieved thereby. *Lewis v. U. S.*, (1910) 216 U. S. 611, 30 S. Ct. 436, dismissing a writ of error.

An order denying relief by habeas corpus to a person convicted in a United States court for the Indian Territory was not reviewable as involving the construction of the Constitution, where the allegation in the petition that the accused was deprived of his liberty without due process of law was based entirely upon the supposed want of jurisdiction in the court where the conviction was had over an offense committed during the interim between the passage of the Oklahoma Enabling Act of June 16, 1906, and the admission of the state into the Union, which is a question involving the construction, and not the constitutionality, of the Enabling Act. *Childers v. McClaughry*, (1910) 216 U. S. 139, 30 S. Ct. 370, 54 U. S. (L. ed.) 420.

"No conceivable constitutional right of the district attorney arose or could have been involved in committing him for contempt for refusing to obey the order of the court" directing him to return to the owner certain books and papers in his possession which the court found had been seized in violation of constitutional right; "and therefore there is no question presented on this record justifying a direct review of the order committing for contempt." *Wise v. Mills*, (1911) 220 U. S. 549, 31 S. Ct. 597, 55 U. S. (L. ed.) 579, followed in *Wise v. Henkel*, (1911) 220 U. S. 556, 31 S. Ct. 599, 55 U. S. (L. ed.) 581, dismissing an appeal from a judgment discharging a writ of habeas corpus sued out by the district attorney on account of the order of commitment.

"While in section 10 of article 1 of the Federal Constitution there is a recognition of the power of the state to pass inspection laws, yet, to justify a holding that the application of the Federal Constitution is involved, there should be a question as to the relation between some constitutional provision and the state statute." *Knop v. Monongahela River Consol. Coal, etc., Co.*, (1909) 211 U. S. 495, 29 S. Ct. 188, 53 U. S. (L. ed.) 294.

Where the only real, substantial point involved is whether or not the secretary of the treasury misconstrued a federal statute, it does not give the Supreme Court jurisdiction upon direct appeal. *American Sugar Refining Co. v. U. S.*, (1908) 211 U. S. 155, 29 S. Ct. 89, 53 U. S. (L. ed.) 129, dismissing for that reason an appeal based upon the contention by importers that the treasury regulations respecting the polariscope test for sugar assumed to add something to the dutiable standard prescribed by the Tariff Act of July 24, 1897, 30 Stat. L. 168, ch. 11, par. 209, 2 Fed. Stat. Annot. 427, and that the secretary of the treasury thus exercised legislative power confided by the Constitution solely to Congress.

A judgment in habeas corpus proceedings on behalf of a person whose interstate extradition is sought pursuant to the Federal Constitution and laws, and who contends that his

detention in custody is unlawful because the indictment, which is its only excuse, is not a charge of crime within the meaning of U. S. Const., art. 4, sec. 2, 2d par., 9 Fed. Stat. Annot. 184, regulating extradition, is appealable as involving the construction of the Constitution. *Pierce v. Creecy*, (1908) 210 U. S. 387, 28 S. Ct. 714, 52 U. S. (L. ed.) 1096.

Contention that constitutional rights to trial by jury and due process of law are infringed by the action of a federal Circuit Court, after appointing receivers of the assets and property of a corporation, and enjoining any interference with such property, in compelling repayment by summary process, after due notice and opportunity for hearing, from one who, with knowledge of the injunction, collects a check drawn in his favor by the corporation to satisfy a debt, and in denying his application to compel the bringing of an action at law for the recovery of the proceeds of the check — is too frivolous to serve as the foundation of a writ of error under this section. *Blen v. Robinson*, (1908) 208 U. S. 423, 28 S. Ct. 379, 52 U. S. (L. ed.) 556.

A case in which the contention is made that the decree which is the basis of the suit is void as violating the right, under the Federal Constitution, to a jury trial and to due process of law, does not involve "the construction or application of the Constitution" under this section, where the real issue as to such prior decree was whether it was *res judicata* between the parties, or, as is contended by the appellants, was rendered without jurisdiction. *Empire State-Idaho Min., etc., Co. v. Hanley*, (1907) 205 U. S. 225, 27 S. Ct. 476, 51 U. S. (L. ed.) 779.

Contention that the constitutional privilege of a congressman from arrest embraces arrest and punishment for a criminal offense while Congress is not in session is not so frivolous as to defeat a writ of error under this section. And a writ of error to review the conviction of a congressman in a Circuit Court, presenting a question respecting his alleged constitutional privilege from arrest, will not be dismissed because the Congress of which the accused was a member has ceased to exist, since, even if the question has thus become a mere abstraction, jurisdiction of the writ of error depends upon the existence of a constitutional question when the writ was sued out, and carries with it the duty of reviewing the whole case. *Williamson v. U. S.*, (1908) 207 U. S. 425, 28 S. Ct. 163, 52 U. S. (L. ed.) 278. So in *Burton v. U. S.*, (1905) 196 U. S. 283, 25 S. Ct. 243, 49 U. S. (L. ed.) 482, a question respecting an alleged constitutional privilege of freedom from arrest as a United States senator was held to be reviewable on a direct writ of error.

The contention by a foreign corporation that the rendition of certain judgments in the state courts, sought to be introduced in evidence against it, was without due process of law, does not make the suit one involving "the construction or application of the Constitution," where this claim is based solely upon the theory that, under the circumstances, the service of process in the suits in

the state courts upon the corporation's designated agent was unauthorized either by the state constitution and laws or the principles of general jurisprudence. *Cosmopolitan Min. Co. v. Walsh*, (1904) 193 U. S. 460, 24 S. Ct. 489, 48 U. S. (L. ed.) 749.

In *Guaranty Trust Co. v. Metropolitan St. R. Co.*, (1909) 171 Fed. 1014, it was held that an appeal should not be granted direct to the Supreme Court in a case involving a large number of miscellaneous and complicated questions, merely because the construction or application of the Constitution is incidentally raised.

The record, and not a certificate of the trial judge, furnishes the basis for determining whether the suit is one which involves the construction or application of the Constitution. "Indeed, we know of no authority for the making of such certificate." *Cosmopolitan Min. Co. v. Walsh*, (1904) 193 U. S. 460, 24 S. Ct. 489, 48 U. S. (L. ed.) 749.

A judgment entered upon a verdict directed in favor of the government on the issues raised by a special plea in bar, by which the accused claimed immunity from prosecution under the Act of Feb. 25, 1903, 32 Stat. L. 904, ch. 755, 10 Fed. Stat. Annot. 173, as amended by the Act of June 30, 1906, 34 Stat. L. 798, ch. 3920, 1909 Supp. Fed. Stat. Annot. 708, because of his testimony before the grand jury, is not a final judgment and is therefore not reviewable under this section, where leave was given to plead over, and a plea of not guilty was entered, upon which no trial has been had. *Heike v. U. S.*, (1910) 217 U. S. 423, 30 S. Ct. 539, 54 U. S. (L. ed.) 821.

Where a complainant has appealed from so much of a decree as denied his prayer for relief involving "the construction or application of the Constitution," the defendant may take a cross appeal to review the nonfederal questions decided against himself. "If he fails to take such appeal the correctness of the decision as against him will be presumed." *Field v. Barber Asphalt Paving Co.*, (1904) 194 U. S. 618, 24 S. Ct. 734, 48 U. S. (L. ed.) 1142.

*Habeas corpus.* — A decision of a federal Circuit Court denying a writ of habeas corpus to a person convicted in a federal District Court was held to be reviewable by direct appeal to the Supreme Court, where the petition averred that the imprisonment of the appellant was in violation of the Federal Constitution. *Dimmick v. Tompkins*, (1904) 194 U. S. 540, 24 S. Ct. 780, 48 U. S. (L. ed.) 1110, citing *Craemer v. Washington*, (1897) 168 U. S. 124, 127, 18 S. Ct. 1, 42 U. S. (L. ed.) 407, 408.

Restriction of right to appeal to the Supreme Court in habeas corpus proceedings in certain cases, see Act of March 10, 1908, ch. 79, 35 Stat. L. 40, 1909 Supp. Fed. Stat. Annot. 293.

#### CLAUSE 5. VALIDITY OF UNITED STATES LAW OR TREATY OR CONSTRUCTION OF TREATY.

If a case depends entirely on the construction of an Act of Congress — its constitutionality not being drawn in question — it cannot

be taken direct to the Supreme Court under this section. *Spreckels Sugar Refining Co. v. McClain*, (1904) 192 U. S. 397, 407, 24 S. Ct. 376, 378, 48 U. S. (L. ed.) 496.

"Assertion of errors of construction furnishes no basis for jurisdiction on constitutional grounds" of alleged invalidity of a law of the United States. *Rakes v. U. S.*, (1909) 212 U. S. 55, 29 S. Ct. 244, 53 U. S. (L. ed.) 401.

There is no foundation in substance for a claim that power of legislation is unconstitutionally delegated to the state legislatures by the Act of July 7, 1898, 30 Stat. L. 717, ch. 570, sec. 2, 2 Fed. Stat. Annot. 356, adopting such punishment for offenses committed in places under the exclusive jurisdiction and control of the United States as the laws of the state in which such places are situated "now provide" for a like offense, the punishment therefor not being otherwise provided for by any law of the United States. *Franklin v. U. S.*, (1910) 216 U. S. 559, 30 S. Ct. 434, 54 U. S. (L. ed.) 615, dismissing a writ of error. And respecting a cognate statute, it was held that a contention of the unconstitutionality of R. S. sec. 5509, 2 Fed. Stat. Annot. 864, "was long since put at rest," so that a writ of error based on that contention was dismissed. *Rakes v. U. S.*, (1909) 212 U. S. 55, 29 S. Ct. 244, 53 U. S. (L. ed.) 429.

The construction of a treaty is not "drawn in question" within the meaning of this section "when the rights of neither party are necessarily dependent upon such construction," but are dependent upon that which may have been given by a federal statute, and when the construction of that statute is independent of that which may be given by the treaty, although weight may be given to the treaty in determining the question of the construction of the statute; for the construction of the treaty must be drawn in question in "other than a merely incidental or remote manner." *Sloan v. U. S.*, (1904) 193 U. S. 614, 24 S. Ct. 570, 48 U. S. (L. ed.) 814.

In habeas corpus proceedings in the Circuit Court the construction of extradition treaties, on which the determination of the case depended in part, at least, "was none the less so drawn in question because it became necessary or appropriate for the court below also to construe the Acts of Congress passed to carry their provisions into effect." *Pettit v. Walshe*, (1904) 194 U. S. 205, 24 S. Ct. 657, 48 U. S. (L. ed.) 938.

#### CLAUSE 6. CONSTITUTION OR LAW OF STATE CLAIMED TO BE IN CONTRAVENTION OF U. S. CONSTITUTION.

"The mere construction of a state statute does not of itself present a federal question." *Knop v. Monongahela River Consol. Coal, etc., Co.*, (1909) 211 U. S. 485, 29 S. Ct. 188, 53 U. S. (L. ed.) 294.

The mere fact that a defeated party in a suit in the federal Circuit Court set up the repugnancy of a state law to the Federal Constitution does not authorize him to maintain

an appeal under this section, where his contention on that point was sustained. *Anglo-American Provision Co. v. Davis Provision Co.*, (1903) 191 U. S. 376, 24 S. Ct. 93, 48 U. S. (L. ed.) 228.

An appealable case within this section is presented by a bill in equity which alleges that a contract right of a waterworks company, with whose predecessors a municipality, with legislative sanction, contracted for a municipal water supply, is impaired by an ordinance directing that the waterworks company be notified that the city denies any liability on a contract for the use of hydrants, and by the subsequent action of the city in holding an election to authorize an issue of bonds to buy or construct waterworks of its own, and in refusing to pay the amount due and payable under the terms of the contract. *Vicksburg v. Vicksburg Waterworks Co.*, (1906) 202 U. S. 453, 26 S. Ct. 660, 50 U. S. (L. ed.) 1102.

"The mere fact that a constitutional question is alleged does not suffice to give us jurisdiction to review by direct appeal if such question is unsubstantial and so devoid of merit as to be clearly frivolous." For that reason a claim that ten days' statutory notice of the time appointed for action upon a petition for settlement of the final account of an executor and for final distribution of a decedent's estate is so unreasonable as to a non-resident claimant as to be wanting in due process of law was held insufficient to support an appeal. *Goodrich v. Ferris*, (1909) 214 U. S. 71, 29 S. Ct. 580, 53 U. S. (L. ed.) 914, dismissing the appeal.

In a case where the validity of a state statute had been sustained by the federal Supreme Court and an amendment not substantially altering the prior Act was afterward involved on a writ of error, the court said: "There is no claim by the appellee of any invalidity in the statute, but only of its inapplicability to the facts. In the face of the decision of this court and the claim of the appellee, it is difficult to see how there can be any question of a conflict between the legislation and the Federal Constitution. After a final decision, it is going too far to hold that there still remains an undecided question, and that when we have held that a statute of a state is valid there remains a controversy as to its validity, and this is emphatically true when neither party challenges that decision." *Knop v. Monongahela River Consol. Coal, etc., Co.*, (1909) 211 U. S. 485, 29 S. Ct. 188, 53 U. S. (L. ed.) 294, dismissing a writ of error.

Contention that due process of law is denied by a tax imposed under the authority of a state statute, upon a custodian of distilled spirits, which rests upon the theory that the taxing power of the state is, by its Constitution, confined exclusively to the levy of taxes *in personam* upon the owners of property is too devoid of merit to sustain a writ of error, where the highest state court has upheld the statute in controversy as an exercise of the taxing power of the state, and, in so doing, declared that it but reiterated and re-expounded the rulings by it previously made. *Hannis Distilling Co. v. Baltimore*,

(1910) 216 U. S. 285, 30 S. Ct. 326, 54 U. S. (L. ed.) 492.

Any question respecting the invalidity of the provisions of the West Virginia Constitution for the forfeiture of lands to the state for five years' neglect to pay taxes is too clearly foreclosed by prior decisions of the federal Supreme Court to serve as the basis of a writ of error to a Circuit Court. *Fay v. Crozer*, (1910) 217 U. S. 455, 30 S. Ct. 568, 54 U. S. (L. ed.) 837.

A decree of a federal Circuit Court dismissing, for want of jurisdiction, a bill to quiet title, on the theory that either complainants' rights as mortgagee in possession had not

been held by a decision of the highest state court, in a prior ejectment suit between the same parties, to have been destroyed by a subsequent state statute, and hence no constitutional question was involved, or that, if the state court so held, the remedy was by writ of error from the federal Supreme Court, will be affirmed on appeal, where the judgment of the state court, on a second appeal in the ejectment suit, and in a subsequent suit to quiet title, has been reversed by the federal Supreme Court for error in deciding the federal question involved. *Bradley v. Lightcap*, (1904) 195 U. S. 25, 24 S. Ct. 753, 40 U. S. (L. ed.) 76.

## Vol. IV, p. 409, sec. 6.

The first part of this section (6), down to the provision for certifying questions or propositions of law to the Supreme Court, is substantially re-enacted in Judicial Code, sec. 128, *ante*, vol. 1 of this Supplement, title JUDICIARY, p. 195; the Judicial Code section, however, extending finality also to decisions in cases arising "under the copyright laws."

The next part of section 6, which provides for certification of questions or propositions of law to the Supreme Court and for action of the Supreme Court "thereupon," is re-enacted in Judicial Code, sec. 239, *ante*, vol. 1 of this Supplement, title JUDICIARY, p. 231.

The middle paragraph of section 6, which provides for certiorari from the Supreme Court, is substantially re-enacted in Judicial Code, sec. 240, *ante*, vol. 1 of this Supplement, title JUDICIARY, p. 232.

The first part of the final paragraph, providing for appeal or writ of error where the matter in controversy exceeds \$1,000, is re-enacted in Judicial Code, sec. 241, *ante*, vol. 1 of this Supplement, title JUDICIARY, p. 232.

The last sentence in section 6, limiting the period of one year for an appeal or writ of error, was not imported into the Judicial Code, and doubtless remains in full force by virtue of the last paragraph in Judicial Code, sec. 297, *ante*, vol. 1 of this Supplement title, JUDICIARY, p. 251.

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### I. APPELLATE JURISDICTION.

**Civil proceeding in a criminal case.**—An order declaring a judgment of conviction in a criminal case—with a sentence to imprison-

ment and to pay a fine—abated by the death of the defendant after the entry of the judgment is an independent proceeding of a civil nature, and reviewable on writ of error by the Circuit Court of Appeals at the instance of the United States. *U. S. v. Dunne*, (1909) 173 Fed. 254, 97 C. C. A. 420, *following U. S. v. New York Cent., etc., R. Co.*, (1908) 164 Fed. 324, 90 C. C. A. 256.

**Patent case.**—Where a suit between citizens of the same state was for infringement of a patent, and was so tried and decided by the Circuit Court, the Circuit Court of Appeals had jurisdiction of an appeal therein, notwithstanding the fact that one of the defenses, upon which the case turned on appeal, depended upon the construction of a contract of license. *Clancy v. Troy Belting, etc., Co.*, (C. C. A. 1907) 157 Fed. 554.

**A proceeding for naturalization under the Act of June 29, 1906, ch. 3592, 34 Stat. L. 506, 1909 Supp. Fed. Stat. Annot. 365, is not a "case" within the meaning of the text section, and there being no provision for direct review in the Naturalization Act a Circuit Court of Appeals is without jurisdiction to review the decision of a federal court in such a proceeding. Moreover, the admission of an alien to citizenship is a political and not a judicial act, and, having been vested by Congress in the courts to be exercised on proof "to the satisfaction of the court," its exercise is discretionary and not reviewable. *U. S. v. Dolla*, (1910) 177 Fed. 101, 100 C. C. A. 521.**

**False averment of constitutional question.**—The Circuit Court of Appeals is not without jurisdiction of an appeal because the petition for removal of the suit from the state court to the federal court below alleged that the construction of the Federal Constitution was involved, if such was not the fact. *Kansas City Northwestern R. Co. v. Zimmerman*, (1908) 210 U. S. 336, 28 S. Ct. 730, 52 U. S. (L. ed.) 1084.

**No jurisdictional amount.**—Under this section the appellate jurisdiction of the Circuit Court of Appeals is without any pecuniary limitation. *Kirby v. American Soda Fountain Co.*, (1904) 194 U. S. 141, 24 S. Ct. 619, 48 U. S. (L. ed.) 911; *The Joseph B. Thomas*, (1906) 148 Fed. 762, 78 C. C. A. 428.

The provision of R. S. sec. 631, 4 Fed. Stat.

Annot. 251, limiting appeals from the District to the Circuit Court in equity and admiralty cases where the sum in dispute exceeds fifty dollars, is not applicable to appeals to the Circuit Court of Appeals. *The Joseph B. Thomas*, (1906) 148 Fed. 762, 78 C. C. A. 428.

## II. FINAL DECISIONS.

**Necessity of finality.**—Where a decree does not grant or continue in force an injunction, and does not appoint a receiver, the Circuit Court of Appeals has no jurisdiction to review the decree unless it be a final decree. *Odbert v. Marquet*, (C. C. A. 1909) 175 Fed. 44.

"The rule . . . for determining whether, for the purposes of an appeal, a decree is final, is, in brief, whether the decree disposes of the entire controversy between the parties." *La Bourgogne*, (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

A final decision "is one which completely adjudicates the rights of the parties to the suit, so that if it is affirmed the court below will have nothing to do but to execute the judgment or decree which evidences the decision it has already rendered. An order, judgment, or decree which does not have this effect—one which leaves the rights of the parties to the suit undetermined and subject to further adjudication—is not a final decision, and the Courts of Appeals have no jurisdiction to review it." *Morgan v. Thompson*, (1903) 124 Fed. 203, 59 C. C. A. 672.

A final decree "must so far terminate the litigation between the parties on the merits that in case of affirmance nothing would remain to be done but to execute the judgment or decree; and the reason for the rule is that thereby a multiplicity of appeals in the same case is prevented, and the case will not be heard by piecemeal." *Scriven v. North*, (C. C. A. 1904) 134 Fed. 366.

A writ of error operates only on a record in which a final judgment has been entered, and does not lie from an order in a personal injury action refusing plaintiff's application for leave to file an amended statement of claim; "in no sense does it, or can it, finally determine the cause." *Stillwagon v. Baltimore, etc., R. Co.*, (1908) 159 Fed. 97, 86 C. C. A. 287.

"An appeal does not lie from the order of the court below, denying the motion in a pending suit to permit a person to intervene and become a party thereto." *Blaffer v. New Orleans Water Supply Co.*, (C. C. A. 1908) 160 Fed. 389.

The Circuit Court of Appeals has no jurisdiction to review an interlocutory order refusing judgment for want of a sufficient affidavit of defense, although by the state statute such an order in the state court would be appealable. *Shumaker v. Security L., etc., Co.*, (1908) 159 Fed. 112, 86 C. C. A. 302.

It was held that a judgment of the United States Court of Appeals in the Indian Territory which reversed the judgment of an inferior court, and remanded the case for further proceedings, in which the trial court

might determine the rights of the parties, was not a final decision, and was not reviewable in the United States Circuit Court of Appeals. *Morgan v. Thompson*, (1903) 124 Fed. 203, 59 C. C. A. 672.

**Reference to master.**—A decree which merely determines that complainants are entitled to recover damages from a defendant for fraudulent misrepresentations, and refers the matter to a special master to find and report such damages, is interlocutory and not appealable. *Odbert v. Marquet*, (C. C. A. 1909) 175 Fed. 44.

A decree in proceedings in admiralty for limitation of liability, which grants such limitation, determines the questions of pending freight to be surrendered, and disallows all claims for loss of life, but refers all other claims to a commissioner to take testimony and report, cannot be regarded as final for the purpose of an appeal to the Circuit Court of Appeals, especially where the court below and the parties have treated such decree as a mere interlocutory one. *La Bourgogne*, (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

A decree on a cross-bill, which orders complainants to pay to cross-complainants the amount due on certain notes, and directs that on default for a certain time a special master shall sell certain collateral to apply thereon, is a final appealable decree, since "no judicial action is required of the special master." *Odbert v. Marquet*, (C. C. A. 1909) 175 Fed. 44.

**Decree for accounting.**—A decree in a patent infringement suit against a single defendant, which, in addition to granting an injunction as to the claims of the patent held to be infringed, and sending the cause to a master for an accounting, dismissed the bill as to the claims held invalid and those found not to be infringed, is not, as to such dismissal, a final decree from which complainant can appeal to the Circuit Court of Appeals. *Ex p. National Enameling, etc., Co.*, (1906) 201 U. S. 156, 26 S. Ct. 404, 50 U. S. (L. ed.) 707.

Where a bill in a Circuit Court set up four distinct causes of action, one for infringement of a patent, one for infringement of a trademark, and two for unfair competition, a decree dismissing the bill as to the first three causes of action was held to be a "final decision" thereon, and appealable, although as to the fourth cause of action the bill was sustained and an accounting directed thereunder. *Scriven v. North*, (C. C. A. 1904) 134 Fed. 366.

**Order to produce books and papers.**—An order entered in an action to recover damages from a carrier for violation of the Interstate Commerce Act of Feb. 4, 1887, 24 Stat. L. 379, ch. 104, 3 Fed. Stat. Annot. 809, requiring certain specified officers and employees who are not parties to produce relevant books and papers, is not, as to those persons, a final judgment, and will not sustain a writ of error sued out by them from the Circuit Court of Appeals. *Webster Coal, etc., Co. v. Cassatt*, (1907) 207 U. S. 181, 28 S. Ct. 108, 52 U. S. (L. ed.) 160; *Pennsylvania Coal, etc., Co. v.*

Cassatt, (1907) 207 U. S. 187, 28 S. Ct. 110, 52 U. S. (L. ed.) 163.

A judgment imposing a fine on a party for contempt for the violation of an injunction is a judgment in a criminal case, and if unconditional and absolute, so that nothing remains but to execute it, is final and reviewable by the Circuit Court of Appeals on a writ of error. *Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co.*, (1904) 129 Fed. 105, 63 C. C. A. 607, certiorari denied 194 U. S. 636, 24 S. Ct. 859, 48 U. S. (L. ed.) 1160.

The Circuit Court of Appeals cannot, in advance of the final decree in the suit, review an order of a federal Circuit Court which adjudges the defendants in such suit guilty of contempt in disobeying an order for the production of certain books and papers for inspection for the benefit of the plaintiff, and imposes a fine or imprisonment in the event of failure to produce such books or papers by a specified date, since this is not a final order rendered in a proceeding criminal in its nature, but was intended to secure the rights of the party to the suit for whose benefit the original order was made. *Doyle v. London Guarantee, etc., Co.*, (1907) 204 U. S. 599, 27 S. Ct. 313, 51 U. S. (L. ed.) 641.

### III. REVIEW BY CIRCUIT COURTS OF APPEALS "IN ALL CASES OTHER THAN," ETC.

**Contempt cases.**—"The only right of review given to the Circuit Court of Appeals in contempt proceedings is derived from the Act giving that court such right in criminal cases. . . . Proceedings which are criminal in their nature and intended for the vindication of public justice, rather than the coercion of the opposite party to do some act for the benefit of another party to the action, are the only ones reviewable in the Circuit Court of Appeals under its power to take jurisdiction of and determine criminal cases." *Doyle v. London Guarantee, etc., Co.*, (1907) 204 U. S. 599, 27 S. Ct. 313, 51 U. S. (L. ed.) 641.

This clause gives the Circuit Court of Appeals jurisdiction of a writ of error to review a judgment finding a person not a party to the suit guilty of contempt in violating a restraining order and imposing a fine therefor, as it is a criminal proceeding. *Bessette v. W. B. Conkey Co.*, (1904) 194 U. S. 324, 24 S. Ct. 665, 48 U. S. (L. ed.) 997. To the same point, see *Frankfort v. Deposit Bank*, (1904) 127 Fed. 812, 62 C. C. A. 492, dismissing an appeal; *In re Heinze*, (1904) 127 Fed. 96, 62 C. C. A. 96; *Bullock Electric, etc., Co. v. Westinghouse Electric, etc., Co.*, (1904) 129 Fed. 105, 63 C. C. A. 607.

Likewise reviewable by the Circuit Court of Appeals on writ of error is an order adjudging the defendant in a suit for the infringement of a patent guilty of contempt in disobeying a preliminary injunction, and ordering him to pay a fine, one-half to the United States and the other half to the complainant: the fine payable to the United States is clearly punitive, dominates the proceeding, and fixes its character. *Matter of Christen-*

*sen Engineering Co.*, (1904) 194 U. S. 458, 24 S. Ct. 729, 48 U. S. (L. ed.) 1072.

**Method of review.**—Writ of error, and not appeal, is the proper mode of reviewing a judgment or order of a federal court finding a person not a party to the suit guilty of contempt in violating a restraining order of that court and imposing a fine therefor. *Bessette v. W. B. Conkey Co.*, (1904) 194 U. S. 324, 24 S. Ct. 665, 48 U. S. (L. ed.) 997.

"It is no longer an open question that the proper method of reviewing judgments in criminal cases by this court is by writ of error and not by appeal." *Sena v. U. S.*, (1906) 147 Fed. 485, 78 C. C. A. 27.

A judgment at law in a federal court on a scire facias on a forfeited recognizance is reviewable by the Circuit Court of Appeals only on a writ of error, and not by appeal; and objection that review is sought by a writ of error cannot be waived by appearance, nor cured by amendment. *Kerr v. U. S.*, (1907) 159 Fed. 428, 86 C. C. A. 408.

A suit in a federal court by an employee who has recovered a judgment for personal injury against his employer, to enforce payment of such judgment by an insurance company which issued a policy to the employer insuring it against liability on account of such injuries, the insolvency of the judgment defendant being alleged, is in equity, and the decree therein cannot be reviewed by the Circuit Court of Appeals on a writ of error. *Thomson v. Travelers' Ins. Co.*, (C. C. A. 1908) 161 Fed. 867.

**Review.**—Where the record on a writ of error to review the decision of a District Court does not show a case within the jurisdiction of the latter, the Circuit Court of Appeals will notice the fact, although no jurisdictional question is raised by the parties. *Yeandle v. Pennsylvania R. Co.*, (1909) 169 Fed. 938, 95 C. C. A. 582.

A question of jurisdiction on the ground of diverse citizenship raised in the trial court can be brought by appeal or writ of error to the Circuit Court of Appeals along with other questions arising upon the trial of the merits of the case, and it will then be the duty of the Circuit Court of Appeals to decide the whole case, including the jurisdictional question, and its decision of that question as well as the others would be final, if jurisdiction rested on diverse citizenship, unless the Supreme Court should review it on certiorari. *Boston, etc., R. Co. v. Gokey*, (1908) 210 U. S. 155, 28 S. Ct. 657, 52 U. S. (L. ed.) 1002.

A Circuit Court of Appeals is bound to inquire, first, as to its own jurisdiction of a cause brought before it by appeal or writ of error, and, second, as to the jurisdiction of the court from which the record comes, even though the question is not raised by the parties. *Kansas City Southern R. Co. v. Prunty*, (1904) 133 Fed. 13, 66 C. C. A. 163; *Utah-Nevada Co. v. De Lamar*, (1904) 133 Fed. 113, 66 C. C. A. 179; *C. C. Taft Co. v. Century Sav. Bank*, (1905) 141 Fed. 369, 72 C. C. A. 671; *Puget Sound Nav. Co. v. Lavendar*, (1907) 156 Fed. 361, 84 C. C. A. 259.

The question of the jurisdiction of the Dis-

trict Court, where it appears on the record on an appeal to the Circuit Court of Appeals, cannot be ignored, but must be determined by that court in disposing of the appeal, although not made a ground of appeal. *McGilvra v. Ross*, (C. C. A. 1908) 164 Fed. 604, *reversed*, but not on this point, (1909) 215 U. S. 70, 30 S. Ct. 27, 54 U. S. (L. ed.) 95.

It is the duty of the Circuit Court of Appeals, on an appeal from a decree in a suit removed from a state court, to determine whether the record exhibits a case properly removable, regardless of whether any objection was taken to the jurisdiction of the federal court either in the court below or on appeal. *Fred Macey Co. v. Macey*, (1905) 135 Fed. 725, 68 C. C. A. 363.

**Disposition of case.**—If a case at law in the District Court is tried by stipulation without a jury, contrary to the provisions of R. S. sec. 566, 4 Fed. Stat. Annot. 236, the judgment therein is not reviewable by the Circuit Court of Appeals. But it is appealable and the judgment will be affirmed, instead of dismissing the writ of error. *U. S. v. Louisville, etc., R. Co.*, (C. C. A. 1909) 167 Fed. 306.

#### IV. "UNLESS OTHERWISE PROVIDED BY LAW."

"These words must be taken to refer to existing provisions, and not to be merely a futile permission to future legislatures to make a change. They do not save every existing provision, of course, or the Act would fail of its purpose. But they save some." Thus, the appeal required by the Act of June 22, 1860, 12 Stat. L. 85, 87, ch. 188, sec. 11, to be taken to the Supreme Court of the United States if the decree of the District Court in certain private land claim cases is against the United States, is "otherwise provided by law" within the meaning of the text section, and the Supreme Court, and not the Circuit Court of Appeals, has jurisdiction of such appeal. *U. S. v. Dalcour*, (1906) 203 U. S. 408, 27 S. Ct. 58, 51 U. S. (L. ed.) 248.

#### V. WHEN DECISIONS OF CIRCUIT COURTS OF APPEALS ARE FINAL.

See *infra*, p. 1360, division VIII. of this note.

The "jurisdiction" referred to in the phrase "cases in which the jurisdiction is dependent entirely," etc., is the jurisdiction of the federal court as originally invoked. *MacFadden v. U. S.*, (1909) 213 U. S. 288, 29 S. Ct. 490, 53 U. S. (L. ed.) 801.

As to the original jurisdiction of the federal District Court see Judicial Code, sec. 24, *ante*, vol. 1 of this Supplement, title JUDICIARY, p. 139.

"It is to be observed that the line of division between cases appealable directly to this court and those appealable to the Circuit Court of Appeals, made by section 5 of the Act, is based upon the nature of the case or of the questions of law raised. But the line of division between cases appealable from the Circuit Court of Appeals to this court and those not so appealable, drawn by section 6, is different, and is determined, not by the

nature of the case or of the questions of law raised, but by the sources of jurisdiction of the trial court, . . . whether the jurisdiction rests upon the character of the parties or the nature of the case." *MacFadden v. U. S.*, (1909) 213 U. S. 288, 29 S. Ct. 490, 53 U. S. (L. ed.) 801.

**Jurisdiction depending entirely on diverse citizenship, etc.**—Jurisdiction below "is dependent entirely" upon diverse citizenship within the meaning of this section where that is the sole ground of jurisdiction disclosed by the complaint, although a federal question may have been raised at the trial. *Bagley v. General Fire Extinguisher Co.*, (1909) 212 U. S. 477, 29 S. Ct. 341, 53 U. S. (L. ed.) 605.

The jurisdiction of the federal court depended entirely upon diversity of citizenship where the cause was removed for prejudice or local influence from a state court. *Cochran v. Montgomery County*, (1905) 199 U. S. 280, 26 S. Ct. 58, 50 U. S. (L. ed.) 182.

Jurisdiction of a federal Circuit Court over a controversy between citizens of different states, claiming under grants from different states, depends entirely upon the diversity of citizenship, since that court has original jurisdiction over controversies of this character only when the parties are citizens of the same state. *Stevenson v. Fain*, (1904) 195 U. S. 165, 25 S. Ct. 6, 49 U. S. (L. ed.) 142.

The mere assertion of title under a patent from the United States presents no federal question which, of itself, deprives the judgment of the Circuit Court of Appeals, in a petitory action for real property, of finality as dependent entirely upon diversity of citizenship. *Bonin v. Gulf Co.*, (1905) 198 U. S. 115, 25 S. Ct. 608, 49 U. S. (L. ed.) 970, dismissing a writ of error.

A suit against a railway company engaged in carrying the United States mails under the federal laws and postal regulations, to recover the value of a registered package alleged to have been lost through its negligence, does not arise under the Federal Constitution and laws so as to deprive the judgment of the Circuit Court of Appeals therein of finality as dependent entirely on diverse citizenship, where the plaintiff relied on principles of general law, and nowhere asserted a right which might be defeated or sustained by one or another construction of the Constitution or of any law of the United States. *Bankers Mut. Casualty Co. v. Minneapolis, etc., R. Co.*, (1904) 192 U. S. 371, 24 S. Ct. 325, 48 U. S. (L. ed.) 484, dismissing a writ of error.

An appeal from a Circuit Court of Appeals will not be dismissed on the ground that the jurisdiction of the Circuit Court was invoked solely on the grounds of diverse citizenship, where grounds of suit and relief were also based upon federal statutes which were necessary elements of the decision of the Circuit Court of Appeals. *Henningsen v. U. S. Fidelity, etc., Co.*, (1908) 208 U. S. 404, 23 S. Ct. 389, 52 U. S. (L. ed.) 547.

A decree of a Circuit Court of Appeals affirming a decree of dismissal rendered by a federal Circuit Court is not reviewable in the



federal Supreme Court where, if the allegations which set up diversity of citizenship were stricken from the bill, the Circuit Court would have had no jurisdiction of the suit. *Weir v. Roundtree*, (1910) 216 U. S. 607, 30 S. Ct. 418.

**Under criminal laws.**—A judgment of a Circuit Court of Appeals in a case in which the jurisdiction of the District Court depended solely upon the fact that the case was one arising under the criminal laws is, by the very terms of this section, "final" and not reviewable in the federal Supreme Court on a writ of error, although constitutional questions were invoked by the accused, and the case might, therefore, have been brought directly from the District Court to the Supreme Court. *MacFadden v. U. S.*, (1909) 213 U. S. 288, 2 S. Ct. 490, 53 U. S. (L. ed.) 801.

#### VI. CERTIFYING QUESTIONS TO SUPREME COURT.

See also as to certification of questions under section 25d of the Bankruptcy Act of 1898, *ante*, vol. 1 of this Supplement, title *BANKRUPTCY*, p. 641.

"I think such questions are to be encouraged as a mode of disposing of cases in the least cumbersome and most expeditious way." *Per Mr. Justice Holmes in dissenting opinion in Chicago, etc., R. Co. v. Williams*, (1909) 214 U. S. 492, 29 S. Ct. 514, 53 U. S. (L. ed.) 1058.

**When questions will be certified.**—See also cases cited under section 25d of the Bankruptcy Act of 1898, *ante*, vol. 1, p. 641, of this Supplement.

"It is only in cases of grave doubt that questions should be certified to the Supreme Court. *Fabre v. Cunard Steamship Co.*, (1892) 59 Fed. 500, 8 C. C. A. 199; *The Horace B. Parker*, (1896) 74 Fed. 640, 20 C. C. A. 572." *Cella v. Brown*, (C. C. A. 1906) 144 Fed. 742.

Where the Circuit Court of Appeals, by reason of conflicting decisions, found itself unable to determine whether a provision of a state constitution rendering stockholders of a corporation individually liable to creditors for a sum equal to the amount of their stock in addition thereto was self-executing, and there was no decision of the Supreme Court of the state on the subject, the question was certified to the Supreme Court. *Middletown Nat. Bank v. Toledo, etc., R. Co.*, (C. C. A. 1903) 127 Fed. 85.

**Affirmances in the federal Supreme Court**, upon equal division of opinion, of rulings of the Circuit Courts of Appeals against the legality of a tax, are not such authoritative determinations of the question as to preclude one of the latter courts, when called upon again to consider the question, and finding a decision of another Circuit Court of Appeals opposed, from certifying such question to the Supreme Court for determination. *Hertz v. Woodman*, (1910) 218 U. S. 205, 30 S. Ct. 621, 54 U. S. (L. ed.) 1001.

*Following are the cases in which questions were certified, except those cited in the foregoing part of this note:*

*American Land Co. v. Zeiss*, (1911) 219 U. S. 47, 31 S. Ct. 200, 55 U. S. (L. ed.) 82, as to validity of state statute under Federal Constitution.

*Hills v. Hoover*, (1911) 220 U. S. 329, 31 S. Ct. 402, 55 U. S. (L. ed.) 485, construction of Copyright Acts.

*In re Harris*, (1911) 221 U. S. 274, 31 S. Ct. 557, 55 U. S. (L. ed.) 732, as to self-crimination in bankruptcy proceedings.

*Hallowell v. U. S.*, (1911) 221 U. S. 317, 31 S. Ct. 587, 55 U. S. (L. ed.) 750, as to whether an Indian citizen may be convicted for introducing liquor into his allotment.

*Kuhn v. Fairmont Coal Co.*, (1910) 215 U. S. 349, 30 S. Ct. 140, 54 U. S. (L. ed.) 228, as to obligation of federal court to follow state decision.

*Moxley v. Hertz*, (1910) 216 U. S. 344, 30 S. Ct. 305, 54 U. S. (L. ed.) 510, as to rate of taxation of colored oleomargarine.

*Hertz v. Woodman*, (1910) 218 U. S. 205, 30 S. Ct. 621, 54 U. S. (L. ed.) 1001, whether legacy exempt from federal inheritance tax.

*The Eugene F. Moran v. New York Cent., etc., R. Co.*, (1909) 212 U. S. 466, 29 S. Ct. 339, 53 U. S. (L. ed.) 600, as to division of damages in collision cases.

*Jahn v. The Folmina*, (1909) 212 U. S. 354, 15 Ann. Cas. 748, 29 S. Ct. 363, 53 U. S. (L. ed.) 546, as to liability of carrier by water for damages to cargo.

*Hepner v. U. S.*, (1909) 213 U. S. 103, 16 Ann. Cas. 960, 29 S. Ct. 474, 53 U. S. (L. ed.) 720, as to whether the trial court may direct a verdict for the government in action to recover statutory penalty.

*Delaware, etc., Co. v. Albany, etc., R. Co.*, (1909) 213 U. S. 435, 29 S. Ct. 540, 53 U. S. (L. ed.) 862, as to the requirements of equity rule 94.

*Polk v. Mutual Reserve Fund L. Assoc.*, (1907) 207 U. S. 310, 28 S. Ct. 65, 52 U. S. (L. ed.) 222, constitutional questions as to contract obligations and due process of law.

*U. S. v. A. Graf Distilling Co.*, (1908) 208 U. S. 198, 28 S. Ct. 264, 52 U. S. (L. ed.) 452, construction of revenue law as to forfeiture of colored whiskey.

*Loewe v. Lawlor*, (1908) 208 U. S. 274, 13 Ann. Cas. 815, 28 S. Ct. 301, 52 U. S. (L. ed.) 488, construction of Anti-Trust Act of 1890.

*Guy v. Donald*, (1906) 203 U. S. 399, 27 S. Ct. 63, 51 U. S. (L. ed.) 245, as to liability of members of a pilot association for negligence of each other.

*Doyle v. London Guarantee, etc., Co.*, (1907) 204 U. S. 599, 27 S. Ct. 313, 51 U. S. (L. ed.) 641, as to jurisdiction of Circuit Court of Appeals to review an order in contempt proceedings.

*Mason City, etc., R. Co. v. Boynton*, (1907) 204 U. S. 570, 27 S. Ct. 321, 51 U. S. (L. ed.) 629, as to whether the landowner in condemnation proceedings is the defendant for the purpose of removal of a cause from a state court.

*Quinlan v. Green County*, (1907) 205 U. S. 410, 27 S. Ct. 505, 51 U. S. (L. ed.) 860, as to rights of a bona fide purchaser of county bonds for value before maturity.

*Kessler v. Eldred*, (1907) 206 U. S. 285, 27

S. Ct. 611, 51 U. S. (L. ed.) 1065, in respect of the right of a successful defendant in a patent infringement suit to have the complainant enjoined from suing defendant's customers.

Alabama G. S. R. Co. v. Thompson, (1906) 200 U. S. 206, 4 Ann. Cas. 1147, 26 S. Ct. 161, 50 U. S. (L. ed.) 441, question of separable controversy authorizing removal.

St. Louis Dressed Beef, etc., Co. v. Maryland Casualty Co., (1906) 201 U. S. 173, 26 S. Ct. 400, 50 U. S. (L. ed.) 712, recovery on employers' liability insurance.

Thomas v. Ohio State University, (1904) 195 U. S. 207, 25 S. Ct. 24, 49 U. S. (L. ed.) 160, sufficiency of jurisdictional averments as to diverse citizenship.

Bradford v. Southern R. Co., (1904) 195 U. S. 243, 25 S. Ct. 55, 49 U. S. (L. ed.) 178, as to whether a writ of error from the Circuit Court of Appeals can be prosecuted *in forma pauperis*.

Union Stock Yards Co. v. Chicago, etc., R. Co., (1905) 196 U. S. 217, 2 Ann. Cas. 525, 25 S. Ct. 226, 49 U. S. (L. ed.) 453, negligence, contribution among wrongdoers.

Vanderbilt v. Eidman, (1905) 196 U. S. 480, 25 S. Ct. 331, 49 U. S. (L. ed.) 563, as to taxability under the War Revenue Act of a certain legacy.

U. S. v. Montana Lumber, etc., Co., (1905) 196 U. S. 573, 25 S. Ct. 367, 49 U. S. (L. ed.) 604, public lands, railroad land grants, etc.

Middletown Nat. Bank v. Toledo, etc., R. Co., (1905) 197 U. S. 394, 25 S. Ct. 462, 49 U. S. (L. ed.) 803, enforcement of individual liability of stockholders.

Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer, (1905) 197 U. S. 407, 25 S. Ct. 483, 49 U. S. (L. ed.) 810, as to service of process on foreign corporation.

Matter of Strauss, (1905) 197 U. S. 324, 25 S. Ct. 535, 49 U. S. (L. ed.) 774, the extradition laws.

U. S. v. Ju Toy, (1905) 198 U. S. 253, 25 S. Ct. 644, 49 U. S. (L. ed.) 1040, habeas corpus in Chinese exclusion case.

Union Trust Co. v. Wilson, (1905) 198 U. S. 530, 25 S. Ct. 766, 49 U. S. (L. ed.) 1154, as to pledge of warehouse receipts.

U. S. Fidelity, etc., Co. v. U. S., (1903) 191 U. S. 416, 24 S. Ct. 142, 48 U. S. (L. ed.) 242, as to the discharge of a surety by extension of time for payment.

Bessette v. W. B. Conkey Co., (1904) 194 U. S. 324, 24 S. Ct. 665, 48 U. S. (L. ed.) 997, as to review by Circuit Court of Appeals of order in contempt proceedings.

Northern Pac. R. Co. v. Dixon, (1904) 194 U. S. 338, 24 S. Ct. 683, 48 U. S. (L. ed.) 1006, who are fellow servants.

Davis v. Mills, (1904) 194 U. S. 451, 24 S. Ct. 692, 48 U. S. (L. ed.) 1067, conflict of laws as to limitation of actions.

Sun Printing, etc., Assoc. v. Edwards, (1904) 194 U. S. 377, 24 S. Ct. 696, 48 U. S. (L. ed.) 1027, sufficiency of jurisdictional averments of diverse citizenship.

Hanks Dental Assoc. v. International Tooth Crown Co., (1904) 194 U. S. 303, 24 S. Ct. 700, 48 U. S. (L. ed.) 989, as to examination of party before trial pursuant to state law.

Knepper v. Sands, (1904) 194 U. S. 476, 24 S. Ct. 744, 48 U. S. (L. ed.) 1083, railway land grants, *bona fide* purchaser under Adjustment Act.

International Postal Supply Co. v. Bruce, (1904) 194 U. S. 601, 24 S. Ct. 820, 48 U. S. (L. ed.) 1134, injunction against federal official in patent case.

Helwig v. U. S., (1903) 188 U. S. 605, 23 S. Ct. 427, 47 U. S. (L. ed.) 614, jurisdiction of District Court in action under Customs Administrative Act.

U. S. v. Rickert, (1903) 188 U. S. 432, 23 S. Ct. 478, 47 U. S. (L. ed.) 532, state taxation of Indian allottees.

The Osceola, (1903) 189 U. S. 158, 23 S. Ct. 483, 47 U. S. (L. ed.) 760, liability of a ship for seaman's injuries.

Patterson v. The Eudora, (1903) 190 U. S. 169, 23 S. Ct. 821, 47 U. S. (L. ed.) 1002, statute forbidding advance pay to seamen.

Eidman v. Martinez, (1902) 184 U. S. 578, 22 S. Ct. 515, 46 U. S. (L. ed.) 697, and Moore v. Ruckgaber, (1902) 184 U. S. 593, 22 S. Ct. 521, 46 U. S. (L. ed.) 705, questions as to inheritance tax under War Revenue Act.

U. S. v. Lee Yen Tai, (1902) 185 U. S. 213, 22 S. Ct. 629, 46 U. S. (L. ed.) 878, question arising under Chinese Exclusion Act.

Woodworth v. Northwestern Mut. L. Ins. Co., (1902) 185 U. S. 354, 22 S. Ct. 676, 46 U. S. (L. ed.) 945, liability on supersedeas bond.

Felsenheld v. U. S., (1902) 186 U. S. 126, 22 S. Ct. 740, 46 U. S. (L. ed.) 1085, as to construction and constitutionality of a provision in the Dingley Act.

Emsheimer v. New Orleans, (1902) 186 U. S. 33, 22 S. Ct. 770, 46 U. S. (L. ed.) 1042, as to federal jurisdiction for diverse citizenship.

U. S. v. Nichols, (1902) 186 U. S. 298, 22 S. Ct. 918, 46 U. S. (L. ed.) 1173, as to dutiable classification of certain articles.

Good Shot v. U. S., (1900) 179 U. S. 87, 21 S. Ct. 33, 45 U. S. (L. ed.) 101, as to jurisdiction of the Circuit Court of Appeals.

Baggs v. Martin, (1900) 179 U. S. 200, 21 S. Ct. 109, 45 U. S. (L. ed.) 155, and Gableman v. Peoria, etc., R. Co., (1900) 179 U. S. 335, 21 S. Ct. 171, 45 U. S. (L. ed.) 220, as to jurisdiction by removal.

Rothschild v. U. S., (1900) 179 U. S. 403, 21 S. Ct. 197, 45 U. S. (L. ed.) 277, as to dutiability of certain tobacco.

Wilkes County v. Coler, (1901) 180 U. S. 506, 21 S. Ct. 458, 45 U. S. (L. ed.) 642, as to the rights of holders of county bonds.

Treat v. White, (1901) 181 U. S. 264, 21 S. Ct. 611, 45 U. S. (L. ed.) 853, as to stamp tax under War Revenue Act of 1898.

Huus v. New York, etc., Steamship Co., (1901) 182 U. S. 392, 21 S. Ct. 827, 45 U. S. (L. ed.) 1146, exemption from state pilotage laws.

Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique, (1901) 182 U. S. 406, 21 S. Ct. 831, 45 U. S. (L. ed.) 1155, as to liability for negligence of compulsory pilot.

New England R. Co. v. Conroy, (1899) 175

U. S. 323, 20 S. Ct. 85, 44 U. S. (L. ed.) 181, as to who are fellow servants.

*Tullis v. Lake Erie, etc., R. Co.*, (1899) 175 U. S. 348, 20 S. Ct. 136, 44 U. S. (L. ed.) 192, as to constitutionality of a state statute.

*Baltimore, etc., R. Co. v. Voigt*, (1900) 176 U. S. 498, 20 S. Ct. 385, 44 U. S. (L. ed.) 560, as to whether express messenger is a passenger.

*Camden, etc., R. Co. v. Stetson*, (1900) 177 U. S. 172, 20 S. Ct. 617, 44 U. S. (L. ed.) 721, as to power to order surgical examination of party.

*Crawford v. Hubbell*, (1900) 177 U. S. 419, 20 S. Ct. 701, 44 U. S. (L. ed.) 829, war revenue stamp tax on express company's receipt.

*Cincinnati, etc., R. Co. v. Thiebaud*, (1900) 177 U. S. 615, 20 S. Ct. 822, 44 U. S. (L. ed.) 911, as to jurisdiction of Circuit Court of Appeals.

*The G. R. Booth*, (1898) 171 U. S. 450, 19 S. Ct. 9, 43 U. S. (L. ed.) 234, "accident of navigation" within bill of lading exception.

*U. S. v. Harsha*, (1899) 172 U. S. 567, 19 S. Ct. 294, 43 U. S. (L. ed.) 556, as to jurisdiction of Circuit Court of Appeals and other questions.

*Hoeninghaus v. U. S.*, (1899) 172 U. S. 622, 19 S. Ct. 305, 43 U. S. (L. ed.) 576, relating to customs duties.

*Baltimore, etc., R. Co. v. Joy*, (1899) 173 U. S. 226, 19 S. Ct. 387, 43 U. S. (L. ed.) 677, abatement and revivor, and removal of causes.

*U. S. v. Johnson*, (1890) 173 U. S. 363, 19 S. Ct. 427, 43 U. S. (L. ed.) 731, district attorney, extra compensation.

*Cooper v. Newell*, (1899) 173 U. S. 555, 19 S. Ct. 506, 43 U. S. (L. ed.) 808, collateral attack on judgment.

*Security Trust Co. v. Dodd*, (1899) 173 U. S. 624, 19 S. Ct. 545, 43 U. S. (L. ed.) 835, extraterritorial force of state insolvency laws.

*McDonald v. Williams*, (1899) 174 U. S. 397, 19 S. Ct. 743, 43 U. S. (L. ed.) 1022, recovery of dividends by national bank receiver.

*U. S. v. Goldenberg*, (1897) 168 U. S. 95, 18 S. Ct. 3, 42 U. S. (L. ed.) 394, and *U. S. v. Passavant*, (1898) 169 U. S. 16, 18 S. Ct. 219, 42 U. S. (L. ed.) 644, relating to customs duties.

*Highland Ave., etc., R. Co. v. Columbian Equipment Co.*, (1898) 168 U. S. 627, 18 S. Ct. 240, 42 U. S. (L. ed.) 605, jurisdiction of Circuit Court of Appeals.

*McHenry v. Alford*, (1898) 168 U. S. 651, 18 S. Ct. 242, 42 U. S. (L. ed.) 614, state taxation of railroads.

*McCormick Harvesting Mach. Co. v. Aultman-Miller Co.*, (1898) 169 U. S. 606, 18 S. Ct. 443, 42 U. S. (L. ed.) 875, patents, reissues.

*Barrow Steamship Co. v. Kane*, (1898) 170 U. S. 100, 18 S. Ct. 526, 42 U. S. (L. ed.) 964, service of process on alien corporation.

*The John G. Stevens*, (1898) 170 U. S. 113, 18 S. Ct. 544, 42 U. S. (L. ed.) 969, maritime liens.

*Fink v. U. S.*, (1898) 170 U. S. 584, 18 S. Ct. 770, 42 U. S. (L. ed.) 1153, and *U. S. v. Salambier*, (1898) 170 U. S. 621, 18 S. Ct.

771, 42 U. S. (L. ed.) 1167, as to dutiable classifications.

*Flint v. Chrystall*, (1898) 171 U. S. 187, 18 S. Ct. 831, 43 U. S. (L. ed.) 130, Harter Act, general average.

*Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, (1898) 171 U. S. 55, 18 S. Ct. 895, 43 U. S. (L. ed.) 72, mines and mining.

*The Valencia*, (1897) 165 U. S. 264, 17 S. Ct. 323, 41 U. S. (L. ed.) 710, maritime liens.

*Philadelphia Fourth St. Nat. Bank v. Yardley*, (1897) 165 U. S. 634, 17 S. Ct. 439, 41 U. S. (L. ed.) 855, banks and banking.

*Barber v. Pittsburgh, etc., R. Co.*, (1897) 166 U. S. 83, 17 S. Ct. 488, 41 U. S. (L. ed.) 925, construction of will.

*Burdon Cent. Sugar Refining Co. v. Payne*, (1897) 167 U. S. 127, 17 S. Ct. 754, 42 U. S. (L. ed.) 105, right to pledge sugar bounties.

*Compton v. Jesup*, (1897) 167 U. S. 1, 17 S. Ct. 795, 42 U. S. (L. ed.) 55, railroad mortgage foreclosure.

*Warner v. New Orleans*, (1897) 167 U. S. 467, 17 S. Ct. 892, 42 U. S. (L. ed.) 239, municipal corporation law.

*The J. P. Donaldson*, (1897) 167 U. S. 599, 17 S. Ct. 951, 42 U. S. (L. ed.) 292, "novel question in the law of general average."

*Shiver v. U. S.*, (1895) 159 U. S. 491, 16 S. Ct. 54, 40 U. S. (L. ed.) 231, criminal case, public lands, homestead entries.

*McDowell v. U. S.*, (1895) 159 U. S. 596, 16 S. Ct. 111, 40 U. S. (L. ed.) 271, act of judge *de facto*.

*Folsom v. Township Ninety-Six*, (1895) 159 U. S. 611, 16 S. Ct. 174, 40 U. S. (L. ed.) 278, validity of township railroad aid bonds.

*Folsom v. U. S.*, (1895) 160 U. S. 121, 16 S. Ct. 222, 40 U. S. (L. ed.) 363, a criminal case, jurisdiction of Circuit Court of Appeals.

*Central R. Co. v. Keegan*, (1895) 160 U. S. 259, 16 S. Ct. 269, 40 U. S. (L. ed.) 418, fellow servants.

*The Coquitlam v. U. S.*, (1896) 163 U. S. 346, 16 S. Ct. 1117, 41 U. S. (L. ed.) 184, jurisdiction of Circuit Court of Appeals.

*Graves v. Saline County*, (1896) 161 U. S. 359, 16 S. Ct. 528, 40 U. S. (L. ed.) 732, and *Evansville v. Dennett*, (1896) 161 U. S. 434, 16 S. Ct. 613, 40 U. S. (L. ed.) 760, validity of municipal railroad aid bonds.

*St Louis, etc., R. Co. v. James*, (1896) 161 U. S. 545, 16 S. Ct. 621, 40 U. S. (L. ed.) 802, diverse citizenship of corporations.

*U. S. v. Laws*, (1896) 163 U. S. 258, 16 S. Ct. 998, 41 U. S. (L. ed.) 151, a criminal case, alien contract-labor law.

*U. S. v. Jahn*, (1894) 155 U. S. 109, 15 S. Ct. 39, 39 U. S. (L. ed.) 87, question of jurisdiction of the Circuit Court.

*Pittsburgh, etc., R. Co. v. Keokuk, etc., Bridge Co.*, (1894) 155 U. S. 156, 15 S. Ct. 42, 39 U. S. (L. ed.) 106, contract and lease.

*Bate Refrigerating Co. v. Sulzberger*, (1895) 157 U. S. 1, 15 S. Ct. 508, 39 U. S. (L. ed.) 601, patents, expiration with foreign patents, etc.

*Mexican Nat. R. Co. v. Davidson*, (1895) 157 U. S. 201, 15 S. Ct. 563, 39 U. S. (L. ed.)

672, federal jurisdiction of action by assignee.

*Morgan v. Potter*, (1895) 157 U. S. 195, 15 S. Ct. 590, 39 U. S. (L. ed.) 670, federal jurisdiction of suit by foreign guardian.

The *Beaconsfield*, (1895) 158 U. S. 303, 15 S. Ct. 860, 39 U. S. (L. ed.) 993, collision case, damages.

*U. S. v. Burr*, (1895) 159 U. S. 78, 15 S. Ct. 1002, 40 U. S. (L. ed.) 82, customs duties.

*White v. Ewing*, (1895) 159 U. S. 36, 15 S. Ct. 1018, 40 U. S. (L. ed.) 67, federal jurisdiction of ancillary suits.

*U. S. v. Jahn*, (1894) 155 U. S. 109, 15 S. Ct. 39, 39 U. S. (L. ed.) 87, as to jurisdiction of appeal from general appraisers.

*U. S. v. Pridgeon*, (1894) 153 U. S. 48, 14 S. Ct. 746, 38 U. S. (L. ed.) 631, habeas corpus, "Indian country," etc.

*Northern Pac. R. Co. v. Clark*, (1894) 153 U. S. 252, 14 S. Ct. 809, 38 U. S. (L. ed.) 706, taxation of railroad property, railroad land grants.

*New Orleans v. Benjamin*, (1894) 153 U. S. 411, 14 S. Ct. 905, 38 U. S. (L. ed.) 764, jurisdiction of Circuit Courts.

*Roberts v. Lewis*, (1894) 153 U. S. 367, 14 S. Ct. 945, 38 U. S. (L. ed.) 747, construction of will.

*Smale v. Mitchell*, (1892) 143 U. S. 99, 12 S. Ct. 353, 36 U. S. (L. ed.) 90, statutory new trial in ejectment.

*Scott v. Armstrong*, (1892) 146 U. S. 499, 13 S. Ct. 148, 36 U. S. (L. ed.) 1059, national banks, insolvency, etc.

*De La Vergne Refrigerating Mach. Co. v. Featherstone*, (1893) 147 U. S. 209, 13 S. Ct. 283, 37 U. S. (L. ed.) 138, validity of patent.

*Sutliff v. Lake County*, (1893) 147 U. S. 230, 13 S. Ct. 318, 37 U. S. (L. ed.) 145, constitutional law, county bonds.

*Horner v. U. S.*, (1893) 147 U. S. 449, 13 S. Ct. 409, 37 U. S. (L. ed.) 237, criminal case, postal laws, "lottery."

The *J. E. Rumbell*, (1893) 148 U. S. 1, 13 S. Ct. 498, 37 U. S. (L. ed.) 345, maritime liens.

*Texas, etc., R. Co. v. Anderson*, (1893) 149 U. S. 237, 13 S. Ct. 843, 37 U. S. (L. ed.) 717, jurisdiction of Circuit Court of Appeals.

*Sigafus v. Porter*, (C. C. A. 1898) 84 Fed. 430, 85 Fed. 689, as to measure of damages, certified "in view of the recent opinion in" a case in the Supreme Court, and "apparent conflict of authorities."

*Sun Printing, etc., Assoc. v. Edwards*, (1903) 121 Fed. 826, 58 C. C. A. 162, question of jurisdiction of Circuit Court.

After a decision in the case a question will not be certified. Certification at that stage would be impertinent and unlawful, since there could then be no desire for instructions for a "proper decision" in the language of the statute. *Dickinson v. U. S.*, (C. C. A. 1909) 174 Fed. 808, where the court said: "We have refused to certify under circumstances like those at bar; and our refusal so to do seems justified and perhaps required, by the expressions in *Columbus Watch Co. v.*

*Robbins*, (1893) 148 U. S. 266, 269, 270, 13 S. Ct. 594, 37 U. S. (L. ed.) 445."

"Questions should not be certified after the case has been decided. *Louisville, etc., R. Co. v. Pope*, (1896) 74 Fed. 1, 20 C. C. A. 253; *Andrews v. National Foundry, etc., Works*, (1897) 77 Fed. 774, 23 C. C. A. 454." *Cella v. Brown*, (C. C. A. 1906) 144 Fed. 742. The remedy at that stage is by petition to the Supreme Court for a writ of certiorari, as was pointed out in *Andrews v. National Foundry, etc., Works*, (C. C. A. 1897) 77 Fed. 774. As to petition for certiorari, see *infra*, VII., this note.

But a judgment may be vacated and a question then certified, as was done, according to Mr. Justice Gray's statement, in *Wall v. Cox*, (1901) 181 U. S. 244, 246, 21 S. Ct. 642, 45 U. S. (L. ed.) 845. In *German Ins. Co. v. Hearne*, (C. C. A. 1902) 118 Fed. 134, there was a motion for certificate after judgment and the court said: "If the motion is to be treated as an application to rehear the cases, and, pending the rehearing, if this should be granted, to certify a question or proposition to the Supreme Court, we are equally without authority to grant such a request, because we cannot truthfully declare that the question, or proposition of law that underlies the judgments recently entered in this court, but is believed by the defendant in error to have been wrongly decided, is a question or proposition concerning which we desire the instruction of the Supreme Court in order that we may properly determine it. The Circuit Court of Appeals was unanimous in its opinion, and none of the judges who then constituted the court considered then, or now considers, that the point in controversy was so doubtful that instruction thereon should be asked from the ultimate tribunal. Of course, our conclusion may have been erroneous, but, so long as we believe in its soundness, we cannot properly give the certificate required by the Act. *Columbus Watch Co. v. Robbins*, (1893) 148 U. S. 266, 13 S. Ct. 594, 37 U. S. (L. ed.) 445." See also *Andrews v. National Foundry, etc., Works*, (C. C. A. 1897) 77 Fed. 774.

One or more questions out of many arising in the case may be certified, the court meanwhile deciding the questions upon which it desires no instructions and placing its opinion on file, "and, when instructions are received as to the question certified, the cause will be finally disposed of." *Sigafus v. Porter*, (C. C. A. 1898) 84 Fed. 430. See also the statement preceding the opinion of the court in *The Delaware*, (1896) 161 U. S. 459, 16 S. Ct. 516, 40 U. S. (L. ed.) 771.

Certifying the entire case.—This cannot be done, even if the case be divided into several points. *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1909) 215 U. S. 216, 30 S. Ct. 86, 54 U. S. (L. ed.) 164; *Southern Pac. Co. v. Interstate Commerce Commission*, (1909) 215 U. S. 226, 30 S. Ct. 89, 54 U. S. (L. ed.) 169; *Chicago, etc., R. Co. v. Williams*, (1909) 214 U. S. 492, 29 S. Ct. 514, 53 U. S. (L. ed.) 1058, where Mr. Justice Holmes, dissenting with two other justices, said: "It is no objection to a ques-

tion of law that the case turns upon it. That is the best of reasons for propounding it. The only objection is not to deciding the case here, but to putting questions that turn upon conclusions from evidence, or that present a general statement and ask a judgment with regard to unspecified questions of law."

A "case" or "judgment" cannot be certified, but only "questions," etc., as expressed in the statute. *German Ins. Co. v. Hearne*, (C. C. A. 1902) 118 Fed. 134.

The questions must present distinct points or propositions of law, and not require the Supreme Court to search the entire record and in effect determine whether the judgment of the trial court should be affirmed or reversed. *Felsenheld v. U. S.*, (1902) 186 U. S. 126, 22 S. Ct. 740, 46 U. S. (L. ed.) 1085.

"So far as the second question is concerned, it does not propound a distinct issue of law, but, in effect, calls for a decision of the whole case, and therefore need not be answered. *Chicago, etc., R. Co. v. Williams*, (1907) 205 U. S. 444, 27 S. Ct. 559, 51 U. S. (L. ed.) 875, 878, and cases cited." *Jahn v. The Folmina*, (1909) 212 U. S. 354, 15 Ann. Cas. 748, 29 S. Ct. 363, 53 U. S. (L. ed.) 546.

"Upon this state of facts can plaintiffs maintain an action against defendants under section 7 of the Anti-Trust Act of July 2, 1890?" was the question certified in *Loewe v. Lawlor*, (1908) 208 U. S. 274, 13 Ann. Cas. 815, 28 S. Ct. 301, 52 U. S. (L. ed.) 488. Before hearing on the certificate a certiorari was granted to bring up the whole record, and the case was decided thereon.

In *Hallowell v. U. S.*, (1908) 209 U. S. 101, 28 S. Ct. 498, 52 U. S. (L. ed.) 702, where the certificate was "dismissed because not in conformity to the statute," the court said: "The certificate in the present case is objectionable upon the ground that it does not set forth propositions of law, clearly stated, which may be answered without reference to all the facts, but mixed questions of law and fact which require us to construe various Acts of Congress, and, in the light of all the testimony in the case, determine whether the accused could be held guilty of any offense legally punishable by the United States. It is as if the court were asked what, upon the whole case as sent up, should have been the verdict and judgment in the trial court."

"The present certificate brings to us a question of mixed law and fact, and, substantially, all the circumstances connected with the issue to be determined. It does not present a distinct point of law, clearly stated, which can be decided without passing upon the weight or effect of all the evidence out of which the question arises." *Chicago, etc., R. Co. v. Williams*, (1907) 205 U. S. 444, 27 S. Ct. 559, 51 U. S. (L. ed.) 875, dismissing the certificate.

**Separate points.**—A question containing "more than a single question or proposition of law" was, for that reason, not answered in *Quinlan v. Green County*, (1907) 205 U. S. 410, 27 S. Ct. 505, 51 U. S. (L. ed.) 860.

A petition for certification of a question seems to be a proper proceeding if the court

does not act of its own motion. See *Cella v. Brown*, (C. C. A. 1906) 144 Fed. 742; *Dickinson v. U. S.*, (C. C. A. 1909) 174 Fed. 808.

But in *Andrews v. National Foundry, etc., Works*, (C. C. A. 1897) 77 Fed. 774, the court said questions are certified "only upon our own motion," citing *Louisville, etc., R. Co. v. Pope*, (1896) 74 Fed. 1, 20 C. C. A. 253.

And in *Cella v. Brown*, (C. C. A. 1906) 144 Fed. 742, the court said, quoting from *Louisville, N. A. & C. Ry. Co. v. Pope*, 74 Fed. 1: "Whether a question should be certified rests within the discretion of the court, but it is not a discretion the exercise of which may be invoked by a party as of right. The certification is for the instruction of the court upon doubtful questions; and while in cases of magnitude and upon intricate and doubtful questions of law the court upon the argument may perhaps properly indulge the suggestion of counsel of the desirability of the advice and instruction of the Supreme Court, we are compelled to say that this formal motion is not conformable to correct practice. . . . It may be that upon the argument of the cause upon its merits some question may be raised which, upon consultation, the judges may deem proper to certify. . . . We must decline at this time to entertain the motion, or to recognize the right of a party to challenge our judgment upon the propriety of so doing in advance of the argument of the case upon its merits."

**Form and frame of certificate.**—See also cases cited under section 25d of the Bankruptcy Act of 1898, *ante*, vol. 1, p. 641, of this Supplement.

Supreme Court rule 37 provides that "where . . . a Circuit Court of Appeals shall certify to this court a question or proposition of law concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises." The phraseology of this clause "indicates that it is the fundamental facts that are to be stated, not the evidential facts from which the fundamental facts are found." *Sigafus v. Porter*, (C. C. A. 1898) 85 Fed. 689.

In *American Land Co. v. Zeiss*, (1911) 219 U. S. 47, 31 S. Ct. 200, 55 U. S. (L. ed.) 82, where the certificate is quoted, it was held sufficient, considered as a whole, as against the objections: "First, because the certificate on its face indicates that the court below was not in a state of mind which required the instruction of this court, but was merely desirous of provoking a direct decision by this court, to avoid the delay and the public inconvenience which otherwise might result. Second, because the certificate is so broad as simply to refer the whole case to this court for decision, instead of presenting definite propositions of law for solution."

In a case where the court answered questions to some extent, it alluded to other "matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified." *Wilkes*

County v. Coler, (1901) 180 U. S. 506, 21 S. Ct. 458, 45 U. S. (L. ed.) 642.

In *Wilkes County v. Coler*, (1901) 180 U. S. 506, 21 S. Ct. 458, 45 U. S. (L. ed.) 642, the court considered a point, although it was "not specifically embraced in either of the certified questions," because of its close connection with a question certified.

In *New England R. Co. v. Conroy*, (1899) 175 U. S. 323, 20 S. Ct. 85, 44 U. S. (L. ed.) 181, where the certificate is set forth, "it may be doubted whether the questions of law presented to us are really raised by the facts as certified," said the court. "However, waiving these suggestions," the court proceeded to answer.

*Certificates dismissed as insufficient are quoted in* *Columbus Watch Co. v. Robbins*, (1893) 148 U. S. 266, 13 S. Ct. 594, 37 U. S. (L. ed.) 445; *Cross v. Evans*, (1897) 167 U. S. 60, 17 S. Ct. 733, 42 U. S. (L. ed.) 77; *Hallowell v. U. S.*, (1908) 209 U. S. 101, 28 S. Ct. 498, 52 U. S. (L. ed.) 702; *Chicago, etc., R. Co. v. Williams*, (1909) 214 U. S. 492, 29 S. Ct. 514, 53 U. S. (L. ed.) 1058, (1907) 205 U. S. 444, 27 S. Ct. 559, 51 U. S. (L. ed.) 875.

*Questions not answered because objectionable in form are quoted in* *McHenry v. Alford*, (1898) 168 U. S. 651, 18 S. Ct. 242, 42 U. S. (L. ed.) 614; *Del Monte Min., etc., Co. v. Last Chance Min., etc., Co.*, (1898) 171 U. S. 55, 18 S. Ct. 895, 43 U. S. (L. ed.) 72; *Quinlan v. Green County*, (1907) 205 U. S. 410, 27 S. Ct. 505, 51 U. S. (L. ed.) 860.

*Certificates pronounced defective in part are quoted in full in* *Warner v. New Orleans*, (1897) 167 U. S. 467, 17 S. Ct. 892, 42 U. S. (L. ed.) 239; *Emsheimer v. New Orleans*, (1902) 186 U. S. 33, 22 S. Ct. 770, 46 U. S. (L. ed.) 1042.

*Other certificates quoted.*—In nearly all the cases cited in this note, at least a part of the certificate is quoted. In the following it is quoted in full or substantially in full: *De La Vergne Refrigerating Mach. Co. v. Featherstone*, (1893) 147 U. S. 209, 13 S. Ct. 283, 37 U. S. (L. ed.) 138; *New Orleans v. Benjamin*, (1894) 153 U. S. 411, 14 S. Ct. 905, 38 U. S. (L. ed.) 764; *The Beaconsfield*, (1895) 158 U. S. 303, 15 S. Ct. 860, 39 U. S. (L. ed.) 993; *Folsom v. U. S.*, (1895) 160 U. S. 121, 16 S. Ct. 222, 40 U. S. (L. ed.) 363; *Compton v. Jesup*, (1897) 167 U. S. 1, 17 S. Ct. 795, 42 U. S. (L. ed.) 55; *U. S. v. Passavant*, (1898) 169 U. S. 16, 18 S. Ct. 219, 42 U. S. (L. ed.) 644; *Fink v. U. S.*, (1898) 170 U. S. 584, 18 S. Ct. 770, 42 U. S. (L. ed.) 1153; *U. S. v. Harsha*, (1899) 172 U. S. 567, 19 S. Ct. 294, 43 U. S. (L. ed.) 556; *Tullis v. Lake Erie, etc., R. Co.*, (1899) 175 U. S. 348, 20 S. Ct. 136, 44 U. S. (L. ed.) 192; *Baltimore, etc., R. Co. v. Voight*, (1900) 176 U. S. 498, 20 S. Ct. 385, 44 U. S. (L. ed.) 560; *Cincinnati, etc., R. Co. v. Thiebaud*, (1900) 177 U. S. 615, 20 S. Ct. 822, 44 U. S. (L. ed.) 911; *Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, (1901) 182 U. S. 406, 21 S. Ct. 831, 45 U. S. (L. ed.) 1155; *Woodworth v. Northwestern Mut. L. Ins. Co.*, (1902) 185 U. S. 354, 22 S. Ct. 676, 46 U. S. (L. ed.) 945; *Evans v. Nellis*, (1902)

187 U. S. 271, 23 S. Ct. 74, 47 U. S. (L. ed.) 173; *Hanks Dental Assoc. v. International Tooth Crown Co.*, (1904) 194 U. S. 303, 24 S. Ct. 700, 48 U. S. (L. ed.) 989; *Sun Printing, etc., Assoc. v. Edwards*, (1904) 194 U. S. 377, 24 S. Ct. 696, 48 U. S. (L. ed.) 1027; *International Postal Supply Co. v. Bruce*, (1904) 194 U. S. 601, 24 S. Ct. 820, 48 U. S. (L. ed.) 1134; *Union Stock Yards Co. v. Chicago, etc., R. Co.*, (1905) 196 U. S. 217, 2 Ann. Cas. 525, 25 S. Ct. 226, 49 U. S. (L. ed.) 453; *Vanderbilt v. Eidman*, (1905) 196 U. S. 480, 25 S. Ct. 331, 49 U. S. (L. ed.) 563; *U. S. v. Montana Lumber, etc., Co.*, (1905) 196 U. S. 573, 25 S. Ct. 367, 49 U. S. (L. ed.) 604; *Alabama G. S. R. Co. v. Thompson*, (1906) 200 U. S. 206, 26 S. Ct. 161, 50 U. S. (L. ed.) 441; *St. Louis Dressed Beef, etc., Co. v. Maryland Casualty Co.*, (1906) 201 U. S. 173, 26 S. Ct. 400, 50 U. S. (L. ed.) 712; *Mason City, etc., R. Co. v. Boynton*, (1907) 204 U. S. 570, 27 S. Ct. 321, 51 U. S. (L. ed.) 629; *Polk v. Mutual Reserve Fund L. Assoc.*, (1907) 207 U. S. 310, 28 S. Ct. 65, 52 U. S. (L. ed.) 222; *U. S. v. A. Graf Distilling Co.*, (1908) 208 U. S. 198, 28 S. Ct. 265, 52 U. S. (L. ed.) 452; *Delaware, etc., Co. v. Albany, etc., R. Co.*, (1909) 213 U. S. 435, 29 S. Ct. 540, 53 U. S. (L. ed.) 862; *Hills v. Hoover*, (1911) 220 U. S. 329, 31 S. Ct. 402, 55 U. S. (L. ed.) 485; *Hallowell v. U. S.*, (1911) 221 U. S. 317, 31 S. Ct. 587, 55 U. S. (L. ed.) 750.

"The form of this certificate has been criticised, but we think it sufficiently states both the question and the desire of that court for the instruction of this court that it may make a proper decision. It conforms in substance with the statute, and finds precedences in a number of instances in matter of form." *Hertz v. Woodman*, (1910) 218 U. S. 205, 30 S. Ct. 621, 54 U. S. (L. ed.) 1001, citing as cases containing such precedents, *U. S. v. Pridgeon*, (1894) 153 U. S. 48, 14 S. Ct. 746, 38 U. S. (L. ed.) 631; *Helwig v. U. S.*, (1903) 188 U. S. 605, 23 S. Ct. 427, 47 U. S. (L. ed.) 614, and *U. S. v. Ju Toy*, (1905) 198 U. S. 253, 25 S. Ct. 644, 49 U. S. (L. ed.) 1040.

*Amendment of certificate.*—The certificate was amended at the suggestion of both parties, and by order of the Circuit Court of Appeals, before transmission to the Supreme Court, in *Barber v. Pittsburgh, etc., R. Co.*, (1897) 166 U. S. 83, 17 S. Ct. 488, 41 U. S. (L. ed.) 925. A motion to amend by incorporating specified parts of the evidence, etc., was denied in *Sigafus v. Porter*, (C. C. A. 1898) 85 Fed. 689, as "we find no fundamental fact in the proposed amendment not already included in our statement."

A fact deemed material by the parties and in the record, but not stated in the certificate, may be stipulated into it upon the argument in the Supreme Court as in *Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer*, (1905) 197 U. S. 407, 25 S. Ct. 483, 49 U. S. (L. ed.) 810.

*Facts stated in certificate as constituting law of the case.*—Where facts have been found and stated to the Supreme Court as the basis for asking its instructions, the Circuit

Court of Appeals will not, after such instructions have been obtained, re-examine upon the identical evidence already considered controverted questions of fact which have been advisedly determined. The *Folmina*, (C. C. A. 1909) 173 Fed. 615, the court saying, however: "We do not now determine whether in a case where it clearly appears that a statement of fact accompanying a question certified to the Supreme Court was made through mistake or inadvertence, or in a case where new evidence has been received subsequently to the making of such statement, this court would have power to change the facts so found after the Supreme Court has answered the question, and render its decision upon the basis of the altered facts."

**Recertification of questions.**—In *Chicago, etc., R. Co. v. Williams*, (1907) 205 U. S. 444, 27 S. Ct. 559, 51 U. S. (L. ed.) 875, a certificate was dismissed without answer because of its imperfect form; whereupon another certificate was sent up and dismissed because it was still imperfect (three justices dissenting).

A certificate was dismissed for informality in *Hallowell v. U. S.*, (1908) 209 U. S. 101, 28 S. Ct. 498, 52 U. S. (L. ed.) 702, but again sent up in satisfactory form in *Hallowell v. U. S.*, (1911) 221 U. S. 317, 31 S. Ct. 587, 55 U. S. (L. ed.) 750.

There seems to have been an abortive certification prior to the final one in *Northern Pac. R. Co. v. Clark*, (1894) 153 U. S. 252, 14 S. Ct. 809, 38 U. S. (L. ed.) 706.

**Answer to questions.**—Questions propounded must be answered in reference to the actual case and in view of the facts stated. *Hills v. Hoover*, (1911) 220 U. S. 329, 31 S. Ct. 402, 55 U. S. (L. ed.) 485.

**"Whole record and cause"** brought up—**Certiorari.**—As far as appears in the reported cases, certiorari is invariably used for the purpose of requiring the whole record and cause to be sent up under this section.

In *The Delaware*, (1896) 161 U. S. 459, 16 S. Ct. 516, 40 U. S. (L. ed.) 771, a collision case involving construction of the Harter Act, the Circuit Court of Appeals affirmed a decree of the District Court in part and certified to the Supreme Court certain questions remaining, and the certificate was docketed as a separate cause. The appellant thereupon applied for and was granted a writ of certiorari to bring up the whole record.

In *Loewe v. Lawlor*, (1908) 208 U. S. 274, 13 Ann. Cas. 815, 28 S. Ct. 301, 52 U. S. (L. ed.) 488, "after the case on certificate had been docketed here, plaintiffs in error applied, and defendants in error joined in the application, to this court to require the whole record and cause to be sent up for its consideration. The application was granted," etc.

In *Brunswick Terminal Co. v. Baltimore Nat. Bank*, (1904) 192 U. S. 386, 24 S. Ct. 314, 48 U. S. (L. ed.) 491, the Circuit Court of Appeals certified certain questions, and "after full argument on the merits this court required the whole record and cause to be sent up for consideration." See also *U. S. v. Northern Pac. R. Co.*, (1904) 193 U. S. 1, 24 S. Ct. 330, 48 U. S. (L. ed.) 593.

The application for certiorari will be denied if it is evident that the Circuit Court of Appeals did not have jurisdiction of the case. *Good Shot v. U. S.*, (1900) 179 U. S. 87, 21 S. Ct. 33, 45 U. S. (L. ed.) 101.

**Supreme Court Rule 37** provides that when a question is certified, "if application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record."

Cases where the whole record was brought up under this section are as follows:

*Sigafus v. Porter*, (1900) 179 U. S. 116, 21 S. Ct. 34, 45 U. S. (L. ed.) 113, damages for deceit, two justices dissenting; certiorari issued after the case was argued and submitted on the certificate;

*Bedford v. Eastern Bldg., etc., Assoc.*, (1901) 181 U. S. 227, 21 S. Ct. 597, 45 U. S. (L. ed.) 834, building and loan associations;

*Hopkins v. U. S.*, (1898) 171 U. S. 578, 19 S. Ct. 40, 43 U. S. (L. ed.) 290, and *Anderson v. U. S.*, (1898) 171 U. S. 604, 19 S. Ct. 50, 43 U. S. (L. ed.) 300, construction of Anti-trust Act of 1890;

*U. S. v. Ranlett*, (1898) 172 U. S. 133, 19 S. Ct. 114, 43 U. S. (L. ed.) 393, as to free and dutiable goods;

*Shaw v. Kellogg*, (1898) 170 U. S. 312, 18 S. Ct. 632, 42 U. S. (L. ed.) 1050, public lands, mineral grants;

*Northern Pac. R. Co. v. Walker*, (1893) 148 U. S. 391, 13 S. Ct. 650, 37 U. S. (L. ed.) 494, "argument having been had upon the certificate, we directed a certiorari to issue," etc.

*Humbird v. Avery*, (1904) 195 U. S. 480, 25 S. Ct. 123, 49 U. S. (L. ed.) 286, where, after the questions were presented to the Supreme Court on certificate, "the United States was allowed to intervene upon the general ground that the case involved important questions affecting the administration of the public land laws, including the grant to the Northern Pacific Railroad Company then in process of adjustment, and on motion of the government, the plaintiffs and defendants concurring, the whole record was ordered to be sent up for our consideration."

## VII. REVIEW BY SUPREME COURT ON CERTIORARI.

General authority to issue writs of certiorari in bankruptcy cases is granted in section 25d of the Bankruptcy Act of 1898, *ante*, title **BANKRUPTCY**, p. 641 of this Supplement, where numerous cases are cited.

For certiorari to the Court of Appeals of the District of Columbia see *Judicial Code*, sec. 251, *ante*, p. 236 of this Supplement, and the Acts to which the note thereto refers.

For the general power to issue writs of certiorari, see *R. S.* sec. 716, 4 Fed. Stat. Annot. 498, and section 12 of the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. L. 829, 4 Fed. Stat. Annot. 430, which are now embodied in *Judicial Code*, sec. 262, *ante*, p. 241 of this Supplement.

**Object of the statute.**—"In order to guard against any injurious results which might flow from having nine appellate courts, acting independently of each other, power was given to this court to bring before it for decision by certiorari any case pending in either of those courts. In that way it was believed that uniformity of ruling might be secured, as well as the disposition of cases whose gravity and importance rendered the action of the tribunal of last resort peculiarly desirable." *Warner v. New Orleans*, (1897) 167 U. S. 467, 17 S. Ct. 893, 42 U. S. (L. ed.) 239.

**The power of the Supreme Court to issue writs of certiorari** is not limited to the provision in this section; it may be issued in other cases under U. S. R. S. sec. 716, 4 Fed. Stat. Annot. 498, now Judicial Code, sec. 262, *ante*, p. 241 of this Supplement. *McClellan v. Carland*, (1910) 217 U. S. 268, 30 S. Ct. 501, 54 U. S. (L. ed.) 762.

**The certiorari provided for by this section** is "in the nature of an appeal or writ of error for the mere correction of error—a new use of the writ. . . . Certiorari cannot be independently used to supply the place of a writ of error for the mere correction of error." And since the government cannot have a writ of error to review a judgment reversing a conviction in any criminal case, it cannot have a writ of certiorari for that purpose. *U. S. v. Dickinson*, (1909) 213 U. S. 92, 29 S. Ct. 485, 53 U. S. (L. ed.) 711.

**The Supreme Court has power to issue the writ of certiorari to review a case pending in the Circuit Court of Appeals on an appeal from a decree of the Circuit Court entered pursuant to the mandate of the Circuit Court of Appeals on a prior appeal.** *St. Louis, etc., R. Co. v. Wabash R. Co.*, (1910) 217 U. S. 247, 30 S. Ct. 510, 54 U. S. (L. ed.) 752.

**The Circuit Court of Appeals stayed its mandate in order to enable the party against whom it had rendered judgment to make application to the Supreme Court for a writ of certiorari**, as stated in *In re Woods*, (1892) 143 U. S. 202, 12 S. Ct. 417, 36 U. S. (L. ed.) 125.

**If the Circuit Court of Appeals refuses to certify a question under the preceding provision of this section**, the Supreme Court may nevertheless grant a writ of certiorari to determine that question as in *Lau Ow Bew, Petitioner*, (1891) 141 U. S. 583, 12 S. Ct. 43, 35 U. S. (L. ed.) 868.

**A jurisdictional amount in dispute for the purpose of appeal is not necessary to authorize granting the writ of certiorari.** *Whitney v. Dick*, (1906) 202 U. S. 132, 26 S. Ct. 584, 50 U. S. (L. ed.) 963.

**No limit of time for application for certiorari is fixed by statute.** "While we think such application should be made with reasonable promptness . . . we do not think the party complaining is limited to the six months allowed . . . for suing out a writ of error from the Court of Appeals to review the judgment of the District or Circuit Court; and it would seem that he is, by analogy, entitled to the year within which . . . an appeal shall be taken or writ of error

sued out from this court to review judgments or decrees of the Court of Appeals in cases where the losing party is entitled to such review." *The Conqueror*, (1897) 166 U. S. 110, 17 S. Ct. 510, 41 U. S. (L. ed.) 937.

Upon dismissing, for want of jurisdiction, a writ of error to the Circuit Court of Appeals the Supreme Court, without discussion, denied a writ of certiorari, the judgment sought to be reviewed having been entered May 22, 1902, the writ of error allowed May 22, 1903, the cause docketed June 1, 1903, and the petition for certiorari filed Feb. 17, 1905. *Bonin v. Gulf Co.*, (1905) 198 U. S. 115, 25 S. Ct. 608, 49 U. S. (L. ed.) 970.

**At what stage of the case.**—"We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the Court of Appeals. *Chicago, etc., R. Co. v. Osborne*, (1892) 146 U. S. 354, 13 S. Ct. 281, 36 U. S. (L. ed.) 1002." *Forsyth v. Hammond*, (1897) 166 U. S. 506, 17 S. Ct. 665, 41 U. S. (L. ed.) 1095.

A writ of certiorari was denied where the cause was pending undecided, under peculiar circumstances, in the Circuit Court of Appeals, in *Columbus Constr. Co. v. Crane Co.*, (1899) 174 U. S. 600, 603, 803, 19 S. Ct. 721, 884, 43 U. S. (L. ed.) 1102.

The lack of finality in a decree reversing an order of a Circuit Court granting a preliminary injunction will not prevent a review in the Supreme Court on certiorari, where the record presented the whole case to the Circuit Court of Appeals so that it might properly have been finally disposed of in terms by its decree. *Harriman v. Northern Securities Co.*, (1905) 197 U. S. 244, 25 S. Ct. 493, 49 U. S. (L. ed.) 739.

"In *Pullman's Palace Car Co. v. Central Transp. Co.*, (1898) 171 U. S. 138, 18 S. Ct. 808, 43 U. S. (L. ed.) 108, an appeal was taken to this court and also to the Circuit Court of Appeals, and a motion was made in each court to dismiss the appeal, whereupon, by reason of the circumstances, we granted a writ of certiorari, and brought up the record from the latter court before it had proceeded to decree. The question as to which was the correct route to reach this court became immaterial, and we disposed of the case on its merits." *Union, etc., Bank v. Memphis*, (1903) 189 U. S. 71, 23 S. Ct. 604, 47 U. S. (L. ed.) 712.

**After questions have been certified by the Circuit Court of Appeals** (see *supra*, p. 1343, VI.) and answers certified back to that court which thereupon proceeds to final judgment, a writ of certiorari may then be granted to review the judgment, as in *Wilkes County v. Coler*, (1903) 190 U. S. 107, 23 S. Ct. 738, 47 U. S. (L. ed.) 971.

**On motion to dismiss appeal or writ of error.**—Certiorari is frequently granted on motion made after motion filed to dismiss an appeal or writ of error, and to avoid consuming time to consider questions as to the proper method of appellate review. In *White-Smith Music Pub. Co. v. Apollo Co.*, (1908) 209 U. S. 1, 28 S. Ct. 319, 52 U. S. (L. ed.) 655, there was a motion made to dismiss



appeals, and a petition for a writ of certiorari was filed by the appellant. The writ was granted, "the record on the appeals to stand as a return to the writ," citing for that practice *Montana Min. Co. v. St. Louis Min., etc., Co.*, (1907) 204 U. S. 204, 27 S. Ct. 254, 51 U. S. (L. ed.) 444. For other instances of the same procedure and order as to the return, see *O'Farrell v. O'Brien*, (1905) 199 U. S. 89, 25 S. Ct. 727, 50 U. S. (L. ed.) 101; *Cochran v. Montgomery County*, (1905) 199 U. S. 260, 26 S. Ct. 58, 50 U. S. (L. ed.) 182; *Whitney v. Dick*, (1906) 202 U. S. 132, 26 S. Ct. 584, 50 U. S. (L. ed.) 963; *Baglin v. Cusenier Co.*, (1911) 221 U. S. 580, 31 S. Ct. 669, 55 U. S. (L. ed.) 863. See also *Pullman's Palace Car Co. v. Central Transp. Co.*, (1898) 171 U. S. 138, 18 S. Ct. 808, 43 U. S. (L. ed.) 108. In *Security Trust Co. v. Deat*, (1902) 187 U. S. 237, 23 S. Ct. 61, 47 U. S. (L. ed.) 158, the court remarked that the case was brought up by a writ of error, and then said: "We think the proper course was to have asked for a writ of certiorari to bring the final judgment of the Circuit Court of Appeals here for review. However, under the powers possessed by us under the Judiciary Act of March 3, 1891, we now allow a writ of certiorari, and direct that the copy of the record heretofore filed under the writ of error shall be taken and deemed as a sufficient return to the certiorari."

Upon motion to dismiss an appeal for want of jurisdiction the appellant applied for a writ of certiorari, and the appeal being subsequently dismissed, the court granted the certiorari and at the same time proceeded to dispose of the case on the merits. *O'Farrell v. O'Brien*, (1905) 199 U. S. 89, 25 S. Ct. 727, 50 U. S. (L. ed.) 101.

After dismissal of a writ of error by the Supreme Court for want of jurisdiction a writ of certiorari was awarded in *Willis v. Eastern Trust, etc., Co.*, (1898) 169 U. S. 295, 18 S. Ct. 347, 42 U. S. (L. ed.) 752.

**Certiorari and writ of error.**—"This case was brought here on certiorari, and also on writ of error, and will be determined on the merits, without discussing the question of jurisdiction as between the one writ and the other. *Pullman's Palace Car Co. v. Central Transp. Co.*, (1898) 171 U. S. 138, 18 S. Ct. 808, 43 U. S. (L. ed.) 108." *Johnson v. Southern Pac. Co.*, (1904) 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363.

A writ and a cross writ of certiorari are sometimes granted and the case heard thereon. *The Victory*, (1897) 168 U. S. 410, 18 S. Ct. 149, 42 U. S. (L. ed.) 519; *The Albert Du-mois*, (1900) 177 U. S. 240, 20 S. Ct. 595, 44 U. S. (L. ed.) 751; *U. S. Rubber Co. v. American Oak Leather Co.*, (1901) 181 U. S. 434, 21 S. Ct. 670, 45 U. S. (L. ed.) 938; *Kokomo Fence Mach. Co. v. Kitzelman*, (1903) 189 U. S. 8, 23 S. Ct. 521, 47 U. S. (L. ed.) 689; *Fidelity, etc., Co. v. L. Bucki, etc.*, *Lumber Co.*, (1903) 189 U. S. 135, 23 S. Ct. 582, 47 U. S. (L. ed.) 744; *Howe Scale Co. v. Wyckoff*, (1905) 198 U. S. 118, 25 S. Ct. 609, 49 U. S. (L. ed.) 972; *La Bourgogne*, (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973; *Baglin v. Cusenier Co.*, (1911)

221 U. S. 580, 31 S. Ct. 669, 55 U. S. (L. ed.) 863.

**Successive writs of certiorari** are sometimes granted (perhaps specially favored) to review on the later writs proceedings that have taken place after remand on the prior writs, as in *Guarantee Co. of North America v. Mechanics' Sav. Bank, etc., Co.*, (1902) 183 U. S. 402, 22 S. Ct. 124, 46 U. S. (L. ed.) 253; *The Conemaugh*, (1903) 189 U. S. 363, 23 S. Ct. 504, 47 U. S. (L. ed.) 854; *Great Southern Fire Proof Hotel Co. v. Jones*, (1904) 193 U. S. 532, 24 S. Ct. 676, 49 U. S. (L. ed.) 778; *Mutual L. Ins. Co. v. Hill*, (1904) 193 U. S. 551, 24 S. Ct. 538, 48 U. S. (L. ed.) 788; *Erie R. Co. v. Erie, etc., Transp. Co.*, (1907) 204 U. S. 220, 27 S. Ct. 247, 51 U. S. (L. ed.) 450.

**When such power will be exercised.**—"The writ of certiorari authorized by the Act of 1891, and prayed for in this case, being in the nature of a writ of error to bring up for review the decree of the Circuit Court of Appeals, the question whether the writ should be granted rests in the discretion of this court." *American Constr. Co. v. Jacksonville, etc., R. Co.*, (1893) 148 U. S. 372, 13 S. Ct. 758, 37 U. S. (L. ed.) 486.

The Supreme Court "ordinarily refuses a petition for certiorari in the early stages of a case." *Burget v. Robinson*, (1903) 123 Fed. 262, 267, 59 C. C. A. 260, 265.

In *St. Louis, etc., R. Co. v. Wabash R. Co.*, (1910) 217 U. S. 247, 30 S. Ct. 510, 54 U. S. (L. ed.) 752, a petition for a writ of certiorari was granted, because "both the private interests of the railroad companies and of the separate industries and the greater interests of the public call for the granting of the writ."

In *McMullen v. Hoffman*, (1899) 174 U. S. 639, 19 S. Ct. 839, 43 U. S. (L. ed.) 1117, where certiorari was granted, the Supreme Court said: "There is a difference of opinion in the courts below [in this case] as to the law applicable to the case. The question is one of importance, involving as it does the principles which should control in regard to the procurement of contracts at public lettings for work to be awarded to the lowest bidder. Assuming the same facts, the courts below have come to opposite conclusions upon the character of the contract, and upon the right of the complainant to obtain redress for his alleged wrongs. It was on account of the general importance of the question, and the many lettings for public works by the government and by municipal corporations which are affected by the law relative to bidding, that this court thought it a proper case to issue the writ of certiorari herein. The cases upon the subject are not entirely harmonious, and we think it well to again consider some of them, and, so far as possible, to remove the doubts which seemingly have arisen in this branch of the law."

It is not a sufficient ground for granting the writ that the judgment thereon may effect a different result in the court below, but not affect the substantial rights of the parties. *Smith v. Vulcan Iron Works*, (1897) 165 U. S. 518, 17 S. Ct. 407, 41 U. S. (L. ed.) 810.

"Pure questions of fact depending on conflicting evidence and on the peculiar circumstances of the case; upon which, had they been the only questions presented by the record, a writ of certiorari would not have been granted," said the court in *Crossman v. Burrill*, (1900) 179 U. S. 100, 21 S. Ct. 38, 45 U. S. (L. ed.) 106.

**Table of certiorari cases.**—See also cases cited at the end of division VI., *supra*, this note; certiorari in bankruptcy cases, vol. 1 of this Supplement, p. 643; certiorari to the Court of Appeals of the District of Columbia, under the Act of March 3, 1897, ch. 390, 29 Stat. L. 692, 4 Fed. Stat. Annot. 466, annotated *infra*, this title. With the exception of the foregoing the following table of cases, where determinations were made on writs of certiorari, is believed to be complete, with expressed or inferred grounds for granting the writ.

**Cases or questions of importance.**—*Chicago, etc., R. Co. v. U. S.*, (1911) 220 U. S. 559, 31 S. Ct. 612, 55 U. S. (L. ed.) 582, construing the Safety Appliance Act of Congress under the circumstances and because of the importance of the questions raised.

*Bean v. Morris*, (1911) 221 U. S. 485, 31 S. Ct. 703, 55 U. S. (L. ed.) 821, enjoining diversion of water of interstate stream; the case "suggested questions that might be grave."

*U. S. v. Dickinson*, (1909) 213 U. S. 92, 29 S. Ct. 485, 53 U. S. (L. ed.) 711, a criminal case, because of the urgency of the government as to the importance of the particular decision, and division of opinion in the Circuit Court of Appeals.

*White-Smith Music Pub. Co. v. Apollo Co.*, (1908) 209 U. S. 1, 28 S. Ct. 319, 52 U. S. (L. ed.) 655, it being "evident that the question involved . . . is one of very considerable importance, involving large property interests and closely touching the rights of composers and music publishers."

*Ex p. Young*, (1908) 209 U. S. 123, 28 S. Ct. 441, 52 U. S. (L. ed.) 714, a suit in effect against a state, and of very great importance "not only to the parties now before the court, but also to the great mass of the citizens of this country."

*Montana Min. Co. v. St. Louis Min., etc., Co.*, (1907) 204 U. S. 204, 213, 27 S. Ct. 254, 51 U. S. (L. ed.) 444, protracted litigation, large amount involved, questions of federal mining law, and "importance of the case seems to demand our examination."

*Western Union Tel. Co. v. Pennsylvania R. Co.*, (1904) 195 U. S. 540, 25 S. Ct. 133, 49 U. S. (L. ed.) 312, construction of Act of Congress the main issue in the case, and (*per Harlan, J.*) "in view of the importance of these cases."

*Johnson v. Southern Pac. Co.*, (1904) 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363, personal injury action, involving construction of Automatic Coupler Act of Congress of 1893, questions deemed of such general importance, etc., and division of opinion in court below.

*Gregg v. Metropolitan Trust Co.*, (1905) 197 U. S. 193, 25 S. Ct. 415, 49 U. S. (L. ed.)

721, railroad mortgage foreclosure, preference for supplies, three justices dissenting, and (*per McKenna, J.*) "importance of the questions involved."

*Workman v. New York*, (1900) 179 U. S. 552, 21 S. Ct. 212, 45 U. S. (L. ed.) 314, "serious question" in maritime law, four justices dissenting.

*Louisville Trust Co. v. Louisville, etc., R. Co.*, (1899) 174 U. S. 674, 19 S. Ct. 827, 43 U. S. (L. ed.) 1130, railroad foreclosure with receivership, questions said to be novel and important and one justice dissenting.

**Division of opinion in Circuit Court of Appeals in the same case.** *Delk v. St. Louis, etc., R. Co.*, (1911) 220 U. S. 580, 31 S. Ct. 617, 55 U. S. (L. ed.) 590, construing Safety Appliance Act of Congress;

*Baglin v. Cusenier Co.*, (1911) 221 U. S. 580, 31 S. Ct. 669, 55 U. S. (L. ed.) 863, trademark and unfair competition;

*Penman v. St. Paul F. & M. Ins. Co.*, (1910) 216 U. S. 311, 30 S. Ct. 312, 54 U. S. (L. ed.) 493, construction of fire insurance policy;

*Ingersoll v. Coram*, (1908) 211 U. S. 335, 29 S. Ct. 92, 53 U. S. (L. ed.) 208, questions of jurisdiction of the Circuit Court and on the merits;

*Green County v. Quinlan*, (1909) 211 U. S. 582, 29 S. Ct. 162, 53 U. S. (L. ed.) 335, validity of county bonds;

*Green County v. Thomas*, (1909) 211 U. S. 598, 29 S. Ct. 168, 53 U. S. (L. ed.) 343, as to jurisdiction of the Circuit Court and question of appellate procedure;

*Bitterman v. Louisville, etc., R. Co.*, (1907) 207 U. S. 205, 28 S. Ct. 91, 52 U. S. (L. ed.) 171, constitutional and other questions;

*Taylor v. U. S.*, (1907) 207 U. S. 120, 28 S. Ct. 53, 52 U. S. (L. ed.) 130, to review a judgment affirming a conviction in a criminal case, and construing the Immigration Act;

*Empire State Cattle Co. v. Atchison, etc., R. Co.*, (1908) 210 U. S. 1, 28 S. Ct. 607, 52 U. S. (L. ed.) 931, as to direction of verdict;

*Boston, etc., R. Co. v. Gokey*, (1908) 210 U. S. 155, 28 S. Ct. 657, 52 U. S. (L. ed.) 1002, as to jurisdiction of Circuit Court of Appeals;

*La Bourgogne*, (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973, fault of colliding vessels, limitation of liability;

*U. S. v. Dieckerhoff*, (1906) 202 U. S. 302, 26 S. Ct. 605, 50 U. S. (L. ed.) 1041, difficulty in the solution of the question;

*U. S. v. Cornell Steamboat Co.*, (1906) 202 U. S. 184, 26 S. Ct. 648, 50 U. S. (L. ed.) 987, practically a libel *in personam* for salvage of government property, involving construction of Tucker Act;

*The Germanic*, (1905) 196 U. S. 589, 25 S. Ct. 317, 49 U. S. (L. ed.) 610, question of negligence and construction of Harter Act;

*Howe Scale Co. v. Wyckoff*, (1905) 198 U. S. 118, 25 S. Ct. 609, 49 U. S. (L. ed.) 972, trade name and unfair competition;

*Riverdale Cotton Mills v. Alabama, etc., Mfg. Co.*, (1905) 198 U. S. 188, 25 S. Ct. 629, 49 U. S. (L. ed.) 1008, federal court enjoining suit in state court, collateral attack

on prior federal court judgment for alleged want of jurisdiction;

*Knights Templars', etc., L. Indemnity Co. v. Jarman*, (1902) 187 U. S. 197, 23 S. Ct. 108, 47 U. S. (L. ed.) 139, construction and application of Missouri "suicide statute" in action on life insurance policy;

*Burt v. Union Cent. L. Ins. Co.*, (1902) 187 U. S. 362, 23 S. Ct. 139, 47 U. S. (L. ed.) 216, life insurance policy not a binding contract to insure against legal execution for crime;

*Worden v. California Fig Syrup Co.*, (1903) 187 U. S. 516, 23 S. Ct. 161, 47 U. S. (L. ed.) 282, trademark case;

*Connecticut Mut. L. Ins. Co. v. Hillmon*, (1903) 188 U. S. 208, 23 S. Ct. 294, 47 U. S. (L. ed.) 446, matters of practice, and case once before in Supreme Court;

*Fidelity, etc., Co. v. L. Bucki, etc., Lumber Co.*, (1903) 189 U. S. 135, 23 S. Ct. 582, 47 U. S. (L. ed.) 744, action on attachment bond, right to recover counsel fees;

*Wilkes County v. Coler*, (1903) 190 U. S. 107, 23 S. Ct. 738, 47 U. S. (L. ed.) 971, as to validity of county railroad aid bonds;

*Holzappel's Compositions Co. v. Rahtjen's American Composition Co.*, (1901) 183 U. S. 1, 22 S. Ct. 6, 46 U. S. (L. ed.) 49, trademark case;

*Dinamore v. Southern Express Co.*, (1901) 183 U. S. 115, 22 S. Ct. 45, 46 U. S. (L. ed.) 111, as to stamp tax under War Revenue Act of 1898;

*Tucker v. Alexandroff*, (1902) 183 U. S. 424, 22 S. Ct. 195, 46 U. S. (L. ed.) 264, habeas corpus case for alleged deserter from Russian cruiser, construction of treaty, etc., four justices dissenting;

*Waite v. Santa Cruz*, (1902) 184 U. S. 302, 22 S. Ct. 327, 46 U. S. (L. ed.) 552, validity of municipal bonds; federal jurisdiction for diverse citizenship;

*New York v. Pine*, (1902) 185 U. S. 93, 22 S. Ct. 592, 46 U. S. (L. ed.) 820, injunction by riparian owner, damages in lieu, interesting questions involved;

*Farmers' L. & T. Co. v. Penn Plate Glass Co.*, (1902) 186 U. S. 434, 22 S. Ct. 842, 46 U. S. (L. ed.) 1234, foreclosure suit;

*Hunting Elevator Co. v. Bosworth*, (1900) 179 U. S. 415, 21 S. Ct. 183, 45 U. S. (L. ed.) 256, liability of railroad company for loss of property by fire—see also *certiorari* cases in same matter, *Chicago, etc., R. Co. v. Bosworth*, (1900) 179 U. S. 442, 21 S. Ct. 183, 45 U. S. (L. ed.) 267; *Rau v. Bosworth*, (1900) 179 U. S. 443, 21 S. Ct. 194, 45 U. S. (L. ed.) 268; *Bosworth v. Carr*, (1900) 170 U. S. 444, 21 S. Ct. 194, 45 U. S. (L. ed.) 269;

*International Nav. Co. v. Farr, etc., Mfg. Co.*, (1901) 181 U. S. 218, 21 S. Ct. 591, 45 U. S. (L. ed.) 830, construction of Harter Act of 1893;

*American Sugar Refining Co. v. New Orleans*, (1901) 181 U. S. 277, 21 S. Ct. 646, 45 U. S. (L. ed.) 859, to review decision dismissing a writ of error for want of jurisdiction;

*U. S. Rubber Co. v. American Oak Leather Co.*, (1901) 181 U. S. 434, 21 S. Ct. 670, 45 U. S. (L. ed.) 938, fraudulent preferences by insolvent corporation;

*De la Vergne Refrigerating Mach. Co. v. German Sav. Inst.*, (1899) 175 U. S. 40, 20 S. Ct. 20, 44 U. S. (L. ed.) 65, question of corporation law, equal division in court below, two justices dissenting here;

*Mutual L. Ins. Co. v. Phinney*, (1900) 178 U. S. 327, 20 S. Ct. 906, 44 U. S. (L. ed.) 1088, as to jurisdiction of Circuit Court of Appeals, and questions of insurance law;

*Moffett v. Rochester*, (1900) 178 U. S. 373, 20 S. Ct. 957, 44 U. S. (L. ed.) 1108, contract with city, mistake in bid, right to correct;

*Hubbard v. Tod*, (1898) 171 U. S. 474, 19 S. Ct. 14, 43 U. S. (L. ed.) 246, suit to recover securities pledged;

*The Elfrida*, (1898) 172 U. S. 186, 19 S. Ct. 146, 43 U. S. (L. ed.) 413, validity and enforcement of salvage contracts;

*Missouri, etc., Trust Co. v. Krumseig*, (1899) 172 U. S. 351, 19 S. Ct. 179, 43 U. S. (L. ed.) 474, usury, and following state statute;

*U. S. v. Buffalo Natural Gas Fuel Co.*, (1899) 172 U. S. 339, 19 S. Ct. 200, 43 U. S. (L. ed.) 469, natural gas not dutiable, partial dissent in court below;

*Pierce v. Tennessee Coal, etc., Co.*, (1899) 173 U. S. 1, 19 S. Ct. 335, 43 U. S. (L. ed.) 591, personal injury case, master and servant;

*Lake County Com'rs v. Dudley*, (1899) 173 U. S. 243, 19 S. Ct. 398, 43 U. S. (L. ed.) 684, federal jurisdiction, collusive parties;

*Richmond v. Southern Bell Telephone, etc., Co.*, (1899) 174 U. S. 761, 19 S. Ct. 778, 43 U. S. (L. ed.) 1162, construction of federal statute, military and post roads, partial dissent in court below;

*U. S. v. Dudley*, (1899) 174 U. S. 670, 19 S. Ct. 801, 43 U. S. (L. ed.) 1129, as to dutiable goods under Act of 1894;

*Compania de Navegacion la Flecha v. Brauer*, (1897) 168 U. S. 104, 18 S. Ct. 12, 42 U. S. (L. ed.) 398, exceptions in a bill of lading or charter party;

*Hyer v. Richmond Traction Co.*, (1897) 168 U. S. 471, 18 S. Ct. 114, 42 U. S. (L. ed.) 547, contracts, public policy, specific performance, two justices dissenting;

*The Umbria*, (1897) 166 U. S. 404, 16 S. Ct. 610, 41 U. S. (L. ed.) 1053, collision, negligence, damages.

*Conflicting decisions of Circuit Courts of Appeals.*—*Carpenter v. Winn*, (1911) 221 U. S. 533, 31 S. Ct. 683, 55 U. S. (L. ed.) 842, as to power to compel production of books and papers before trial under R. S. sec. 724, 3 Fed. Stat. Annot. 2.

*Graves v. Ashburn*, (1909) 215 U. S. 331, 30 S. Ct. 108, 54 U. S. (L. ed.) 217, dealing "with the last ground of decision, which involves a difference of opinion between different Circuit Courts of Appeals;"

*Saxlehner v. Wagner*, (1910) 216 U. S. 375, 30 S. Ct. 298, 54 U. S. (L. ed.) 525, a trademark case, apparent conflict between Circuit Courts of Appeals;

*Komada v. U. S.*, (1910) 215 U. S. 392, 30 S. Ct. 136, 54 U. S. (L. ed.) 249, construction of Tariff Acts, apparent conflict in Circuit Court of Appeals;

*Chicago Board of Trade v. Christie Grain*,

etc., Co., (1905) 198 U. S. 236, 25 S. Ct. 637, 49 U. S. (L. ed.) 1031, construction of Anti-trust Act of 1890, conflict of decisions in Circuit Courts of Appeals in same case;

Northern Assur. Co. v. Grand View Bldg. Assoc., (1902) 183 U. S. 308, 22 S. Ct. 133, 46 U. S. (L. ed.) 213, as to waiver of condition in insurance policy, division of opinion in court below, and conflict in Circuit Courts of Appeals; in such divergence of decisions it was deemed proper to grant a certiorari;

Smith v. Vulcan Iron Works, (1897) 165 U. S. 518, 17 S. Ct. 407, 41 U. S. (L. ed.) 810, as to jurisdiction of Circuit Court of Appeals, some diversity of opinion among the Circuit Courts of Appeals;

*Questions of federal jurisdiction in general.*—Julian v. Central Trust Co., (1904) 193 U. S. 93, 24 S. Ct. 399, 48 U. S. (L. ed.) 629, construction of state statutes, and power of federal court to enjoin proceedings in state courts;

Rickey Land, etc., Co. v. Miller, (1910) 218 U. S. 258, 31 S. Ct. 11, 54 U. S. (L. ed.) 1032, holding that, by being first seized of the subject-matter the federal court acquired a jurisdiction to enjoin proceedings in a state court in the same matter;

Palmer v. Texas, (1909) 212 U. S. 118, 29 S. Ct. 230, 53 U. S. (L. ed.) 435, as to conflict of jurisdiction between the federal court and a state court in possession of the *res*;

Chicago, etc., R. Co. v. Willard, (1911) 220 U. S. 413, 31 S. Ct. 460, 55 U. S. (L. ed.) 521, as to jurisdiction by removal;

Cochran v. Montgomery County, (1905) 199 U. S. 260, 26 S. Ct. 58, 50 U. S. (L. ed.) 182, as to jurisdiction by attempted removal;

Cable v. U. S. Life Ins. Co., (1903) 191 U. S. 288, 24 S. Ct. 74, 48 U. S. (L. ed.) 188, federal equity jurisdiction by removal;

Kreigh v. Westinghouse, (1909) 214 U. S. 249, 29 S. Ct. 619, 53 U. S. (L. ed.) 984, and question of direction of verdict;

Erie R. Co. v. Erie, etc., Transp. Co., (1907) 204 U. S. 220, 27 S. Ct. 246, 51 U. S. (L. ed.) 450, as to admiralty jurisdiction and on the merits;

W. L. Wells Co. v. Gastonia Cotton Mfg. Co., (1905) 198 U. S. 177, 25 S. Ct. 640, 49 U. S. (L. ed.) 1003, and Louisville, etc., R. Co. v. Louisville Trust Co., (1899) 174 U. S. 552, 19 S. Ct. 817, 43 U. S. (L. ed.) 1081, citizenship of corporation for federal jurisdiction;

Farrell v. O'Brien, (1905) 199 U. S. 89, 25 S. Ct. 727, 50 U. S. (L. ed.) 101, as to federal jurisdiction to set aside probate of a will in a state court;

Slater v. Mexican Nat. R. Co., (1904) 194 U. S. 120, 24 S. Ct. 581, 48 U. S. (L. ed.) 900, as to federal jurisdiction of action for death by wrongful act under Mexican statute, three justices dissenting;

Security Trust Co. v. Black River Nat. Bank, (1902) 187 U. S. 211, 23 S. Ct. 52, 47 U. S. (L. ed.) 147, and Security Trust Co. v. Dent, (1902) 187 U. S. 237, 24 S. Ct. 61, 47 U. S. (L. ed.) 158, federal jurisdiction to establish claim against decedent's estate and construction of state constitution and statutes;

Great Southern Fire Proof Hotel Co. v. Jones, (1900) 177 U. S. 449, 20 S. Ct. 690, 44 U. S. (L. ed.) 842, citizenship of limited partnership for federal jurisdiction;

Wabash Western R. Co. v. Brow, (1896) 164 U. S. 271, 17 S. Ct. 126, 41 U. S. (L. ed.) 431, removal of causes, objection to jurisdiction, two justices dissenting;

Panama R. Co. v. Napier Shipping Co., (1897) 166 U. S. 280, 17 S. Ct. 572, 41 U. S. (L. ed.) 1004, negligent injuries to vessel, admiralty jurisdiction;

*Ex p. Lennon*, (1897) 166 U. S. 548, 17 S. Ct. 658, 41 U. S. (L. ed.) 1110, and as to mandatory injunction;

Tindal v. Wesley, (1897) 167 U. S. 204, 17 S. Ct. 770, 42 U. S. (L. ed.) 137, and as to vendor and purchaser.

*Questions of jurisdiction of Circuit Court of Appeals in the case.*—Kingman v. Western Mfg. Co., (1898) 170 U. S. 675, 18 S. Ct. 786, 42 U. S. (L. ed.) 1192; Guarantee Co. of North America v. Mechanics' Sav. Bank, etc., Co., (1899) 173 U. S. 582, 19 S. Ct. 551, 43 U. S. (L. ed.) 818; Whitney v. Dick, (1906) 202 U. S. 132, 26 S. Ct. 584, 50 U. S. (L. ed.) 963 (as to power to issue habeas corpus); Webster Coal, etc., Co. v. Cassatt, (1907) 207 U. S. 181, 28 S. Ct. 108, 52 U. S. (L. ed.) 160; Pennsylvania Coal, etc., Co. v. Cassatt, (1907) 207 U. S. 187, 28 S. Ct. 110, 52 U. S. (L. ed.) 163.

*Patent cases.*—Diamond Rubber Co. v. Consolidated Rubber Tire Co., (1911) 220 U. S. 428, 31 S. Ct. 444, 55 U. S. (L. ed.) 527, conflicting decisions as to validity of patent; Rumford Chemical Works v. Hygiene Chemical Co., (1909) 215 U. S. 156, 30 S. Ct. 45, 54 U. S. (L. ed.) 137; Steward v. American Lava Co., (1909) 215 U. S. 161, 30 S. Ct. 46, 54 U. S. (L. ed.) 139; Leeds, etc., Co. v. Victor Talking Mach. Co., (1909) 213 U. S. 325, 29 S. Ct. 495, 53 U. S. (L. ed.) 816, involving validity of a patent, and reviewing a decree which affirmed a decree granting a preliminary injunction; General Fireproofing Co. v. Expanded Metal Co., (1909) 214 U. S. 366, 29 S. Ct. 652, 53 U. S. (L. ed.) 1034, conflicting decisions of Circuit Courts of Appeals as to validity of patent; Cortelyou v. Johnson, (1907) 207 U. S. 193, 28 S. Ct. 105, 52 U. S. (L. ed.) 167, court below divided in opinion; Continental Paper Bag Co. v. Eastern Paper Bag Co., (1908) 210 U. S. 405, 28 S. Ct. 748, 52 U. S. (L. ed.) 1122, involving construction of opinion of the Supreme Court, in another patent case, and division of opinion in the court below; Cimiotti Unhairing Co. v. American Fur Refining Co., (1905) 198 U. S. 399, 25 S. Ct. 697, 49 U. S. (L. ed.) 1100, validity of patent conceded, sole question of infringement; Singer Mfg. Co. v. Cramer, (1904) 192 U. S. 265, 24 S. Ct. 291, 48 U. S. (L. ed.) 437, question of infringement; Kokomo Fence Mach. Co. v. Kitselman, (1903) 189 U. S. 8, 23 S. Ct. 521, 47 U. S. (L. ed.) 689, question of infringement, division of opinion in the court below; U. S. Repair, etc., Co. v. Assyrian Asphalt Co., (1902) 183 U. S. 591, 22 S. Ct. 87, 46 U. S. (L. ed.) 342, as to patentable novelty; Carnegie Steel Co. v. Cambria Iron Co., (1902) 185 U. S. 403,

22 S. Ct. 698, 46 U. S. (L. ed.) 968, validity of patent, etc., four justices dissenting; *Hobbs v. Beach*, (1901) 180 U. S. 383, 21 S. Ct. 409, 45 U. S. (L. ed.) 586, validity and infringement; *Mast v. Stever Mfg. Co.*, (1900) 177 U. S. 485, 20 S. Ct. 708, 44 U. S. (L. ed.) 856, conflicting decisions in Circuit Courts of Appeals; *Boyden Power-Brake Co. v. Westinghouse*, (1898) 170 U. S. 537, 18 S. Ct. 707, 42 U. S. (L. ed.) 1136, as to infringement, four justices dissenting; *Dashiell v. Grosvenor*, (1896) 162 U. S. 425, 16 S. Ct. 805, 40 U. S. (L. ed.) 1025, validity and infringement.

*Customs duties cases.*—*Downs v. U. S.*, (1903) 187 U. S. 496, 23 S. Ct. 222, 47 U. S. (L. ed.) 275; *Benziger v. U. S.*, (1904) 192 U. S. 38, 24 S. Ct. 189, 48 U. S. (L. ed.) 331; *U. S. v. Downing*, (1906) 201 U. S. 354, 26 S. Ct. 476, 50 U. S. (L. ed.) 786; *U. S. v. Riggs*, (1906) 203 U. S. 136, 27 S. Ct. 39, 51 U. S. (L. ed.) 127; *U. S. v. Falk*, (1907) 204 U. S. 143, 27 S. Ct. 191, 51 U. S. (L. ed.) 411; *Goat, etc., Import Co. v. U. S.*, (1907) 206 U. S. 194, 27 S. Ct. 634, 51 U. S. (L. ed.) 1022; *Henry E. Frankenberg Co. v. U. S.*, (1907) 206 U. S. 224, 27 S. Ct. 628, 51 U. S. (L. ed.) 1034—all the foregoing as to the duty chargeable on an article under a Tariff Act of 1897.

*Lawder v. Stone*, (1902) 187 U. S. 281, 23 S. Ct. 79, 47 U. S. (L. ed.) 178, as to duties on worthless articles under Act of 1890;

*U. S. v. Morrison*, (1900) 179 U. S. 456, 21 S. Ct. 195, 45 U. S. (L. ed.) 275, as to how certain articles were dutiable under Act of 1890, one justice dissenting;

*American Sugar Refining Co. v. U. S.*, (1901) 181 U. S. 610, 21 S. Ct. 830, 45 U. S. (L. ed.) 1026, appraisement of imported sugars under Act of 1890;

*Chew Hing Lung v. Wise*, (1900) 176 U. S. 156, 20 S. Ct. 320, 44 U. S. (L. ed.) 412, as to duties on certain articles under Act of 1890;

*U. S. v. Klumpp*, (1898) 169 U. S. 209, 18 S. Ct. 311, 42 U. S. (L. ed.) 720, classification of dutiable goods;

*U. S. v. Lies*, (1898) 170 U. S. 628, 18 S. Ct. 780, 42 U. S. (L. ed.) 1170, procedure to review order of board of general appraisers;

*Saltonstall v. Birtwell*, (1896) 164 U. S. 54, 17 S. Ct. 19, 41 U. S. (L. ed.) 348, payment of excessive duties under protest, four justices dissenting;

*The Conqueror*, (1897) 166 U. S. 110, 17 S. Ct. 510, 41 U. S. (L. ed.) 937, customs duties, demurrage, etc.;

*U. S. v. Allen*, (1896) 163 U. S. 499, 16 S. Ct. 1071, 41 U. S. (L. ed.) 242, as to customs duties, one justice dissenting.

*Criminal cases.*—*Old Nick Williams Co. v. U. S.*, (1910) 215 U. S. 541, 30 S. Ct. 221, 54 U. S. (L. ed.) 318;

*Holmgren v. U. S.*, (1910) 217 U. S. 509, 30 S. Ct. 588, 54 U. S. (L. ed.) 861, claimed conflict between Circuit Courts of Appeals;

*Great Northern R. Co. v. U. S.*, (1908) 208 U. S. 452, 28 S. Ct. 313, 52 U. S. (L. ed.) 567, as to effect of Hepburn Act upon the Elkins Act;

*Armour Packing Co. v. U. S.*, (1908) 209

U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 681, and Chicago, etc., R. Co. v. U. S., (1908) 209 U. S. 90, 28 S. Ct. 439, 52 U. S. (L. ed.) 698, construction of the Elkins Act;

*Clyatt v. U. S.*, (1905) 197 U. S. 207, 25 S. Ct. 429, 49 U. S. (L. ed.) 726, constitutionality and scope of Peonage Act of Congress, sufficiency of record on writ of error, etc.;

*Hackfeld v. U. S.*, (1905) 197 U. S. 442, 25 S. Ct. 456, 49 U. S. (L. ed.) 826, case arising in Hawaii, construction of Act of Congress of 1891 as to neglect to return immigrants unlawfully brought in;

*Francis v. U. S.*, (1903) 188 U. S. 375, 23 S. Ct. 334, 47 U. S. (L. ed.) 508, interstate traffic in lottery tickets;

*Leovy v. U. S.*, (1900) 177 U. S. 621, 20 S. Ct. 797, 44 U. S. (L. ed.) 914, for building dam across navigable stream;

*Spurr v. U. S.*, (1899) 174 U. S. 728, 19 S. Ct. 812, 44 U. S. (L. ed.) 1150, construction of federal statutes as to officers of national banks, two justices dissenting.

*Construction of Harter Act of 1893.*—*Calderon v. Atlas Steamship Co.*, (1898) 170 U. S. 272, 18 S. Ct. 588, 42 U. S. (L. ed.) 1033; *The Carib Prince*, (1898) 170 U. S. 656, 18 S. Ct. 753, 42 U. S. (L. ed.) 1181; *The Sylvia*, (1898) 171 U. S. 462, 19 S. Ct. 7, 43 U. S. (L. ed.) 241; *The Chattahoochee*, (1899) 173 U. S. 540, 19 S. Ct. 491, 43 U. S. (L. ed.) 801; *Knott v. Botany Worsted Mills*, (1900) 179 U. S. 69, 21 S. Ct. 30, 45 U. S. (L. ed.) 90; *The Southwark*, (1903) 191 U. S. 1, 24 S. Ct. 1, 48 U. S. (L. ed.) 65; *The Wildercroft*, (1906) 201 U. S. 378, 26 S. Ct. 467, 50 U. S. (L. ed.) 794.

*Miscellaneous cases.*—*Southern R. Co. v. King*, (1910) 217 U. S. 524, 30 S. Ct. 594, 54 U. S. (L. ed.) 868, state statute claimed to violate interstate commerce clause of Federal Constitution;

*Standard Oil Co. v. Anderson*, (1909) 212 U. S. 215, 29 S. Ct. 252, 53 U. S. (L. ed.) 480, "supposed conflict of decision in the lower federal courts" on a question in the law of master and servant;

*Murray v. Wilson Distilling Co.*, (1909) 213 U. S. 151, 29 S. Ct. 458, 53 U. S. (L. ed.) 742, construing state constitution and statutes, and holding the suit to be one against a state and inhibited by the Eleventh Amendment;

*Peck v. Tribune Co.*, (1909) 214 U. S. 185, 29 S. Ct. 554, 53 U. S. (L. ed.) 960, holding a publication libelous where there was "no decision in which this matter is discussed upon principle;"

*McGuire v. Blount*, (1905) 199 U. S. 142, 26 S. Ct. 1, 50 U. S. (L. ed.) 125, as to disqualification of federal trial judge on the ground of interest, and various questions of general law;

*Moran v. Dillingham*, (1899) 174 U. S. 153, 19 S. Ct. 620, 43 U. S. (L. ed.) 930, as to disqualification of judge of Circuit Court of Appeals;

*The Eliza Lines*, (1905) 199 U. S. 119, 26 S. Ct. 8, 50 U. S. (L. ed.) 115, a difficult question in maritime law on a libel for salvage, four justices dissenting;

French Republic *v.* Saratoga Vichy Spring Co., (1903) 191 U. S. 427, 24 S. Ct. 145, 48 U. S. (L. ed.) 247, suit by French Republic, unfair competition, trade name, laches;

U. S. *v.* Northern Pac. R. Co., (1904) 193 U. S. 1, 24 S. Ct. 330, 48 U. S. (L. ed.) 593, railroad land grant, considering the scope of a recent decision of the Supreme Court in a cognate case;

Great Southern Fire Proof Hotel Co. *v.* Jones, (1904) 193 U. S. 532, 24 S. Ct. 576, 48 U. S. (L. ed.) 778, constitutionality of state mechanics' lien law, the Circuit Court of Appeals and the Supreme Court of the state holding different views;

U. S. *v.* Sing Tuck, (1904) 194 U. S. 161, 24 S. Ct. 621, 48 U. S. (L. ed.) 917, case of habeas corpus to inquire into detention of Chinese seeking to enter the United States and claiming citizenship, two justices dissenting;

Hale *v.* Allinson, (1903) 188 U. S. 56, 23 S. Ct. 244, 47 U. S. (L. ed.) 380, equitable jurisdiction and right of receiver to sue in foreign state, "contrariety of opinion in lower federal courts," one justice dissenting;

The Conemaugh, (1903) 189 U. S. 363, 23 S. Ct. 504, 47 U. S. (L. ed.) 854, construction of mandate of Supreme Court on prior certiorari in the same case;

The Styria *v.* Munroe, (1902) 186 U. S. 1, 22 S. Ct. 731, 46 U. S. (L. ed.) 1027, libel in admiralty for failure to deliver goods, discharge of contraband goods, "the learned judges of the courts below . . . disagreed on the critical question;"

Hagan *v.* Scottish Union, etc., Ins. Co., (1902) 186 U. S. 423, 22 S. Ct. 862, 46 U. S. (L. ed.) 1229, construction of marine insurance policy different views of the judges of the courts below in the same case upon the question at issue;

Mutual L. Ins. Co. *v.* Cohen, (1900) 179 U. S. 262, 21 S. Ct. 106, 45 U. S. (L. ed.) 181, questions in insurance law left undecided in recent similar cases in Supreme Court;

Bosworth *v.* St. Louis Terminal R. Assoc., (1899) 174 U. S. 182, 19 S. Ct. 625, 43 U. S. (L. ed.) 941, as to a receiver's right to appeal;

The Three Friends, (1897) 166 U. S. 1, 17 S. Ct. 495, 41 U. S. (L. ed.) 897, violation of neutrality law, one justice dissenting;

U. S. *v.* Chamberlin, (1911) 219 U. S. 250, 31 S. Ct. 155, 55 U. S. (L. ed.) 204, deciding questions of law and procedure under the War Revenue Act of 1898;

U. S. *v.* Atchison, etc., R. Co., (1911) 220 U. S. 37, 31 S. Ct. 362, 55 U. S. (L. ed.) 361, construing a recent Act of Congress;

Dr. Miles Medical Co. *v.* John D. Park, etc., Co., (1911) 220 U. S. 373, 31 S. Ct. 376, 55 U. S. (L. ed.) 502, and Continental Wall Paper Co. *v.* Louis Voight, etc., Co., (1909) 212 U. S. 227, 29 S. Ct. 280, 53 U. S. (L. ed.) 486, construing and applying provisions in the Anti-Trust Act of 1890;

Omaha *v.* Omaha Water Co., (1910) 218 U. S. 180, 30 S. Ct. 615, 54 U. S. (L. ed.) 991, considering the powers of a city with respect to waterworks and waterworks company;

Presidio County *v.* Noel-Young Bond, etc.,

Co., (1909) 212 U. S. 58, 29 S. Ct. 237, 53 U. S. (L. ed.) 402, determining that the plaintiff was a *bona fide* holder of county bonds;

Equitable L. Assur. Soc. *v.* Brown, (1909) 213 U. S. 25, 29 S. Ct. 404, 53 U. S. (L. ed.) 682, questions of equity jurisdiction;

Dupree *v.* Mansur, (1909) 214 U. S. 161, 29 S. Ct. 548, 53 U. S. (L. ed.) 950, as to duty of federal courts to follow rule of local law;

Weems Steamboat Co. *v.* People's Steamboat Co., (1909) 214 U. S. 345, 29 S. Ct. 661, 53 U. S. (L. ed.) 1024, as to rights of a riparian owner upon a navigable stream;

Lawson *v.* U. S. Mining Co., (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65, federal equity jurisdiction, mining claim, apexing veins, etc.;

Ozan Lumber Co. *v.* Union County Nat. Bank, (1907) 207 U. S. 251, 28 S. Ct. 89, 52 U. S. (L. ed.) 195, constitutionality of state statute;

The Hamilton, (1907) 207 U. S. 398, 28 S. Ct. 133, 52 U. S. (L. ed.) 264, application of state law in admiralty case;

Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., (1908) 208 U. S. 554, 28 S. Ct. 350, 52 U. S. (L. ed.) 616, and Donnell *v.* Herring-Hall-Marvin Safe Co., (1908) 208 U. S. 267, 28 S. Ct. 288, 52 U. S. (L. ed.) 481, as to unfair use of trade name;

Atlantic Trust Co. *v.* Chapman, (1908) 208 U. S. 360, 28 S. Ct. 406, 52 U. S. (L. ed.) 528, as to personal liability of complainant in foreclosure for certain expenses of receiver;

Old Dominion Copper Min., etc., Co. *v.* Lewisohn, (1908) 210 U. S. 206, 28 S. Ct. 634, 52 U. S. (L. ed.) 1025, question of corporation law;

Wicomico County *v.* Bancroft, (1906) 203 U. S. 112, 27 S. Ct. 21, 51 U. S. (L. ed.) 112, as to the proper construction of a statute repealing certain exemptions from taxation;

Whitfield *v.* Aetna L. Ins. Co., (1907) 205 U. S. 489, 27 S. Ct. 578, 51 U. S. (L. ed.) 895, validity of provision in life insurance policy as tested by state statute;

Nederland L. Ins. Co. *v.* Meinert, (1905) 199 U. S. 171, 26 S. Ct. 15, 50 U. S. (L. ed.) 139, construction of state statute on a question of insurance law;

Donovan *v.* Pennsylvania Co., (1905) 199 U. S. 279, 26 S. Ct. 91, 50 U. S. (L. ed.) 192, as to rights of cabmen to solicit custom in railroad station and grounds and on sidewalks;

California Reduction Co. *v.* Sanitary Reduction Works, (1905) 199 U. S. 306, 26 S. Ct. 100, 50 U. S. (L. ed.) 204, as to validity of municipal ordinances under state and federal constitution;

Guardian Trust, etc., Co. *v.* Fisher, (1906) 200 U. S. 57, 26 S. Ct. 186, 50 U. S. (L. ed.) 367, as to priority of judgment creditors of a corporation over lien of a corporate mortgage;

Wright *v.* Louisville, etc., R. Co., (1904) 195 U. S. 219, 25 S. Ct. 16, 49 U. S. (L. ed.) 167, construction of state constitution and statutes as to taxation of shares of stock in foreign corporation;

Creede, etc., Min., etc., Co. *v.* Uinta Tunnel

Min., etc., Co., (1905) 196 U. S. 337, 25 S. Ct. 266, 49 U. S. (L. ed.) 501, mining claims, construction of Acts of Congress;

Flanigan v. Sierra County, (1905) 196 U. S. 553, 25 S. Ct. 314, 49 U. S. (L. ed.) 597, and Wheeler v. Plumas County, (1905) 196 U. S. 562, 25 S. Ct. 316, 49 U. S. (L. ed.) 599, construction and effect of state statutes bearing on validity of license fee imposed by county ordinance;

U. S. v. Whitridge, (1905) 197 U. S. 135, 25 S. Ct. 406, 49 U. S. (L. ed.) 896, construction of an Act of Congress of 1894 as to power of secretary of the treasury in reliquidation of entry of imported merchandise;

Harriman v. Northern Securities Co., (1905) 197 U. S. 244, 25 S. Ct. 493, 49 U. S. (L. ed.) 739, as to enjoining defendant from making ratable distribution of its corporate assets, etc.;

Louisville, etc., R. Co. v. West Coast Naval Stores Co., (1905) 198 U. S. 483, 25 S. Ct. 745, 49 U. S. (L. ed.) 1135, question whether wharf built by a railroad company was a public wharf;

Great Western Min., etc., Co. v. Harris, (1905) 198 U. S. 561, 25 S. Ct. 770, 49 U. S. (L. ed.) 1163, as to right of receiver to sue in foreign jurisdiction;

Hubbert v. Campbellsville Lumber Co., (1903) 191 U. S. 70, 24 S. Ct. 28, 48 U. S. (L. ed.) 101, construction of state statutes relating to remedy of holder of county bonds, three justices dissenting;

Brunswick Terminal Co. v. Baltimore Nat. Bank, (1904) 192 U. S. 386, 24 S. Ct. 314, 48 U. S. (L. ed.) 491, construing state statute as to individual liability of stockholders in state bank;

Northern Pac. R. Co. v. Adams, (1904) 192 U. S. 440, 24 S. Ct. 408, 48 U. S. (L. ed.) 513, involving a state statute relating to actions for death by wrongful act, two justices dissenting;

Mutual L. Ins. Co. v. Hill, (1904) 193 U. S. 551, 24 S. Ct. 538, 48 U. S. (L. ed.) 788, extraterritorial effect of state statute respecting forfeitures, etc.;

The Iroquois, (1904) 194 U. S. 240, 24 S. Ct. 640, 48 U. S. (L. ed.) 955, as to master's obligation to seaman severely injured at sea;

Schwartz v. Duss, (1902) 187 U. S. 8, 23 S. Ct. 4, 47 U. S. (L. ed.) 53, as to distribution of the property and assets of the Harmony Society in Pennsylvania, two justices dissenting;

Mencke v. Cargo Java Sugar, (1902) 187 U. S. 248, 23 S. Ct. 86, 47 U. S. (L. ed.) 163, libel for freight, construction of charter party;

Nashua Sav. Bank v. Anglo-American Land, etc., Co., (1903) 189 U. S. 221, 23 S. Ct. 517, 47 U. S. (L. ed.) 782, as to proof of Acts of Parliament, and other matters;

Zane v. Hamilton County, (1903) 189 U. S. 370, 23 S. Ct. 538, 47 U. S. (L. ed.) 858, validity of statute under which county bonds were issued;

Brill v. Peckham Motor Truck, etc., Co., (1903) 189 U. S. 57, 23 S. Ct. 562, 47 U. S. (L. ed.) 706, a question of proper practice in Circuit Court of Appeals;

Bell v. Commonwealth Title Ins., etc., Co., (1903) 189 U. S. 131, 23 S. Ct. 569, 47 U. S. (L. ed.) 741, as to right of title guaranty company to inspect indices of judgment records in federal courts;

Chattanooga Nat. Bldg., etc., Assoc. v. Denson, (1903) 189 U. S. 408, 23 S. Ct. 630, 47 U. S. (L. ed.) 870, as to what constitutes doing business in a state by a foreign corporation;

Stanly County v. Coler, (1903) 190 U. S. 437, 23 S. Ct. 811, 47 U. S. (L. ed.) 1126, as to validity of certain county railroad aid bonds;

McMaster v. New York L. Ins. Co., (1901) 183 U. S. 25, 22 S. Ct. 10, 46 U. S. (L. ed.) 64, question of forfeiture of insurance policy;

The Kensington, (1902) 183 U. S. 263, 22 S. Ct. 102, 46 U. S. (L. ed.) 190, validity of exceptions in passenger ticket as to liability for loss of baggage;

Guarantee Co. of North America v. Mechanics' Sav. Bank, etc., Co., (1902) 183 U. S. 402, 22 S. Ct. 124, 46 U. S. (L. ed.) 253, construction of guarantee company's bond for employee;

Sun Printing, etc., Assoc. v. Moore, (1902) 183 U. S. 642, 22 S. Ct. 240, 46 U. S. (L. ed.) 366, construction of charter party, etc.;

O'Brien v. Wheelock, (1902) 184 U. S. 450, 22 S. Ct. 354, 46 U. S. (L. ed.) 636, validity of state levee assessments, constitutional law;

Williams v. Gaylord, (1902) 186 U. S. 157, 22 S. Ct. 798, 46 U. S. (L. ed.) 1102, as to following state decisions on state statutes;

Ward v. Joslin, (1902) 186 U. S. 142, 22 S. Ct. 807, 46 U. S. (L. ed.) 1093, enforcement of statutory liability of stockholders in foreign corporation;

Fidelity, etc., Co. v. Courtney, (1902) 186 U. S. 342, 22 S. Ct. 833, 46 U. S. (L. ed.) 1193, liability on employee's indemnity bond, questions of practice, etc.;

Washburn, etc., Mfg. Co. v. Reliance Marine Ins. Co., (1900) 179 U. S. 1, 21 S. Ct. 1, 45 U. S. (L. ed.) 49, construction of marine insurance policy;

Saxlehner v. Eisner, etc., Co., (1900) 179 U. S. 19, 21 S. Ct. 7, 45 U. S. (L. ed.) 60, and Saxlehner v. Neilsen, (1900) 179 U. S. 43, 21 S. Ct. 16, 45 U. S. (L. ed.) 77, trademark cases, laches, etc., depending almost wholly upon questions of fact;

Crossman v. Burrill, (1900) 179 U. S. 100, 21 S. Ct. 38, 45 U. S. (L. ed.) 106, demurrage, liability of charterers;

The Queen of the Pacific, (1901) 180 U. S. 49, 21 S. Ct. 278, 45 U. S. (L. ed.) 419, stipulation in bill of lading limiting liability;

New Orleans v. Fisher, (1901) 180 U. S. 185, 21 S. Ct. 347, 45 U. S. (L. ed.) 485, and New Orleans v. Warner, (1901) 180 U. S. 199, 21 S. Ct. 353, 45 U. S. (L. ed.) 493, creditors' bill, equity jurisdiction, etc.;

Holly v. Protestant Episcopal Church Missionary Soc., (1901) 180 U. S. 284, 21 S. Ct. 395, 45 U. S. (L. ed.) 531, liability as a trustee *ex maleficio*;

Mitchell v. Chicago First Nat. Bank, (1901) 180 U. S. 471, 21 S. Ct. 418, 45 U. S. (L. ed.) 627, as to following decisions of state court;

*Li Sing v. U. S.*, (1901) 180 U. S. 486, 21 S. Ct. 449, 45 U. S. (L. ed.) 634, Chinese deportation case;

*Clews v. Jamieson*, (1901) 182 U. S. 461, 21 S. Ct. 845, 45 U. S. (L. ed.) 1183, equity jurisdiction, construction of state statute, one justice dissenting;

*Hartford F. Ins. Co. v. Chicago, etc., R. Co.*, (1899) 175 U. S. 91, 20 S. Ct. 33, 44 U. S. (L. ed.) 84, validity of stipulation in contract, and as to following state court decisions;

*The New York*, (1899) 175 U. S. 187, 20 S. Ct. 67, 44 U. S. (L. ed.) 126, collision case;

*Canada Sugar Refining Co. v. Insurance Co. of North America*, (1900) 175 U. S. 609, 20 S. Ct. 239, 44 U. S. (L. ed.) 292, question in marine insurance law;

*New Orleans v. Warner*, (1899) 175 U. S. 120, 20 S. Ct. 44, 44 U. S. (L. ed.) 96, (1900) 176 U. S. 92, 20 S. Ct. 280, 44 U. S. (L. ed.) 385, municipal corporation law;

*Southern R. Co. v. Carnegie Steel Co.*, (1900) 176 U. S. 257, 20 S. Ct. 347, 44 U. S. (L. ed.) 458, and *Lackawanna Iron, etc., Co. v. Farmers' L. & T. Co.*, (1900) 176 U. S. 298, 20 S. Ct. 363, 44 U. S. (L. ed.) 475, receivership, preferential debts, one justice dissenting;

*The Albert Dumois*, (1900) 177 U. S. 240, 20 S. Ct. 595, 44 U. S. (L. ed.) 751, a collision case, rules of navigation, etc.; two justices dissenting;

*U. S. v. Harris*, (1900) 177 U. S. 305, 20 S. Ct. 609, 44 U. S. (L. ed.) 780, liability of railroad receivers for penalties under federal statutes regulating transportation of live stock;

*Adams v. Cowen*, (1900) 177 U. S. 471, 20 S. Ct. 668, 44 U. S. (L. ed.) 851, construction of a will, two justices dissenting;

*Roehm v. Horst*, (1900) 178 U. S. 1, 20 S. Ct. 780, 44 U. S. (L. ed.) 953, question in law of contracts;

*Castner v. Coffman*, (1900) 178 U. S. 168, 20 S. Ct. 842, 44 U. S. (L. ed.) 1021, trademark case;

*Mutual L. Ins. Co. v. Sears*, (1900) 178 U. S. 345, 20 S. Ct. 912, 44 U. S. (L. ed.) 1096; *Mutual L. Ins. Co. v. Allen*, (1900) 178 U. S. 351, 20 S. Ct. 913, 44 U. S. (L. ed.) 1098, and *Mutual L. Ins. Co. v. Hill*, (1900) 178 U. S. 347, 20 S. Ct. 914, 44 U. S. (L. ed.) 1097, all three cases involving questions of insurance law;

*Chicago, etc., R. Co. v. Clark*, (1900) 178 U. S. 353, 20 S. Ct. 924, 44 U. S. (L. ed.) 1099, questions of appellate procedure and general law;

*Sioux City Terminal R., etc., Co. v. Trust Co. of North America*, (1899) 173 U. S. 99, 19 S. Ct. 341, 43 U. S. (L. ed.) 628, corporation law, excessive indebtedness under state statute;

*Gunnison County v. Rollins*, (1899) 173 U. S. 255, 19 S. Ct. 390, 43 U. S. (L. ed.) 689, county bonds and *bona fide* holder;

*Wade v. Travis County*, (1899) 174 U. S. 499, 19 S. Ct. 715, 43 U. S. (L. ed.) 1060, validity of municipal bonds;

*Underhill v. Hernandez*, (1897) 168 U. S. 250, 18 S. Ct. 83, 42 U. S. (L. ed.) 456, war

in foreign state, personal liability of officer;

*O'Brien v. Miller*, (1897) 168 U. S. 287, 18 S. Ct. 140, 42 U. S. (L. ed.) 469, construction of bottomry bond;

*The Victory*, (1897) 168 U. S. 410, 18 S. Ct. 149, 42 U. S. (L. ed.) 519, collision case, reckless navigation;

*Ritter v. Mutual L. Ins. Co.*, (1898) 169 U. S. 139, 18 S. Ct. 300, 42 U. S. (L. ed.) 693, life insurance, suicide, sanity;

*Stuart v. Easton*, (1898) 170 U. S. 383, 18 S. Ct. 650, 42 U. S. (L. ed.) 1078, construction of deed;

*Virginia, etc., Coal Co. v. Central R., etc., Co.*, (1898) 170 U. S. 355, 18 S. Ct. 657, 42 U. S. (L. ed.) 1068, railroad receivership, preferred charges;

*Provident L., etc., Co. v. Mercer County*, (1898) 170 U. S. 593, 18 S. Ct. 788, 42 U. S. (L. ed.) 1156, county bonds, deposit in escrow;

*Pullman's Palace-Car Co. v. Central Transp. Co.*, (1898) 171 U. S. 138, 18 S. Ct. 808, 43 U. S. (L. ed.) 108, equity practice, *ultra vires* contracts, two justices dissenting;

*North American Commercial Co. v. U. S.*, (1898) 171 U. S. 110, 18 S. Ct. 817, 43 U. S. (L. ed.) 98, Alaskan seal fisheries;

*The Kate*, (1896) 164 U. S. 458, 17 S. Ct. 135, 41 U. S. (L. ed.) 512, maritime liens;

*Walker v. Brown*, (1897) 165 U. S. 654, 17 S. Ct. 453, 41 U. S. (L. ed.) 865, equitable lien;

*The Majestic*, (1897) 166 U. S. 375, 17 S. Ct. 597, 41 U. S. (L. ed.) 1039, carrier's liability for damage to baggage, conditions on ticket;

*Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co.*, (1897) 167 U. S. 108, 17 S. Ct. 762, 42 U. S. (L. ed.) 96, mining rights, construction of federal statute;

*London Assur. v. Companhia de Moagens do Barreiro*, (1897) 167 U. S. 149, 17 S. Ct. 786, 42 U. S. (L. ed.) 113, marine insurance law;

*Telfener v. Russ*, (1896) 162 U. S. 170, 16 S. Ct. 695, 40 U. S. (L. ed.) 930, 163 U. S. 100, 16 S. Ct. 1017, 41 U. S. (L. ed.) 87, state public lands;

*Last Chance Min. Co. v. Tyler Min. Co.*, (1895) 157 U. S. 683, 15 S. Ct. 733, 39 U. S. (L. ed.) 859, mines and mining, construction of federal statutes.

**Applicant for the writ.**—A vice-consul of Russia was granted a writ of certiorari to review a judgment affirming an order discharging a Russian seaman who had been arrested for desertion from a Russian cruiser. *Tucker v. Alexandroff*, (1902) 183 U. S. 424, 22 S. Ct. 195, 46 U. S. (L. ed.) 264.

The provision in Judicial Code, sec. 240, *ante*, title JUDICIARY, vol. 1, of this Supplement, p. 232, that the Supreme Court may issue certiorari "upon the petition of any party thereto" is new legislation as to the quoted clause, but probably merely declaratory of the pre-existing practice.

In *Whitfield v. Aetna L. Ins. Co.*, (1907) 205 U. S. 489, 27 S. Ct. 578, 51 U. S. (L. ed.) 895, it appears that the writ of certiorari was granted upon the application of the plaintiff in the court below and of a state on relation



of its attorney-general, the question presented being the validity of a provision in a life insurance policy in view of the state statute.

**Petition for writ, notice, record.**—See instructions by clerk of Supreme Court "as to applications for writs of certiorari under Act of March 3, 1891," which follow rule 39 in current publications of Supreme Court rules, and are printed in 210 U. S. 503, 29 S. Ct. xxiii.

A petition for a writ of certiorari is quoted, substantially in full, in *Chicago First Nat. Bank v. Chicago Title, etc., Co.*, (1905) 198 U. S. 280, 25 S. Ct. 693, 49 U. S. (L. ed.) 1051.

A rule to show cause was granted upon presentation of a petition for a writ of certiorari in *Smith v. Vulcan Iron Works*, (1897) 165 U. S. 518, 17 S. Ct. 407, 41 U. S. (L. ed.) 810.

In *In re Woods*, (1892) 143 U. S. 202, 12 S. Ct. 417, 36 U. S. (L. ed.) 125, the application for certiorari was made upon notice, and accompanied by a certified copy of the entire record of the case, in compliance with the rule.

Supreme Court rule 37, 210 U. S. 501, 29 S. Ct. xxii., requires that on application for a writ of certiorari "a certified copy of the entire record of the case in the Circuit Court of Appeals shall be furnished to this court by the applicant as part of the application." A printed copy of the transcript of record from a Circuit Court, which was printed under the supervision, direction, and control of the clerk of the Circuit Court of Appeals, under and pursuant to the rules of that court, may be used without being reproduced in manuscript by the clerk, in furnishing a certified copy of the record of the case as required by the rule above quoted. *Toledo, etc., R. Co. v. Continental Trust Co.*, (1900) 176 U. S. 219, 20 S. Ct. 383, 44 U. S. (L. ed.) 442.

Where a writ of certiorari is granted on a single petition for several cases which were considered below on one record, and it is conceded that the differences in the cases are unsubstantial, one record may suffice in the Supreme Court, as in *Armour Packing Co. v. U. S.*, (1908) 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 681.

On petition for certiorari or mandamus to review a decision dismissing a writ of error for want of jurisdiction, where the record was before the Supreme Court on the return to a rule to show cause, and full argument had been had, the writ of certiorari was issued, and the return to the rule was allowed to stand as a return to the writ. *American Sugar Refining Co. v. New Orleans*, (1901) 181 U. S. 277, 21 S. Ct. 646, 45 U. S. (L. ed.) 859.

**Effect of denial of the writ.**—Where an application to the Supreme Court for a writ of certiorari, presenting the identical issues which were determined by the Circuit Court of Appeals, has been summarily denied, it must be assumed that the Supreme Court has impliedly passed on such issues, unless in some way the fact is disclosed that it did not do so, and the Circuit Court of Appeals is

precluded from proceeding anew on the same subject-matter by entertaining a petition for a rehearing. *Burget v. Robinson*, (1903) 123 Fed. 262, 59 C. C. A. 260.

**Hearing and examination, determination, mandate.**—"On writ of certiorari we can dispose of all questions arising on the record." *Donovan v. Pennsylvania Co.*, (1905) 199 U. S. 279, 26 S. Ct. 91, 50 U. S. (L. ed.) 192. Especially is this true where the case is heard on a writ and a cross-writ of certiorari. *La Bourgogne*, (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

When the writ has been granted, and the record certified in obedience to it, the questions arising upon the record must be determined according to fixed rules of law. *American Constr. Co. v. Jacksonville, etc., R. Co.*, (1893) 148 U. S. 372, 13 S. Ct. 758, 37 U. S. (L. ed.) 486.

"The defendant's counsel has not confined his argument to the questions presented by the record. It seems expedient, therefore, simply to determine the questions deemed to arise on the record, and stop there." *Green County v. Quinlan*, (1909) 211 U. S. 582, 29 S. Ct. 162, 53 U. S. (L. ed.) 335.

"We must take the case as it is presented here upon the stipulated return to the writ of certiorari on the record as presented to the Circuit Court of Appeals." *McClellan v. Carland*, (1910) 217 U. S. 268, 30 S. Ct. 501, 54 U. S. (L. ed.) 762.

Where, aside from errors pointed out in the petition for the writ, counsel suggested certain difficulties before a final decree, which were not disposed of in the opinion or decree of the Circuit Court of Appeals, the Supreme Court did not "feel under any obligation to do more than to hold that we find no error in the decree." *Omaha v. Omaha Water Co.*, (1910) 218 U. S. 180, 30 S. Ct. 615, 54 U. S. (L. ed.) 991.

Judgment of reversal on certiorari is not necessarily an adjudication of any other than the questions in terms discussed and decided, and on a second certiorari to review a subsequent judgment below in the same case, all questions which appear upon the record and have not already been decided are open for consideration. *Mutual L. Ins. Co. v. Hill*, (1904) 193 U. S. 551, 24 S. Ct. 538, 48 U. S. (L. ed.) 788.

The scope of review will not be broadened so as to include, in addition to the questions which the petitioner has properly raised, technical questions tending to embarrass the progress and delay the final ending of an action, the merits of which are with the respondents. *Green County v. Thomas*, (1909) 211 U. S. 598, 29 S. Ct. 168, 53 U. S. (L. ed.) 343.

An objection to the sufficiency of an indictment will not be considered on certiorari, although the grounds of demurrer and the general language of the exception taken on the trial are broad enough to embrace such objection, where the conduct of counsel for the accused in the courts below is wholly inconsistent with any intention to rely upon such objection, and the point was not referred to in the petition for a writ of certiorari, or in

the brief submitted in support of that petition. *Great Northern R. Co. v. U. S.*, (1908) 208 U. S. 452, 28 S. Ct. 313, 52 U. S. (L. ed.) 567.

Whether or not the inventions covered by the claims of the patent in suit were exhibited in an expired foreign patent will not be considered on certiorari to review an order granting a preliminary injunction, where the question is largely one of fact, and pertains rather to the evidence than to a construction of the patents. *Leeds, etc., Co. v. Victor Talking Mach. Co.*, (1909) 213 U. S. 325, 29 S. Ct. 495, 53 U. S. (L. ed.) 816.

A writ of certiorari was dismissed after argument without passing on the merits where the action of the court below was neither from its character nor importance within the scope of the grant of power to review by certiorari. *U. S. v. Rimer*, (1911) 220 U. S. 547, 31 S. Ct. 596, 55 U. S. (L. ed.) 578.

Concurrent findings of fact by two courts below will not ordinarily be disturbed. *Workman v. New York*, (1900) 179 U. S. 552, 21 S. Ct. 212, 45 U. S. (L. ed.) 314; *International Nav. Co. v. Farr, etc., Mfg. Co.*, (1901) 181 U. S. 218, 21 S. Ct. 590, 45 U. S. (L. ed.) 830; *Schwartz v. Duss*, (1902) 187 U. S. 8, 23 S. Ct. 4, 47 U. S. (L. ed.) 53; *The Iroquois*, (1904) 194 U. S. 240, 24 S. Ct. 640, 48 U. S. (L. ed.) 955; *The Germanic*, (1905) 196 U. S. 589, 25 S. Ct. 317, 49 U. S. (L. ed.) 610; *The Wilderoft*, (1906) 201 U. S. 378, 26 S. Ct. 467, 50 U. S. (L. ed.) 794; *La Bourgogne*, (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973; *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, (1908) 210 U. S. 405, 28 S. Ct. 748, 52 U. S. (L. ed.) 1122 (a patent case).

On certiorari the Supreme Court will finally dispose of the case by its direction to the Circuit Court, and thus do what the Circuit Court of Appeals might have done, where the latter court had before it a record presenting the whole case, but did nothing more than to reverse the decree of the Circuit Court granting a preliminary injunction. *Harriman v. Northern Securities Co.*, (1905) 197 U. S. 244, 25 S. Ct. 493, 49 U. S. (L. ed.) 739.

In a case where the Circuit Court of Appeals had rendered a judgment on the merits, but declined to decide a question of the jurisdiction of the court below which was presented, for want of power to decide it, the Supreme Court, holding that the Circuit Court of Appeals had power to decide it, proceeded to decide the question in favor of the jurisdiction and then affirmed the judgment on the merits, instead of reversing and sending the case back to have the question of jurisdiction decided. *Boston, etc., R. Co. v. Gokey*, (1908) 210 U. S. 155, 28 S. Ct. 657, 52 U. S. (L. ed.) 1002.

Upon certiorari to review a decision of the Circuit Court of Appeals dismissing a writ of error for want of jurisdiction, the Supreme Court held that the decision was erroneous and thereupon proceeded to determine the case upon the merits. *Mutual L. Ins. Co. v. Phinney*, (1900) 178 U. S. 327, 20 S. Ct. 906, 44 U. S. (L. ed.) 1088.

If by the respondent's fault the record is

not as favorable to him as the actual facts might have justified, lest any injustice be done upon reversal the remand may be with liberty to take such further proceedings, etc., as in *Mueller v. Nugent*, (1902) 184 U. S. 1, 22 S. Ct. 269, 46 U. S. (L. ed.) 405.

As a general rule, to avoid circuitry, the mandate of the Supreme Court will go directly to the court from which the Circuit Court of Appeals took the case. But where the only reason for issuing the certiorari was the failure of the Circuit Court of Appeals to consider the case before it, the case was remanded to the latter court with instructions to hear and decide it. *Lutcher, etc., Lumber Co. v. Knight*, (1910) 217 U. S. 257, 30 S. Ct. 505, 54 U. S. (L. ed.) 757.

#### VIII. REVIEW BY SUPREME COURT IN CASES NOT MADE FINAL.

See *supra*, p. 1342, division V. of this note.

"There shall be of right," etc.—If, in the opinion of the Circuit Court of Appeals, its judgment is not reviewable by the Supreme Court under this section, it will deny an application for a writ of error, as, for instance, in *Weber v. Kentucky Grand Lodge*, (C. C. A. 1909) 171 Fed. 839.

Alleged constitutional question.—Appellants cannot invoke the supposed presence of a constitutional question in a cause as a ground for an appeal from the Circuit Court of Appeals, where, if any such question was disposed of by the decree, it was decided in their favor. *Empire State-Idaho Min., etc., Co. v. Hanley*, (1905) 198 U. S. 292, 25 S. Ct. 691, 49 U. S. (L. ed.) 1056.

Where the alienage of complainants and the citizenship of defendants was alleged in a bill, but a constitutional question was also alleged, it was held on appeal from the Circuit Court of Appeals that the mere averment of a constitutional question is not sufficient, where the question sought to be presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason; and the appeal was dismissed as coming within that rule. *O'Callaghan v. O'Brien*, (1905) 199 U. S. 89, 25 S. Ct. 727, 50 U. S. (L. ed.) 101.

A question as to the full faith and credit to be given judgments of another state is not disclosed so as to permit a review of a decision of the Circuit Court of Appeals under this section, where the complaint in which such judgments are mentioned seems to refer to them primarily, if not solely, as fixing the amount of the plaintiff's claim. *Bagley v. General Fire Extinguisher Co.*, (1909) 212 U. S. 477, 29 S. Ct. 341, 53 U. S. (L. ed.) 605.

A complaint invoking full faith and credit for judgments of another state does not present a case arising under the Federal Constitution so as to permit a review in the Supreme Court of a judgment of the Circuit Court of Appeals, where the defendant was not a party to the judgments, and, if bound by them, is so bound, not by their own operation, but by an estoppel arising out of the contract relations between the parties and notice to defend the suits in which the judgments were rendered, the ground of the de-

cision of the courts below being that there was no such estoppel, the decision turning wholly on the construction of the contract as excluding a liability over in the event that happened. *Bagley v. General Fire Extinguisher Co.*, (1909) 212 U. S. 477, 29 S. Ct. 341, 53 U. S. (L. ed.) 605.

An allegation by a party claiming an interest in a mining claim by virtue of a purchase from an administrator under a decree of the probate court, that a subsequent decree of that court annulling the prior decree was invalid for want of jurisdiction to render it at a subsequent term, for want of notice and for lack of evidence, does not amount to an assertion that he was deprived of his interest by the court without due process of law, which would support the jurisdiction of a federal Circuit Court irrespective of diverse citizenship, and therefore permit an appeal to the Supreme Court, under this section, from a decree of the Circuit Court of Appeals in the cause. *Empire State-Idaho Min., etc., Co. v. Hanley*, (1905) 198 U. S. 292, 25 S. Ct. 691, 49 U. S. (L. ed.) 1056.

**Constitutional question abandoned.**—In a suit between citizens of different states to enforce judgment liens against land, a city was made a defendant, the plaintiff claiming that the land was being taken under paving taxes without due process of law, in violation of the Constitution. Defendants denied that the taxes affected plaintiffs' rights. On a showing of the amount of taxes due, plaintiffs' tender of that amount was received, but afterward returned. On decree for plaintiffs defendants appealed to the Circuit Court of Appeals, where the decree was affirmed on being amended to allow the paving taxes by allowing the city the taxes tendered. Defendants having failed to prosecute their appeal from this judgment, it was dismissed by the Supreme Court. It was held that the constitutional question was abandoned, making final the judgment of the Circuit Court of Appeals on a second appeal. *Huff v. Bidwell*, (C. C. A. 1910) 180 Fed. 374.

**Trademark cases.**—The issue of unfair competition must be regarded as open for consideration by the federal Supreme Court, on an appeal from the Circuit Court of Appeals, where there was both diversity of citizenship and the assertion of a valid trademark to give jurisdiction to the Circuit Court, in view of the statutory description in this section of cases in which the decrees of the Circuit Court of Appeals "shall be final" and in view of the provision in this section giving the Supreme Court jurisdiction "in all cases not . . . made final." *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, (1911) 220 U. S. 446, 31 S. Ct. 456, 55 U. S. (L. ed.) 536, where the court said: "In all other cases

there is a right of review by this court if there is the statutory amount involved. The case at bar is within the letter of the statute. The opposite parties to the suit are citizens of different states, and while this diversity of citizenship was not necessary to give the Circuit Court jurisdiction of the case in so far as it involved the validity of the trademark, it was necessary to give the court jurisdiction of the issue of unfair competition. If the latter had stood alone, its decision would have been final in the Court of Appeals, and this court would have had no jurisdiction to review its decision, and there is some objection on principle, notwithstanding the union of the charge of unfair competition with the claim of a trademark, to our taking jurisdiction, but such, we think, is the effect of the statute. *MacFadden v. U. S.*, (1909) 213 U. S. 288, 29 S. Ct. 490, 53 U. S. (L. ed.) 801; *Spreckels Sugar Refining Co. v. McClain*, (1904) 192 U. S. 397, 24 S. Ct. 376, 48 U. S. (L. ed.) 496."

But in a trademark case where there is no diversity of citizenship and the suit is brought under section 17 of the Act of Feb. 20, 1905, 33 Stat. L. 724, 728, 729, 10 Fed. Stat. Annot. 408, at p. 414, certiorari is the exclusive remedy for a review by the Supreme Court of a decision of the Circuit Court of Appeals. *Hutchinson v. Loewy*, (1910) 217 U. S. 457, 30 S. Ct. 613, 54 U. S. (L. ed.) 838, dismissing an appeal.

**Value of matter in controversy.**—It was remarked in *McClellan v. Carland*, (1910) 217 U. S. 268, 30 S. Ct. 501, 503, 54 U. S. (L. ed.) 762, that in a judgment of the Circuit Court of Appeals denying an original petition for mandamus to a judge of the Circuit Court, "there is no amount in controversy, and consequently there could be no appeal to this court."

The want of any money value in controversy precludes an appeal to the Supreme Court from an order of a Circuit Court of Appeals, discharging, on a writ of certiorari, a person convicted of introducing intoxicating liquors into an Indian reservation, and sentenced to fine and imprisonment. *Whitney v. Dick*, (1906) 202 U. S. 132, 26 S. Ct. 584, 50 U. S. (L. ed.) 963.

**Waiver of right of review.**—If a party defeated in the federal Circuit Court might have carried the case direct to the Supreme Court on the ground of a constitutional question involved, but carried it to the Circuit Court of Appeals as a case in which federal jurisdiction was dependent upon diversity of citizenship, the judgment of the latter court therein is not reviewable on writ of error by the Supreme Court. *Weber v. Kentucky Grand Lodge*, (C. C. A. 1909) 171 Fed. 839, denying an application for a writ of error.

## Vol. IV, p. 422, sec. 7.

This section as amended by the Act of April 14, 1906, ch. 1627, 34 Stat. L. 116, 1909 Supp. Fed. Stat. Annot. 291 (also annotated at the corresponding place, *infra*, this title), is again amended and superseded by the Ju-

dicial Code, sec. 129, *ante*, p. 195, of this Supplement.

The purpose of Congress in this legislation has been to enlarge and not to restrict the jurisdiction of the Circuit Court of Appeals

with respect to interlocutory injunctions. *J. P. Jorgenson Co. v. Rapp*, (C. C. A. 1907) 157 Fed. 732.

It was not intended to give to patent or other cases in which interlocutory decrees or orders were made any precedence. It is generally true that it is of importance to litigants that their cases be disposed of promptly, but other cases have the same right to early hearing. And the purpose of Congress in this legislation was that there be an immediate review of the interlocutory proceedings, and not an advancement generally over other litigation. *Ex p. National Enameling, etc., Co.*, (1906) 201 U. S. 156, 26 S. Ct. 404, 50 U. S. (L. ed.) 707.

This section and section 507 of the Alaska Code, 1 Fed. Stat. Annot. 148, are in accord and should be read *in pari materia*. *In re McKenzie*, (1901) 180 U. S. 536, 548, 21 S. Ct. 468, 45 U. S. (L. ed.) 657; *J. P. Jorgenson Co. v. Rapp*, (C. C. A. 1907) 157 Fed. 732.

**Cross appeal by complainant.**—This section does not authorize a cross appeal to the Circuit Court of Appeals by complainants from a decree in a patent infringement suit, which, in addition to granting an injunction, as to the claims of the patent held to be infringed, and sending the cause to a master for an accounting, dismissed the bill as to the claims held invalid and those found not to be infringed. *Ex p. National Enameling, etc., Co.*, (1906) 201 U. S. 156, 26 S. Ct. 404, 50 U. S. (L. ed.) 707, holding the case not to be within the scope of *Smith v. Vulcan Iron Works*, (1897) 165 U. S. 518, 17 S. Ct. 407, 41 U. S. (L. ed.) 810.

**"Upon a hearing in equity."**—The phrase does not mean the trial of an equity cause on the merits, the right of appeal being given from an "interlocutory" order or decree, which means one entered pending the cause and before final hearing on the merits, and disposing of some intervening matter relating to the cause. *Taylor v. Breese*, (C. C. A. 1908) 163 Fed. 678.

**"An injunction."**—A preliminary restraining order granting temporarily the relief prayed for by the bill and requiring the defendants to show cause why it should not be made permanent is an appealable error granting an "injunction" within the meaning of this section. *Taylor v. Breese*, (C. C. A. 1908) 163 Fed. 678.

**Interlocutory order or decree.**—A decree on the merits, finding infringement of a patent, awarding a permanent injunction, and directing a reference to ascertain damages and profits, although not a preliminary injunction intended to operate only until a hearing upon the merits, is nevertheless an "interlocutory decree" and appealable, inasmuch as the decree is not final in an appealable sense. *Star Brass Works v. General Electric Co.*, (1904) 129 Fed. 102, 63 C. C. A. 604.

**Interlocutory injunction in bankruptcy.**—An interlocutory decree of the District Court, exercising jurisdiction as a court of bankruptcy, awarding an injunction, is appealable under this section. *O'Dell v. Boyden*, (C. C. A. 1906) 150 Fed. 731.

An interlocutory decree denying an injunction is not appealable under this section. *Scriven v. North*, (C. C. A. 1904) 134 Fed. 366.

**Order denying or dissolving or refusing to dissolve injunction.**—“It has frequently been decided that an order refusing to dissolve a preliminary injunction cannot be construed as an order continuing an injunction, so as to bring the case within the operation of section 7.” *Pioneer Lace Mfg. Co. v. Dodd*, (C. C. A. 1910) 181 Fed. 688, dismissing an appeal. To the same point see *Lewis v. Hitchman Coal, etc., Co.*, (1910) 176 Fed. 549, 100 C. C. A. 137.

Since an order dissolving an injunction is not appealable under the section as it now reads, where a temporary injunction was dissolved on a demurrer to the bill being sustained, the plaintiff was not entitled to an appeal from so much of the order only as dissolved the injunction. *Frye v. Carstens*, (C. C. A. 1904) 130 Fed. 766.

**In a cause in which an appeal from a final decree may be taken.**—An appeal would not lie from an interlocutory decree awarding an injunction under this section in a case in which an appeal would not lie to the Circuit Court of Appeals from a final decree. *O'Dell v. Boyden*, (C. C. A. 1906) 150 Fed. 731, dismissing an appeal for that reason; *Harris v. Rosenberger*, (C. C. A. 1906) 145 Fed. 449, certiorari denied 203 U. S. 591, 27 S. Ct. 778, 51 U. S. (L. ed.) 331, where the appeal was entertained as not open to that objection. But the objection is removed by the amendment in the Act of April 14, 1906, ch. 1627, 34 Stat. L. 116, 1909 Supp. Fed. Stat. Annot. 291.

**Time of taking an appeal.**—Prior to the enactment of this section and while the statute did not, as it now does, allow an appeal from an interlocutory order refusing to dissolve an injunction, it was held that the thirty days for appeal from an interlocutory order granting an injunction began to run from the entry of an order denying a motion to dissolve the injunction. *Pioneer Lace Mfg. Co. v. Dodd*, (C. C. A. 1910) 181 Fed. 688, dismissing an appeal as too late.

**Supersedeas.**—See *In re McKenzie*, (1901) 180 U. S. 536, 21 S. Ct. 468, 45 U. S. (L. ed.) 657, cited in note to section 507 of the Alaska Code, 1 Fed. Stat. Annot. 148, *ante*, p. 433 of this Supplement.

The power to grant a supersedeas is discretionary. Such discretion, however, should be cautiously exercised, and only where it is manifest that there are extraordinary reasons to justify it. *Timolat v. Philadelphia Pneumatic Tool Co.*, (1904) 130 Fed. 903.

**Power of Circuit Court to vacate supersedeas.**—Where an appeal has been taken to the Circuit Court of Appeals from an interlocutory decree granting an injunction to restrain the infringement of a patent, and the Circuit Court has accepted an appeal bond and made it a supersedeas, such court has no power, after the appeal has been perfected, to suspend the operation of such bond and vacate the stay prior to the receipt of a mandate from the appellate court. *Shelby Steel Tube*

Co. v. Delaware Seamless Tube Co., (1908) 161 Fed. 798, where Archbald, J., said: "There is but little light thrown upon this question by the decided cases. . . . The case which comes nearest to justifying the present motion [to vacate the stay] is *Timolat v. Philadelphia Pneumatic Tool Co.*, (1904) 130 Fed. 903, where a previous order granting a supersedeas was vacated on motion, the court deeming it advisable to retain the injunction in force while the appeal was pending, after having at first suspended it. But this action, like that in *Black v. Zacherie*, (1845) 3 How. 483, 11 U. S. (L. ed.) 690, was evidently taken while the case was still in the grasp of the court, or at least was so regarded, which may account for its authority not being questioned."

"Precedence in the appellate court" does not mean that the rules of the court with reference to the filing of briefs are to be ignored. Precedence is given by advancing the cause upon the calendar over other cases not advanced, so that it may be called when ripe for hearing under the rules, or earlier if counsel shall choose to expedite the preparation of the cause, or upon a special order made by the court for special reasons of exigency made to appear. *Star Brass Works v. General Electric Co.*, (1904) 129 Fed. 102, 63 C. C. A. 604.

**Review of case on the merits.**—It is well settled that on an appeal from an interlocutory order the court has power to hear the whole case and dispose of it. *Chapman v. Yellow Poplar Lumber Co.*, (C. C. A. 1906) 143 Fed. 201.

The only questions which arise under the special or limited appeal from an interlocutory decree granting a preliminary injunction are those which are necessarily involved by the allowance of the injunction *pendente lite*. If the court below had jurisdiction and did not unreasonably exercise its discretion in the granting of an injunction to preserve the status until a final hearing, the Circuit Court of Appeals will not ordinarily go into the merits of the case any farther than necessary to determine this question. *Owensboro v. Cumberland Telephone, etc., Co.*, (C. C. A. 1909) 174 Fed. 739.

**Injunctions in patent cases.**—Where an interlocutory decree in a suit for infringement of a patent adjudges the patent valid and infringed, awards an injunction, and directs an accounting, an appeal may be taken from the whole of such decree, and the Circuit Court of Appeals has authority to consider and decide the case on the merits, not only with respect to the patent infringement of which was enjoined, but also as to another, infringement of which was charged but not determined by the lower court, and may render or direct a final decree dismissing the bill as to both. *Highland Glass Co. v. Schmertz Wire*

*Glass Co.*, (1910) 178 Fed. 944, 102 C. C. A. 316.

Where the record on appeal from an interlocutory order granting a preliminary injunction restraining the infringement of a patent contains sufficient evidence to enable the Circuit Court of Appeals to determine that the patent is invalid or that for other reasons the bill cannot be maintained, such court may order its dismissal. Such power will only be exercised, however, in plain cases. *Co-operating Merchants' Co. v. Hallock*, (C. C. A. 1904) 128 Fed. 596.

**Discretionary power of court on review.**—Where a preliminary injunction has been granted on a sworn bill, which presents grave questions of law, to prevent immediate and certain injury to the moving party, and it appears that no injury will result therefrom to the defendant which cannot be provided against by a bond, the appellate court on an appeal from the order will not consider questions going to the merits of the bill, which should be raised by proper pleadings and first presented to the trial court. *Lehman v. Graham*, (1905) 135 Fed. 39, 67 C. C. A. 513.

**Appeal presenting only moot question.**—An appeal from an injunctive order requiring a postmaster to deliver to complainants all mail matter addressed to them received at his office between certain dates and to pay all money orders contained therein will not be entertained, where by reason of a full compliance with said order by appellant by delivering such mail and paying the orders the opinion of the appellate court will be on a purely moot question and it would be powerless to execute any decree it might render in appellant's favor. *Meyers v. Cheesman*, (C. C. A. 1909) 174 Fed. 783, dismissing the appeal.

Where an appeal has been taken from an interlocutory decree for an injunction in a patent infringement suit, and it appeared that no hearing of the appeal could be had until after the expiration of the patent, the court said: "It is therefore exceedingly doubtful whether the Circuit Court of Appeals will then listen to the appeal, the right of injunction having expired by operation of law." *Timolat v. Philadelphia Pneumatic Tool Co.*, (1904) 130 Fed. 903, citing *National Folding Box, etc., Co. v. Robertson*, (1900) 104 Fed. 552, 44 C. C. A. 29; *Thomson-Houston Electric Co. v. Nassau Electric R. Co.*, (1902) 119 Fed. 354, 56 C. C. A. 96, and two other cases cited in 4 Fed. Stat. Annot. 427.

**Effect of neglect to appeal.**—A failure to appeal from an appealable interlocutory order dissolving an injunction does not deprive the complainant of the right to a review of other matters determined by the order, not relating to the injunction, on an appeal from a final decree. *Chapman v. Yellow Poplar Lumber Co.*, (C. C. A. 1906) 143 Fed. 201.

## Vol. IV, p. 428, sec. 10.

**Certiorari by Supreme Court after remand.**—The provision that in a case coming from a Circuit Court of Appeals "the cause shall

be remanded to the proper District or Circuit Court" is not inconsistent with the power of the Supreme Court to issue a cer-

tiorari in a case that was an original proceeding in mandamus in the Circuit Court of Appeals. *McClellan v. Carland*, (1910) 217 U. S. 268, 30 S. Ct. 501, 54 U. S. (L. ed.) 762.

**Mandate on certiorari.**—When the Supreme Court, on certiorari, reverses a decision of a Circuit Court of Appeals the mandate will, under some circumstances, go to the Circuit Court of Appeals instead of to the trial court. *Lutcher, etc., Lumber Co. v. Knight*, (1910) 217 U. S. 257, 30 S. Ct. 505, 54 U. S. (L. ed.) 757.

**Amendments.**—Where a Circuit Court was without jurisdiction of a cause because of the absence from the complaint of necessary jurisdictional allegations, the Circuit Court of Appeals, in reversing the judgment therein for that reason, may properly remand the cause and direct that plaintiff be permitted to amend the complaint in that respect, especially where the question of jurisdiction was not raised in the trial court. *Puget Sound Nav. Co. v. Lavendar*, (1907) 156 Fed.

361, 84 C. C. A. 259. See also *Eaton v. Hoge*, (C. C. A. 1905) 141 Fed. 64, 5 Ann. Cas. 487.

But a Circuit Court of Appeals is without power to dismiss an appeal on motion of the appellant and remand the case to the court below with directions to permit the amendment of a pleading on a showing that facts were inadvertently omitted therefrom, the omission not being known to appellant until after the appeal was taken, and with directions for further proceedings. *Strand v. Griffith*, (1905) 135 Fed. 739, 68 C. C. A. 377.

**Proceeding in court below after remand.**—The judge of the Circuit Court cannot open the case when it is remanded. He cannot in any way modify the judgment of the higher court. He has no judicial function to exercise in the matter. He cannot exercise any discretion. All that can be done is to execute the judgment of the appellate court, and this is merely a ministerial act. *Moore v. Chattanooga Electric R. Co.*, (1908) 119 Tenn. 710, 109 S. W. 497.

## Vol. IV, p. 428, sec. 11.

**Time for review.**—It is settled doctrine that the Circuit Court of Appeals has no jurisdiction, where more than six months intervene between the day of judgment and the day on which the appeal is "taken" or the writ of error is "sued out." *Blaffer v. New Orleans Water Supply Co.*, (1908) 160 Fed. 389, 87 C. C. A. 341, dismissing an appeal because more than eight months intervened between the final decree and the allowance of the appeal.

When the last day of the six months limited for appeal is Sunday it is not excluded, and an appeal cannot be taken on the next day. *Meyer v. Hot Springs Imp. Co.*, (1909) 169 Fed. 628, 95 C. C. A. 156.

Where, although an appeal was allowed within the six months limited by the statute, no citation was issued to the persons who procured the order appealed from, and the record was not filed within the time required by rule 16 of the Circuit Court of Appeals (90 Fed. clix, 31 C. C. A. clix), nor until a year after the appeal was allowed, the court had no power then to award a citation, and, by a *nunc pro tunc* order, allow the appeal to stand as of the date when the record was filed. *Hudson v. Limestone Natural Gas Co.*, (1906) 144 Fed. 952, 75 C. C. A. 678.

The limitation of time for appeal applies to suits on claims against the United States brought in the Circuit Court under the Tucker Act of March 3, 1887, ch. 359, 24 Stat. L. 505, 2 Fed. Stat. Annot. 82, and the court has no power to allow an appeal therein by the United States after the expiration of six months from the entry of the decree. *Butt v. U. S.*, (1904) 126 Fed. 794.

A writ of error is not "brought," to use the verbiage of R. S. sec. 1008, 4 Fed. Stat. Annot. 622, within the legal meaning of the term until the writ is actually filed or lodged with the clerk of the court which rendered

the judgment sought to be reviewed. *Old Nick Williams Co. v. U. S.*, (1910) 215 U. S. 541, 30 S. Ct. 221, 54 U. S. (L. ed.) 318. *Kentucky Coal, etc., Co. v. Howes*, (C. C. A. (1907) 153 Fed. 163, dismissing a writ of error because it was not thus brought within six months, and also holding that while a motion for a new trial, having been seasonably entered, prevents the judgment from becoming final until disposed of, the allowance of a bill of exceptions does not have that effect.

An agreement between the parties extending the time within which to sue out a writ of error is ineffectual for that purpose. *Clark v. Doerr*, (C. C. A. 1906) 143 Fed. 960, dismissing a writ of error.

The Circuit Court of Appeals has no jurisdiction to review a judgment on a writ of error not issued until more than six months after the entry of the judgment, notwithstanding it may have been allowed within that time. *Rutan v. Johnson*, (1904) 130 Fed. 109, 64 C. C. A. 443.

Delay in filing the bill of exceptions, due to judicial engagements of the trial judge, is no excuse for the failure to sue out a writ of error within the six months, although an assignment of errors should accompany the petition for the writ of error, since such assignment may be formulated without the previous settlement of the bill of exceptions, and, besides, is not a jurisdictional requirement. *Old Nick Williams Co. v. U. S.*, (1910) 215 U. S. 541, 30 S. Ct. 221, 54 U. S. (L. ed.) 318, affirming a dismissal of a writ of error.

**Appeal in forma pauperis.**—An appeal cannot be taken to the Circuit Court of Appeals *in forma pauperis*, under this section, in connection with the Act of July 20, 1892, ch. 209, sec. 1, 2 Fed. Stat. Annot. 294. *Bradford v. Southern R. Co.*, (1904) 195 U. S. 243, 25 S. Ct. 55, 49 U. S. (L. ed.) 178; *Herman Keck Mfg. Co. v. Lorsch*, (1910) 179 Fed. 485, 103 C. C. A. 65.

The sentence beginning, "And all provisions of law now in force," operated to continue the then existing method by which appeals and writs of error were taken from the Circuit Courts to the Supreme Court and make it applicable to the Circuit Courts of Appeals. So stated by the committee on revising in note to Judicial Code, sec. 250, *ante*, p. 235 of this Supplement.

It adopts as in full force, and applicable to an appeal in a bankruptcy case, R. S. secs. 698, 750, 4 Fed. Stat. Annot. 446, 556, as to what the transcript shall contain on appeal "in causes in equity." *In re A. L. Robertshaw Mfg. Co.*, (1905) 135 Fed. 220.

The provision also makes applicable to the Circuit Court of Appeals, R. S. sec. 701, 4 Fed. Stat. Annot. 458, so that in order to authorize a Circuit Court to issue execution for costs awarded by the Circuit Court of Appeals on a writ of error, the mandate from the latter court should contain a special provision directing the same. *American Trust*,

*etc.*, *Bank v. Zeigler Coal Co.*, (1908) 165 Fed. 512.

By virtue of the same provision, in connection with other sections of federal statutes, a Circuit Court of Appeals has ample power, on reversal of the judgment in a criminal case because of the imposition of an excessive sentence, to correct the error without disturbing the conviction, by remanding the case, with instructions to modify the judgment by remitting the excess. *Hanley v. U. S.*, (C. C. A. 1903) 123 Fed. 849.

**Allowance of amendments.**—Under this section and R. S. sec. 1005, 4 Fed. Stat. Annot. 617, the Circuit Court of Appeals is justified in allowing an amendment to correct a writ of error which, owing to the illness of counsel, does not set forth accurately the parties plaintiff, and in denying a motion to dismiss the writ, founded upon such mistake. *Green County v. Thomas*, (1909) 211 U. S. 598, 29 S. Ct. 168, 53 U. S. (L. ed.) 343.

## Vol. IV, p. 430, sec. 12.

This section is superseded by Judicial Code, sec. 262, *ante*, title JUDICIARY, vol. 1, p. 241, of this Supplement.

As to the power of other federal courts to issue writs, see R. S. sec. 716, 4 Fed. Stat. Annot. 498, and the corresponding page, *infra*, this title.

**Mandamus** to require a federal Circuit Court to proceed with and determine a pending suit which it has stayed to await the commencement and prosecution to final judgment of a suit in a state court may be issued by a Circuit Court of Appeals as in aid of its appellate jurisdiction. *McClellan v. Carland*, (1910) 217 U. S. 268, 30 S. Ct. 501, 54 U. S. (L. ed.) 762.

A Circuit Court of Appeals has jurisdiction to issue a writ of mandamus in the exercise of and in aid of its appellate jurisdiction, and its power to issue the writ is not confined to cases where the appellate jurisdiction has been actually invoked by an appeal or a writ of error. Thus, in *Barber Asphalt Paving Co. v. Morris*, (1904) 132 Fed. 945, 66 C. C. A. 55, appeals from the allowance by the city council of Duluth of the claims of a citizen of West Virginia were taken by the city to the District Court of St. Louis county, Minn., and the charter of the city prohibited its officers from paying the claims pending the appeals except upon the order of that court. Thereupon the petitioner sued the city upon its claims in the federal court. The judge who was holding that court stayed all proceedings in the case pending in it until the final determination of the appeals in the state court. It was held that this was error, remediless otherwise than by the writ of mandamus, and accordingly the writ was granted commanding the judge holding the Circuit Court to vacate the stay, and to proceed with all convenient speed to try and adjudicate the controversy and to enforce the judgment upon it.

**Certiorari.**—The Circuit Court of Appeals has no authority to issue a writ of certiorari as an original and independent proceeding to review a conviction in a federal court, where the only question in the case is whether the punishment of the offense charged was within the jurisdiction of the federal courts, and the case was put in proper condition for a review on writ of error. *Whitney v. Dick*, (1906) 202 U. S. 132, 26 S. Ct. 584, 50 U. S. (L. ed.) 963.

The Circuit Court of Appeals has power to issue writs of certiorari only in aid of its appellate jurisdiction, and cannot issue such a writ to review an order of a Circuit Court which is not appealable. *U. S. v. Circuit Ct.*, (1903) 126 Fed. 169, 61 C. C. A. 315.

**Prohibition.**—A Circuit Court of Appeals has no power to issue a writ of prohibition as an original or independent proceeding, but only in aid of its own jurisdiction, which is wholly appellate, and, except in cases of petitions for review in bankruptcy proceedings, can only be invoked by an appeal or writ of error. Nor can it issue such writ as ancillary to a contemplated appeal or writ of error. *Zell v. Judges*, (C. C. A. 1906) 149 Fed. 86.

**Habeas corpus.**—A Circuit Court of Appeals cannot issue a writ of habeas corpus as an original and independent proceeding. *Whitney v. Dick*, (1906) 202 U. S. 132, 26 S. Ct. 584, 50 U. S. (L. ed.) 963, where, however, the court said: "Cases may arise in which the writ of habeas corpus is necessary to the complete exercise of the appellate jurisdiction vested in the Circuit Court of Appeals. But it is unnecessary to speculate under what circumstances such an exigency may exist."

It has previously been held in *Ex p. Moran*, (C. C. A. 1906) 144 Fed. 594, that the power of the Circuit Courts of Appeals to issue writs of habeas corpus is a part of their appellate jurisdiction, which is distinct and

separate from their power to review by writs of error or appeal, and that it extends to cases of imprisonment by the judgments or orders of inferior courts within their respective territorial appellate jurisdictions

when the final judgments or the orders in the specific cases are not reviewable in those courts by writs of error or by appeals, as well as to the cases in which they are so reviewable.

### Vol. IV, p. 431, sec. 14.

Nothing in this section, nor in sections 5 and 6 of this Act, extended the right of review of judgments of the District Court sitting as a court of claims under the Tucker Act of March 3, 1887, ch. 359, 24 Stat. L. 505, 2 Fed. Stat. Annot. 80, and a writ of error

will not lie to review a judgment in favor of the United States on a claim of less than \$3,000, as provided in R. S. sec. 707, 4 Fed. Stat. Annot. 467. *Reid v. U. S.*, (1909) 211 U. S. 529, 29 S. Ct. 171, 53 U. S. (L. ed.) 313.

### Vol. IV, p. 431, sec. 15.

**Oklahoma, Arizona, and New Mexico territories.**—While this section and the Act of Jan. 20, 1897, ch. 68, 29 Stat. L. 492, 4 Fed. Stat. Annot. 433, were in force, and when Oklahoma was a territory, it was held that the Circuit Court of Appeals had jurisdiction on writ of error to review a conviction for grand larceny, in violation of the laws of the territory which had been affirmed by the Supreme Court of the territory; that the power of review extended to criminal cases arising under the criminal laws of the territory, as well as those of the United States. *Miller v. Oklahoma*, (1906) 149 Fed. 330, 9 Ann. Cas. 389, 79 C. C. A. 268. And in a case controlled by the same legislation it was held that the jurisdiction of the Circuit Court of Appeals extends to all judgments of the Supreme Court of Arizona territory in cases not capital, arising under any criminal statute which such territorial courts administer, whether federal or territorial. *Storm v. Arizona*, (1909) 170 Fed. 423, 95 C. C. A. 593.

Construing this section and section 6 of the Act of Feb. 6, 1889, ch. 113, 25 Stat. L. 656, 4 Fed. Stat. Annot. 491, it was held in *New v. Oklahoma*, (1904) 195 U. S. 252, 25 S. Ct. 68, 49 U. S. (L. ed.) 182, that a writ of error from the United States Supreme Court to the Supreme Court of Oklahoma would not lie in a capital case.

Under this section, in connection with sections 5 and 6, and the Act of Jan. 20, 1897, above cited, it was held that the appellate jurisdiction of the Circuit Court of Appeals

for the Ninth Circuit extended to all judgments of the Supreme Court of Arizona territory in cases not capital, arising under any criminal statute which the territorial courts administer, whether federal or territorial. *Storm v. Arizona*, (C. C. A. 1909) 170 Fed. 423.

And in *Sena v. U. S.*, (1906) 147 Fed. 485, 78 C. C. A. 27, a prosecution of a federal statute, it was held that the Circuit Court of Appeals for the Eighth Circuit had appellate jurisdiction to review the judgments of the Supreme Court of the territory of New Mexico in cases of conviction of crime not capital.

Jurisdiction of writs of error in criminal cases, whether capital or not capital, is now vested solely in the Circuit Courts of Appeals. See Judicial Code, secs. 128, 133, 134, and 238, *ante*, pp. 195 *et seq.*, 231, of this Supplement; and the Act of June 20, 1897, above cited, is repealed by Judicial Code, sec. 297, *ante*, p. 250.

**Porto Rico.**—The territories of the United States, referred to in this section, are those which it was contemplated would be assigned to some circuit, and they do not embrace Porto Rico. If Congress had intended that the judgments of the United States Court for Porto Rico should, in any class of cases, be re-examined in some Circuit Court of Appeals of the United States, it would have so declared by appropriate words. It did not so declare. *Royal Ins. Co. v. Martin*, (1904) 192 U. S. 149, 24 S. Ct. 247, 48 U. S. (L. ed.) 385.

### Vol. IV, p. 436, sec. 687.

**Original jurisdiction.**—The question of jurisdiction precedes any inquiry into the merits. *Oregon v. Hitchcock*, (1906) 202 U. S. 60, 26 S. Ct. 568, 50 U. S. (L. ed.) 935.

Neither the counsel nor the express consent of the parties will justify the Supreme Court of the United States in ignoring the question whether it has original jurisdiction of a suit commenced therein. *Minnesota v. Hitchcock*, (1902) 185 U. S. 373, 22 S. Ct. 650, 46 U. S. (L. ed.) 954.

*Leave to file an original bill* in the Supreme Court of the United States is ordinarily a matter of course, and may be granted without

intimating any opinion upon a question raised as to want of jurisdiction. *Washington v. Northern Securities Co.*, (1902) 185 U. S. 254, 22 S. Ct. 623, 46 U. S. (L. ed.) 897.

**Suits by or against states.**—The federal Supreme Court cannot take original jurisdiction of a suit by a state against corporations of other states brought to enforce by injunction the penal legislation of the state against traffic in intoxicating liquors. *Oklahoma v. Gulf, etc., R. Co.*, (1911) 220 U. S. 290, 31 S. Ct. 437, 55 U. S. (L. ed.) 469.

Oklahoma has no such interest in its cor-



porate capacity as enables it to invoke original jurisdiction of the Supreme Court by suit to enjoin a foreign railroad company from charging more than certain specified rates; the state not being engaged in the transportation of such commodities. *Oklahoma v. Atchison, etc., R. Co.*, (1911) 220 U. S. 277, 31 S. Ct. 434, 55 U. S. (L. ed.) 465.

**Suits between states.**—The original jurisdiction of the Supreme Court extends to a suit by the commonwealth of Virginia against the state of West Virginia to determine the amount due to the former by the latter as the equitable proportion of the public debt of the original state of Virginia which was assumed by West Virginia at the time of its creation as a state (*Virginia v. West Virginia*, (1907) 206 U. S. 290, 27 S. Ct. 732, 51 U. S. (L. ed.) 1068), although by reason of certain transactions with her creditors, Virginia may have been discharged from all liability as to West Virginia's share, other than to turn over the proceeds of the suit. *Virginia v. West Virginia*, (1911) 220 U. S. 1, 31 S. Ct. 330, 55 U. S. (L. ed.) 353. And such suit is to be considered by the federal Supreme Court in the untechnical spirit proper for dealing with a quasi-international controversy. *Virginia v. West Virginia*, (1911) 220 U. S. 1, 31 S. Ct. 330, 55 U. S. (L. ed.) 353.

A conflict between the authorities of the states of Louisiana and Mississippi, arising out of the enforcement of the oyster legislation of those states, which involves a dispute respecting the true boundary line, creates a controversy between the states in their sovereign capacity, which is within the original jurisdiction of the Supreme Court of the United States. *Louisiana v. Mississippi*, (1906) 202 U. S. 1, 26 S. Ct. 408, 50 U. S. (L. ed.) 913.

The original jurisdiction of the federal Supreme Court over "controversies between two or more states" extends to a suit by the state of South Dakota as the donee of the holders of certain bonds issued by the state of North Carolina, and secured by a mortgage of railroad stock belonging to that state, to compel payment of the bonds and a subjection of the mortgaged property to the satisfaction of the debt. *South Dakota v. North Carolina*, (1904) 192 U. S. 286, 24 S. Ct. 269, 48 U. S. (L. ed.) 448.

**Objections as to multifariousness, laches, and the like**, except so far as they affect the merits, will not be considered by the Supreme Court in a suit by the commonwealth of Virginia against the state of West Virginia, to determine the amount due to the former by the latter as the equitable proportion of the public debt of Virginia which was assumed by West Virginia at the time of its creation as a state. *Virginia v. West Virginia*, (1911) 220 U. S. 1, 31 S. Ct. 330, 55 U. S. (L. ed.) 353. See also *Virginia v. West Virginia*, (1907) 206 U. S. 290, 27 S. Ct. 732, 51 U. S. (L. ed.) 1068.

**Suits between United States and states.**—The original jurisdiction of the Supreme Court does not extend to a bill filed against the United States and others by the attorney-

general of Kansas on behalf of the state as trustee for the Missouri, Kansas & Texas Railway Company of certain lands in the Indian Territory, alleged to have been granted by Congress to the state for the benefit of the railway company, where the name of the state is being used simply for the prosecution of the claim of the railway company; "the United States is the real party in interest as defendant, and has not consented to be sued, which it cannot be without its consent." *Kansas v. U. S.*, (1907) 204 U. S. 331, 27 S. Ct. 388, 51 U. S. (L. ed.) 510.

The Supreme Court has no jurisdiction of a bill in equity filed by the state of Louisiana against the Secretary of the Interior and the Commissioner of the General Land Office to establish its title under the Swamp Land Grant Act of March 2, 1849, to certain lands which were approved to the state by the Secretary of the Interior upon the manifest mistake of law, that, upon the abandonment of the military reservation of which they formed a part, the lands fell within the terms of the grant, since such suit raises questions of law and fact upon which the United States would have to be heard. *Louisiana v. Garfield*, (1908) 211 U. S. 70, 29 S. Ct. 31, 53 U. S. (L. ed.) 92.

The original jurisdiction of the Supreme Court extends to a controversy between the states of Kansas and Colorado and the United States, presenting the questions whether Kansas has a right to the continuous flow of the waters of the Arkansas river as that flow existed before any interference therewith, or whether Colorado has the right to appropriate the waters of that stream so as to prevent that continuous flow, or whether the amount of the flow is subject to the superior authority and supervisory control of the United States. *Kansas v. Colorado*, (1907) 206 U. S. 46, 27 S. Ct. 655, 51 U. S. (L. ed.) 956.

A suit by a state to enjoin the Secretary of the Interior and the Commissioner of the Land Office from selling school lands in the Red Lake Indian reservation must be regarded as a controversy to which the United States is a party, and of which, as a state is also a party, the Supreme Court of the United States has original jurisdiction, in view of the provision of the Act of March 2, 1901, 31 Stat. L. 950, ch. 808, that the Indians need not be made parties to such a suit if the Secretary of the Interior is made a party thereto, and that the Attorney-General, on request of the Secretary, shall represent and defend the Indian rights. *Minnesota v. Hitchcock*, (1902) 185 U. S. 373, 22 S. Ct. 650, 46 U. S. (L. ed.) 954.

The immunity of the United States from suit prevents a state from maintaining, in the Supreme Court of the United States, a suit against the Secretary of the Interior and the Commissioner of the General Land Office, to restrain them from allotting and patenting in severalty swamp lands within the limits of an Indian reservation. *Oregon v. Hitchcock*, (1906) 202 U. S. 60, 26 S. Ct. 568, 50 U. S. (L. ed.) 935.

## Vol. IV, p. 439, sec. 688.

**Prohibition.** — In *Ex p. Joins*, (1903) 191 U. S. 93, 24 S. Ct. 28, 48 U. S. (L. ed.) 110, where a petition for a writ of prohibition against the Choctaw and Chickasaw Citizenship Court was denied because the cause in that court was finished, the Supreme Court expressly refrained from considering whether the jurisdiction to grant prohibition to the District Courts is confined, under section 688, to cases where those courts are "proceeding as courts of admiralty and maritime jurisdiction."

Prohibition against proceedings in the federal Circuit Court to enjoin the prosecution of search-and-seizure proceedings instituted in the state courts, under Okla. Sess. Laws 1907-1908, ch. 69, against intoxicating liquors shipped into the state, will not be granted by the federal Supreme Court, since adequate relief is afforded by the full right of review in the latter court and in the proper Circuit Court of Appeals by appeal or certiorari. *Ex p. Oklahoma*, (1911) 220 U. S. 191, 31 S. Ct. 426, 55 U. S. (L. ed.) 431.

**Mandamus.** — "In cases over which we possess neither original nor appellate jurisdiction we cannot grant prohibition or mandamus or certiorari as ancillary thereto." *In re Massachusetts*, (1905) 197 U. S. 482, 25 S. Ct. 512, 49 U. S. (L. ed.) 845, denying a petition for writs of prohibition, mandamus, and certiorari to restrain the justices of the Supreme Court of the District of Columbia from taking further proceedings or entertaining jurisdiction in an equity cause pending in that court. Followed in *In re Glaser*, (1905) 198 U. S. 171, 25 S. Ct. 653, 49 U. S. (L. ed.) 1000, denying a petition for mandamus to require the judges of a federal Circuit Court to take jurisdiction of a suit alleged to be pending and undetermined in that court.

Mandamus is the proper remedy where a single federal judge, in violation of the Act of June 18, 1910, sec. 17, 36 Stat. L. 557, now embodied in Judicial Code, sec. 266, *ante*, p. 242, of this Supplement, vacates a temporary restraining order suspending on constitutional grounds the enforcement of a state statute by restraining the action of a state officer thereunder, and denies an application for an interlocutory injunction, since the section above cited makes no provision for any appeal from an order of this character made by a single judge, and a right of appeal is not otherwise given by statute. *Ex p. Metropolitan Water Co.*, (1911) 220 U. S. 539, 31 S. Ct. 600, 55 U. S. (L. ed.) 575.

The power of the Supreme Court to issue writs of habeas corpus and writs of mandamus was originally conferred by and is still derived from that portion of the Act of 1789 which is now embodied in section 716 of the Revised Statutes (4 Fed. Stat. Annot. 498). It has been settled by repeated decisions of the Supreme Court that this power is a part of its appellate and not of its original jurisdiction, except in cases affecting am-

bassadors, other public ministers or consuls, and those in which a state is a party. *Ex p. Moran*, (C: C. A. 1906) 144 Fed. 594, 596, citing *Ex p. Bollman*, (1807) 4 Cranch 75, 100, 2 U. S. (L. ed.) 554; *Ex p. Yerger*, (1868) 8 Wall. 85, 98, 19 U. S. (L. ed.) 332; *Marbury v. Madison*, (1801) 1 Cranch 137, 2 U. S. (L. ed.) 60; *Bath County v. Amy*, (1871) 13 Wall. 244, 249, 20 U. S. (L. ed.) 539; *Kendall v. U. S.*, (1838) 12 Pet. 622, 9 U. S. (L. ed.) 1181; *Barber Asphalt Paving Co. v. Morris*, (1904) 132 Fed. 952, 66 C. C. A. 62, 67 L. R. A. 781.

In *In re Metropolitan Trust Co.*, (1910) 218 U. S. 312, 31 S. Ct. 18, 54 U. S. (L. ed.) 1051, the Supreme Court issued a mandamus to a federal Circuit Court to compel it to set aside a decree which vacated, after the term, a prior decree dismissing the bill as to one of the defendants, and to forbid the exercise of any further jurisdiction over such defendant.

Where a single judge, refusing to call to his assistance two other judges, had heard and denied an application for an interlocutory injunction under section 17 of the Act of June 18, 1910, ch. 309, 36 Stat. L. 557, which section is now embodied in Judicial Code, sec. 266, *ante*, title JUDICIARY, vol. 1, p. 242, of this Supplement, mandamus by the Supreme Court directing him to vacate his order was held to be the proper remedy, since the section made no provision for an appeal from an order made by a single judge denying an interlocutory injunction, and a right of appeal is not otherwise given by statute. *Ex p. Metropolitan Water Co.*, (1911) 220 U. S. 539, 31 S. Ct. 600, 55 U. S. (L. ed.) 575, citing *Ex p. Harding*, (1911) 219 U. S. 363, 31 S. Ct. 324, 55 U. S. (L. ed.) 252.

Refusal of a federal Circuit Court to remand a civil cause to the state court whence it had been removed as presenting a separable controversy between citizens of different states cannot be reviewed by mandamus, which may not be used to perform the office of an appeal or writ of error. *Ex p. Harding*, (1911) 219 U. S. 363, 31 S. Ct. 324, 55 U. S. (L. ed.) 252, *disapproving and qualifying* to some extent *Ex p. Wisner*, (1906) 203 U. S. 449, 27 S. Ct. 150, 51 U. S. (L. ed.) 264; *In re Moore*, (1908) 209 U. S. 490, 14 Ann. Cas. 1164, 28 S. Ct. 585, 706, 52 U. S. (L. ed.) 904, and *In re Winn*, (1909) 213 U. S. 458, 29 S. Ct. 515, 53 U. S. (L. ed.) 873; and holding that the case was governed by the general rule expressed in *Ex p. Hoard*, (1881) 105 U. S. 578, 26 U. S. (L. ed.) 1176; *In re Pollitz*, (1907) 206 U. S. 323, 27 S. Ct. 729, 51 U. S. (L. ed.) 1081; *Ex p. Nebraska*, (1908) 209 U. S. 436, 28 S. Ct. 581, 52 U. S. (L. ed.) 876; and applied in *Ex p. Gruetter*, (1910) 217 U. S. 586, 30 S. Ct. 690, 54 U. S. (L. ed.) 892.

See further as to power of federal courts to issue writs of prohibition and mandamus, R. S. sec. 716, 4 Fed. Stat. Annot. 499-506, and *infra*, this title.

## Vol. IV, p. 444, sec. 692.

**Repeal of this section.**—In *The Joseph B. Thomas*, (C. C. A. 1906) 148 Fed. 762, it was said: "It is true that section 691 of the Revised Statutes, conferring appellate jurisdiction on the Supreme Court from final judgments of Circuit Courts, or of District Courts acting as Circuit Courts in civil actions, where the matter in dispute exceeds the sum or value of \$2,000 (afterwards increased to \$5,000), was expressly repealed by section 14 of the Act of March 3, 1891, 26 Stat. L. 829, ch. 517; but section 692, in which there are like provisions limiting the appellate jurisdiction of the Supreme Court in reference to appeals from final decrees of the Circuit Courts, in cases of equity and of admiralty and maritime jurisdiction, is not repealed by the said Act, nor is there any express repeal in said Act of section 695, establishing the appellate jurisdiction of the Supreme Court from all final decrees of a District

Court in prize causes, and limiting the same to cases where the matter in dispute exceeds the sum or value of \$2,000, and providing that, without reference to the value of the matter in dispute, the appeal shall be allowed, on the certificate of the district judge that the adjudication involves a question of importance. Yet it is significant that as to causes described in these two sections, appellate jurisdiction without pecuniary limitation has uniformly been held to have been conferred by the Judiciary Act of 1891 upon the Supreme Court and the Circuit Courts of Appeals. This latter Act has been held to be a substitute for the old Judiciary Act, and supersedes and supplies the creation and regulation of appellate jurisdiction by said old Act and its amendments, except where they are consistent with the provisions of the later Act, or are preserved in force under the last paragraph of section 10 of that Act."

## Vol. IV, p. 445, sec. 695.

See note under R. S. sec. 692, *supra*, this page.

## Vol. IV, p. 446, sec. 698.

**Making up record.**—A Circuit Court of Appeals cannot make its own record for the hearing of a case on appeal by authorizing the withdrawal from its files of the record on a previous appeal, and permitting the same to be refiled as a part of the record on a subsequent appeal in the same case. It can act only upon a record which comes from the court below, properly certified. *Merri-man v. Chicago, etc., R. Co.*, (C. C. A. 1903) 120 Fed. 240.

**What should be included in record.**—A rule of the Circuit Court of Appeals which provides that "whenever it shall be necessary or proper in the opinion of the presiding judge in any Circuit or District Court that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting, and return of such original papers as to him may seem proper," fixes the limit within which the presiding judge may act in such matter and he is not authorized to make an order for incorporating original papers introduced in evidence in the record on appeal, instead of copies, merely for the purpose of saving expense to the parties, nor unless in his opinion an inspection of the originals by the appellate court, as distinguished from authenticated copies, is either necessary or would be useful or aidful in the determination of the appeal. *Dowagiac Mfg. Co. v. Brennan*, (1907) 156 Fed. 213, wherein the court said: "Though in this matter acting for the Circuit Court of Appeals under rule 14, we have not overlooked sections 698 and 750 of the Revised Statutes (under which we may say that our ruling would have been precisely the same), but we have preferred to be guided entirely

by the rule of the court where the appeals are pending, particularly as it has fixed the limits within which the presiding judge may act for it after the case has passed from his court."

The power of the court to direct what papers shall constitute that record which shall be transmitted to the appellate court by the transcript will not be questioned whenever such action becomes necessary because of the fact that the disputed paper has not been admitted to the files in the regular way, and this power is an essential grant of R. S. sec. 698, if not already inherent in the court without the statute. *Southern Bldg., etc., Assoc. v. Carey*, (1902) 117 Fed. 325, 334.

The practice of bringing into the record, by bill of exceptions, pleadings, or papers which the court has refused to allow a party to file, is not known to the federal courts in equity cases; but inasmuch as a consideration of such documents may be necessary to enable the appellate court to determine whether or not they were properly rejected, it would seem that, in the absence of any statute or rule regulating the practice in that regard, the trial court may properly, by an order, direct the clerk to certify the pleading or other document rejected to the appellate court for that purpose. *Southern Bldg., etc., Assoc. v. Carey*, (1902) 117 Fed. 326.

The court of bankruptcy from which an appeal is taken has no jurisdiction to designate what records shall be certified on which the appellate court shall determine the appeal. *In re A. L. Robertshaw Mfg. Co.*, (1905) 135 Fed. 220.

Where the parties to an appeal to the Circuit Court of Appeals in bankruptcy are unable to agree as to the contents of the appeal

record, it is the duty of the appellant to file a *proœdipe* with the clerk, pointing out specifically what records, in his judgment, should be certified, leaving appellee, if in his opinion the records certified are insufficient, to suggest a diminution of the record and ask for certiorari. *In re A. L. Robertshaw Mfg. Co.*, (1905) 135 Fed. 220.

**Remedies for defective record.**—The Circuit Court of Appeals will not dismiss an appeal on motion on the ground that the record filed is insufficient; that being a matter to be determined at the hearing on the merits, or to be corrected by certiorari for a diminution of the record. *Merriman v. Chicago, etc., R. Co.*, (C. C. A. 1903) 120 Fed. 240.

Under this section, it devolves on an appellant to see to it that a record is brought up to such court showing such of the proceedings of the trial court as are necessary for the proper presentation of the errors assigned, and for want of such a record the court has

power to dismiss the appeal. This power, however, ought not generally to be exercised unless the omission arose from negligence or indifference, and instead, where good faith is shown, the appellee will be directed to designate such additional papers, documents, and proof used on the hearing below as he deems necessary for a proper presentation of the case, and the appellant will be ordered to file the same as a part of the record under penalty of a dismissal of the appeal. *Kansas v. Meriwether*, (C. C. A. 1909) 171 Fed. 39.

**Amendments.**—A Circuit Court of Appeals is without power to dismiss an appeal on motion of the appellant and remand the case to the court below with directions to permit the amendment of a pleading on a showing that facts were inadvertently omitted therefrom, which was not known to appellant until after the appeal was taken. *Strand v. Griffith*, (C. C. A. 1905) 135 Fed. 739.

## Vol. IV, p. 448, sec. 699.

**Actions against revenue officers.**—Section 844 of the Revised Statutes requiring the clerk to pay into the Treasury any surplus of fees and emoluments shown by his return is

not a revenue law within the meaning of section 699. *U. S. v. Mason*, (1910) 218 U. S. 517, 529, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133.

## Vol. IV, p. 450, sec. 700.

Sections 649 and 700 are considered together herein, as they were in the original work.

**To what court applicable.**—Sections 649 and 700 relate exclusively to trials in the Circuit Courts, and there are no similar provisions in respect of trials in the District Courts. *U. S. v. Cleage*, (C. C. A. 1908) 161 Fed. 85; *U. S. v. St. Louis, etc., R. Co.*, (C. C. A. 1909) 169 Fed. 73; *Low v. U. S.*, (C. C. A. 1909) 169 Fed. 86.

But this section is applicable to the Circuit Court of Appeals. *Paul v. Delaware, etc., R. Co.*, (1904) 130 Fed. 951.

**To what cases applicable.**—This section is not applicable to default cases; and in an action of replevin brought in a federal court within the state of Illinois, in which the defendant makes default, the court is authorized to assess the damages without a jury under the Illinois Practice Act. *Midland Contracting Co. v. Toledo Foundry, etc., Co.*, (C. C. A. 1907) 154 Fed. 797.

There is no authority either at common law or by statute under which the facts in an action at law may be tried by the judge of a District Court of the United States without a jury; and where a case is so tried by stipulation, the judgment is not reviewable by the Circuit Court of Appeals. *U. S. v. Louisville, etc., R. Co.*, (C. C. A. 1909) 167 Fed. 306.

A judge of a federal District Court having neither statutory nor common-law authority to hear a criminal case without a jury on a plea of not guilty, he will be regarded in so doing as an arbitrator only, and his conclusions of fact cannot be reviewed on a writ of error. *Low v. U. S.*, (C. C. A. 1909) 169 Fed. 86.

**Effect of state laws and practice — Ruling on questions of law.**—The court cannot be required to rule on specific propositions of law presented by the parties in accordance with a state practice. *Streeter v. Chicago Sanitary Dist.*, (C. C. A. 1904) 133 Fed. 124.

The statute does not contemplate separate conclusions of law such as are common in the state practice, and judgment should be directed on the findings of fact. *Fowler v. Gowing*, (C. C. A. 1908) 165 Fed. 891.

**Ascertainment of facts.**—The state legislature in so far as the same presents the method for the ascertainment of the facts of the case under consideration, contrary to and inconsistent with the legislation of Congress on the same subject, must and should give way to the plain provisions of the federal law. It is the duty of the trial courts to adhere rigidly to the enactments of Congress prescribed for their government, and the presumptions are all unfavorable to the waiver of the right of trial by jury. *Swift v. Jones*, (C. C. A. 1906) 145 Fed. 489.

**The making of special findings** by a federal Circuit Court on waiver of a jury, and the effect thereof, is governed by R. S. secs. 649, 700, and not by state statutes. *Jones v. U. S.*, (C. C. A. 1905) 135 Fed. 518.

**A state statute permitting the waiver of a jury trial** in actions at law by oral consent in open court entered in the minutes, does not apply to federal courts in the trial of actions at law as a substitute for a written waiver of a jury required by R. S. secs. 649, 700. *Erkel v. U. S.*, (C. C. A. 1909) 169 Fed. 623.

Whatever may be the practice as to references of common-law actions in the courts of

the state, in a federal court the reference of such a case can be made only on consent of both parties. *Elkin v. Denver Engineering Works Co.*, (C. C. A. 1910) 181 Fed. 684.

A motion for a new trial, although indispensable under the state practice, is not essential to a review of the rulings of the trial courts under the federal practice. *Boatmen's Bank v. Trower Bros. Co.*, (C. C. A. 1910) 181 Fed. 804.

**Compliance with Act essential to review—Generally.**—Whenever cases are submitted for trial without a jury, it must plainly appear that the waiver was made as prescribed by the Act of Congress. *Swift v. Jones*, (C. C. A. 1906) 145 Fed. 489.

The trial of issues of fact by the court without a jury was unknown to the common law. Such questions were exclusively for the jury, and in case questions of fact were submitted to the judge without a jury, by agreement of the parties, it was held that, in determining such issues, the judge was not acting in any official capacity, but as an arbitrator. *Campbell v. Boyreau*, (1858) 21 How. 223, 16 U. S. (L. ed.) 96. Manifestly, therefore, the judge has no power, without the consent of the parties, to determine issues of fact, and only by virtue of the provision of section 649 does the judge's decision upon a question of fact become a judicial act. *U. S. v. Ramsey*, (1907) 158 Fed. 488.

Rulings of a Circuit Court in the progress of the trial of an action at law by the court without a jury cannot be reviewed by the appellate court, unless a written stipulation waiving a jury is signed and filed with the clerk in accordance with R. S. sec. 649, so as to bring the case within the provisions of section 700; in the absence of such a stipulation the only question which can be considered is whether the judgment rendered is sustained by the pleadings. *Defiance v. Schmidt*, (C. C. A. 1903) 123 Fed. 1.

**Reference to referee.**—An agreement in open court by the parties to an action at law in a federal court that the cause may be referred to a referee to make findings of fact is a waiver of the right to a jury trial only on condition that the facts be found by a referee, and confers no power upon the judge to ignore such findings, and himself determine the issues of fact, and the judge has no such power unless by consent, but can only confirm or reject the findings of the referee, and in case they are set aside the cause stands for trial precisely the same as though it had never been referred. *U. S. v. Ramsey*, (1907) 158 Fed. 488.

**Reference to special master.**—Where an action at law was brought in the Circuit Court, the trial judge under such sections has no power, even with the acquiescence of both parties, to order a trial before a special master authorized to hear and pass on the issues of fact, and report his findings to the court. *Swift v. Jones*, (C. C. A. 1906) 145 Fed. 489, wherein the court said: "Without, therefore, in any manner questioning the right, in a proper case, to arbitrate, either through the judge acting as arbitrator, or the selection of referees contemplated by state

statute, or otherwise to be chosen, we hold that it is well recognized that neither by agreement of parties nor by the laws of the state can a federal court sitting in such state depart from the prescribed modes of procedure and rules embodied in the Act of Congress for its guidance (*Graham v. Bayne*, (1855) 18 How. 60, 15 U. S. (L. ed.) 265; *Kelsey v. Forsyth*, (1858) 21 How. 85, 16 U. S. (L. ed.) 32; *Richmond v. Smith*, (1872) 15 Wall. 429, 21 U. S. (L. ed.) 200); and hence when it appears that the reference of the lower court was not in any sense intended as an arbitration, or a purpose to have the referee to whom it was referred try and determine the same as an arbitrator, but that plainly the purpose of the reference was to have him ascertain the facts, in lieu of the jury or the judge of the lower court, by written consent of the parties, thereby substituting his judgment as to the facts of the case for that of the jury or the lower court, and that the judgment of the lower court was the result merely of his findings, as distinguished from rendering judgment upon its own findings in a proper case, we think it clear that such practice should not be sanctioned or adopted as a rule applicable to the trial of cases in this circuit. To do so would be, in effect, to create a new and additional method of disposition of common-law cases, neither provided for nor contemplated by the Acts of Congress on the subject."

**What is a submission under the Act.**—A written stipulation which clearly contemplates the trial to the court of an action at law, and requests a special finding, is a sufficient waiver of a jury to authorize a determination, upon writ of error, of the sufficiency of the facts found to support the judgment. *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A. 1904) 132 Fed. 721.

A recital in a judgment that both parties, announcing "ready for trial," formally waived a jury in open court, is sufficient to show waiver of jury by written stipulation, as required by R. S. sec. 649. *Columbus Compress Co. v. U. S. Fidelity, etc., Co.*, (C. C. A. 1911) 186 Fed. 487.

**Stipulation in writing essential.**—Where a case is tried to the court without a jury, and there is no written stipulation waiving the jury, none of the questions decided at the trial can be re-examined on writ of error. *Erkel v. U. S.*, (C. C. A. 1909) 169 Fed. 623.

A request, made to the court by each party, to instruct the jury to render a verdict in his favor, is not equivalent to a submission of the case to the court without the intervention of a jury within the intentment of R. S. secs. 649, 700. *Minahan v. Grand Trunk Western R. Co.*, (C. C. A. 1905) 138 Fed. 42; *McCormick v. Waco Nat. City Bank*, (C. C. A. 1906) 142 Fed. 132.

But a written stipulation is not essential to a waiver of a jury to assess damages on a bond after default, under R. S. sec. 961, declaring that when the sum for which judgment shall be rendered in such suit is uncertain, it shall, if either party request it, be assessed by a jury. *Brock v. Fuller Lumber Co.*, (C. C. A. 1907) 153 Fed. 272.

**Effect of stipulation on new trial.** — *Whether the finding be general or special*, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a special verdict (finding) the question is presented as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant. *Powers v. U. S.*, (C. C. A. 1903) 119 Fed. 565; *York v. Washburn*, (C. C. A. 1904) 129 Fed. 564.

A *general finding* upon a trial by the court without a jury has by the statute the same effect as the verdict of a jury. The parties are concluded upon the facts by the determination of the court, and nothing is presented for review except as might have been reviewed had there been a trial by jury. *Streeter v. Chicago Sanitary Dist.*, (C. C. A. 1904) 133 Fed. 124.

If the finding be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by the bill of exceptions. *Streeter v. Chicago Sanitary Dist.*, (C. C. A. 1904) 133 Fed. 124.

**Findings generally.** — On a petition to revise in matter of law the proceedings of a District Court in bankruptcy, in order that it may appear by the record that the issues raised were presented below, and for other reasons, findings which involve distinct propositions of law, or something as a substitute therefor, are necessary, and they cannot be supplied by a mere opinion of the court. While in some cases involving issues of a substantial character justice may require a relaxation of the rule, or the consideration of issues not presented to the original tribunal, such course will not be followed where the questions raised relate merely to matters of form or administration, and no material detriment to the estate can result from the action complained of. *In re Boston Dry Goods Co.*, (C. C. A. 1903) 125 Fed. 226.

Where parties to a suit tried by the court without a jury desire a review of the law involved in the case, a special verdict raising the legal propositions must be procured, or propositions of law must be presented and ruled on by the trial judge. *Paul v. Delaware, etc., R. Co.*, (1904) 130 Fed. 951.

In actions at law, where a trial by jury is waived, the duty of finding the facts is placed upon the trial court. *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A. 1904) 132 Fed. 721.

But there need be no finding of a fact stated in an agreed statement of facts. *Treat v. Farmers' L. & T. Co.*, (C. C. A. 1911) 185 Fed. 760.

**General and special** — *Special findings not obligatory.* — The trial court is not required to make special findings. *Paul v. Delaware, etc., R. Co.*, (1904) 130 Fed. 951.

When the trial is to the court, without the intervention of a jury, whether the finding shall be general or special rests in the discretion of the court. *Dakota County School Dist. No. 11 v. Chapman*, (C. C. A. 1907) 152 Fed. 887.

Parties have no right to require a federal court, in hearing a law case without a jury,

to make a special finding. *Southern R. Co. v. St. Louis Hay, etc., Co.*, (C. C. A. 1907) 153 Fed. 728.

In *Waialua Agricultural Co. v. Oahu R., etc., Co.*, (1906) 18 Hawaii 87, it was said that however desirable it may be to obtain special findings from the court, our statute does not require them to be made.

In *Berwind-White Coal Min. Co. v. Martin*, (C. C. A. 1903) 124 Fed. 313, it was said: "The defendant presented a number of requests for special findings of fact and conclusions of law, but the court, without passing upon them, found generally that the plaintiff was entitled to recover. There can be no question as to the entire propriety of this course. The statute expressly provides that the finding of the court on the facts may be general or special, and you can no more compel the latter than you can require a special verdict from a jury. It is true that in *Norris v. Jackson*, (1869) 9 Wall. 125, 19 U. S. (L. ed.) 608, it is said that, 'if the parties desire a review of the law involved in the case, they must . . . get the court to find a special verdict which raises the legal questions;' but it is not to be understood from this that it can be exacted, all that is meant being that the court should be persuaded to do so. Neither is the alternative, which is there suggested, of presenting propositions of law, and requiring the court to rule upon them, of any greater obligation. The right to this has been asserted without success in a number of cases, and the practice must now be considered as settled to the contrary. *Mercantile Mut. Ins. Co. v. Folsom*, (1873) 18 Wall. 237, 21 U. S. (L. ed.) 827; *Cooper v. Omohundro*, (1873) 19 Wall. 65, 22 U. S. (L. ed.) 47; *St. Louis v. Western Union Tel. Co.*, (1897) 166 U. S. 388, 17 S. Ct. 608, 41 U. S. (L. ed.) 1044; *Key West v. Baer*, (1895) 86 Fed. 440, 13 C. C. A. 572; *Consolidated Coal Co. v. Polar Wave Ice Co.*, (1901) 106 Fed. 798, 45 C. C. A. 638."

But the court should make special findings of fact when it is doubtful, under the decisions, whether the defeated party could otherwise properly present to an appellate court the questions of law involved. *Joline v. Metropolitan Securities Co.*, (1908) 164 Fed. 650.

*But the finding must be either one or the other*, general or special, and its effect is to be determined upon its character in that regard. *Powers v. U. S.*, (C. C. A. 1903) 119 Fed. 565.

*Nor can there be both a general and a special finding.* It must be one or the other. *Streeter v. Chicago Sanitary Dist.*, (C. C. A. 1904) 133 Fed. 124; *U. S. v. Cleage*, (C. C. A. 1908) 161 Fed. 85.

Where a *general finding* is made and judgment is rendered thereon, it cannot be regarded as superseded by a supposed special finding, which was not entered of record, is only found in the bill of exceptions, and does not purport to qualify or take the place of the general finding. *U. S. v. Cleage*, (C. C. A. 1908) 161 Fed. 85.

**Special findings and agreed statement of facts** — *Manner of making.* — A special finding should be a clear and concise statement

of the ultimate facts, and not a statement, report, or recapitulation of evidence from which such facts may be found or inferred. The ultimate facts must be so stated that, without inferences, or comparisons, or balancing testimony, or weighing evidence, the case may be determined by the application of pertinent rules of law. If any ultimate fact material to the issues is to be inferred from the whole evidence, or from other facts proved or admitted, the inference must be drawn by the trial court, and the fact must be stated in the finding. Like the special verdict of a jury, a special finding can present only questions of law. *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A. 1904) 132 Fed. 721.

A special finding should state the ultimate facts on which the law must determine the rights of the parties, and should not contain a statement of the evidence. *American Nat. Bank v. Watkins*, (C. C. A. 1902) 119 Fed. 545.

A special finding of facts should be the equivalent of the special verdict of a jury, and should cover all the issues, so that in the event of proceedings in error, if the trial court's conclusions of law are deemed incorrect, and if the proceedings are otherwise without error, the appellate court may, under section 701, Rev. Stat., direct such judgment as the special finding requires, without the necessity of awarding a new trial. *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A. 1904) 132 Fed. 721.

A mere setting out of the testimony of a witness, with a statement that the court finds it to be true, is not a finding of fact which will support a judgment. *Perkins v. Von Baumbach*, (C. C. A. 1911) 185 Fed. 265.

Where only probative facts are found, leaving the ultimate facts necessary to support the judgment to be inferred, the judgment must be reversed, and a new trial ordered. *Powers v. U. S.*, (C. C. A. 1903) 119 Fed. 582.

When judgment has been rendered on a general finding, there is no authority for inserting special findings in the bill of exceptions signed at a succeeding term of court. *Streeter v. Chicago Sanitary Dist.*, (C. C. A. 1904) 133 Fed. 124.

*What constitutes.*—A special finding is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest. *Powers v. U. S.*, (C. C. A. 1903) 119 Fed. 585.

The special finding, contemplated by R. S. secs. 649, 700, corresponds to the special verdict of a jury, is equally specific and responsive to the issues, and is spread at large upon the record, as part thereof, in like manner as is such a verdict. *U. S. v. Sioux City Stock Yards Co.*, (C. C. A. 1909) 167 Fed. 126.

An opinion of the trial judge setting forth the reasons for his decision in an action at law tried by a Circuit Court without the intervention of a jury cannot be regarded as a special finding within the meaning of R. S.

secs. 649, 700. *U. S. v. Sioux City Stock Yards Co.*, (C. C. A. 1909) 167 Fed. 126.

Nor does such an opinion, by being copied into the judgment entry, become a special finding of the ultimate facts, in the nature of a special verdict. *York v. Washburn*, (C. C. A. 1904) 129 Fed. 564.

An opinion of the trial judge analyzing the facts and applying the law is not a "special finding" of facts within section 700. *Keeley v. Ophir Hill Consol. Min. Co.*, (C. C. A. 1909) 169 Fed. 598.

*Omissions.*—In *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A. 1904) 132 Fed. 721, it was said: "While the special finding under consideration does not meet the requirements of the Act of Congress, it does sufficiently respond to some of the issues raised by the pleadings, although not responding to others. In this situation the finding may be examined to ascertain whether the ultimate facts found and stated therein are decisive of the controversy, and determine what judgments should be rendered, irrespective of any response which could be made to the issues upon which the finding is silent. If, under a correct application of legal principles, the facts adequately found and stated determine the cases, the imperfection in the special finding becomes immaterial, and the present judgments must be affirmed, or other judgments must be directed in their stead, as the facts found and stated may require. But if the facts found do not, under the application of pertinent rules of law, determine the cases, the judgments must be reversed, and a new trial awarded. In the latter event, the Circuit Court will be precluded from again adjudging in favor of the defendants upon the facts declared by the judgment of reversal to be insufficient to sustain the present judgments, and it will be incumbent upon that court to proceed to the trial and proper determination of the other issues."

*Effect.*—A special finding which states the ultimate facts is conclusive upon the appellate court, even though it contains, in addition, statements of evidence and inferences therefrom. *American Nat. Bank v. Watkins*, (C. C. A. 1902) 119 Fed. 545.

Special findings by a trial judge in an action at law in a federal court, where a jury has been waived pursuant to the provisions of R. S. sec. 649, have the same effect as special verdicts of a jury, and must embrace a finding on every material issue joined in the case, otherwise the result is a mistrial. *Towle v. Boston First Nat. Bank*, (C. C. A. 1907) 153 Fed. 566. See also *San Fernando Copper Min., etc., Co. v. Humphrey*, (C. C. A. 1904) 130 Fed. 300.

*Questions reviewable.*—If the findings be special the review may extend to the determination of the sufficiency of the facts found to support the judgment. No other or different review is permitted. *Streeter v. Chicago Sanitary Dist.*, (C. C. A. 1904) 133 Fed. 124; *Southern R. Co. v. St. Louis Hay, etc., Co.*, (C. C. A. 1907) 153 Fed. 728; *Mason City, etc., R. Co. v. Boynton*, (C. C. A. 1907) 158 Fed. 599; *Chicago G. W. R. Co. v. Minneapolis, etc., R. Co.*, (C. C. A. 1910) 176

Fed. 237; *Chicago, etc., R. Co. v. Frye-Bruhn Co.*, (C. C. A. 1911) 184 Fed. 15.

The true test for determining whether or not a question or ruling in a trial by the court without a jury is reviewable is the answer to the question whether or not it would have been open to review if the trial had been to a jury. The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial to a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court which fairly presents this issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered. *U. S. Fidelity, etc., Co. v. Woodson County*, (C. C. A. 1906) 145 Fed. 144.

Decisions upon the admission and exclusion of evidence, upon questions of law, upon the question whether or not there is any substantial evidence to warrant the finding, and upon the question whether or not the finding supports the judgment, are the only rulings at the trial that may be reviewed. *Barnsdall v. Waltemeyer*, (C. C. A. 1905) 142 Fed. 415.

Where a jury is waived, and an action at law is tried by a national court which makes a finding or renders a judgment, no question of fact and no question of mixed law and fact, except those questions of law which have been reserved by exception, motion, or request, are reviewable in an appellate court. *U. S. Fidelity, etc., Co. v. Woodson County*, (C. C. A. 1906) 145 Fed. 144.

Errors alleged in the findings of the court on a trial without a jury are not subject to revision by the Circuit Court of Appeals, that court being limited in that connection to the question whether there is any evidence on which such findings could be made. *Paul v. Delaware, etc., R. Co.*, (1904) 130 Fed. 951.

A special finding that plaintiff was not a *bona fide* purchaser of a note for value, but took the same subject to any defense affecting the consideration, is one of fact, and is not reviewable on appeal as a conclusion of law. *American Nat. Bank v. Watkins*, (C. C. A. 1902) 119 Fed. 545.

An assignment that the court erred in making a particular finding of fact is not reviewable on appeal, if there is any evidence on which to base the finding. *San Fernando Copper Min., etc., Co. v. Humphrey*, (C. C. A. 1904) 130 Fed. 298.

**Disposal of case on error.**—Evidence which should have been excluded on the trial as irrelevant will be excluded on review under R. S. sec. 700. *Black v. Supreme Council, etc.*, (1903) 120 Fed. 580.

Where, in an action on an award pursuant to a fire policy, a reversal was required because of an error of the trial court in disposing of a question of law and there was no disputed question of fact in the case, the

Court of Appeals will render final judgment instead of remanding the cause for a new trial. *Fellman v. Royal Ins. Co.*, (C. C. A. 1911) 184 Fed. 577.

**General findings.**—Where an action at law is tried without a jury, under R. S. secs. 649, 700, and only a general finding is made, and the ultimate facts are not agreed upon by the parties, there can be no review of the question whether the judgment is supported by the facts found; and, unless exceptions are taken to the rulings made during the trial, there is no question which can be reviewed by the appellate court. *National Surety Co. v. Cincinnati, etc., R. Co.*, (C. C. A. 1906) 145 Fed. 34.

Where, notwithstanding defendant's application for special findings of fact, the court found generally that the plaintiff was entitled to recover, the facts cannot be reviewed on appeal. *Berwind-White Coal Min. Co. v. Martin*, (C. C. A. 1903) 124 Fed. 313.

Where writs of error are prosecuted in cases tried to the court on stipulation waiving a jury trial, as authorized by R. S. sec. 649, the Court of Appeals is limited to reviewing exceptions taken to the admission or exclusion of evidence, and to rulings on question of law. *Kruger v. Constable*, (C. C. A. 1904) 128 Fed. 908; *Paul v. Delaware, etc., R. Co.*, (1904) 130 Fed. 951; *Streeter v. Chicago Sanitary Dist.*, (C. C. A. 1904) 133 Fed. 124; *Mankato v. Barber Asphalt Paving Co.*, (C. C. A. 1905) 142 Fed. 329; *Chicago G. W. R. Co. v. Minneapolis, etc., R. Co.*, (C. C. A. 1910) 176 Fed. 237; *Boatmen's Bank v. Trower Bros. Co.*, (C. C. A. 1910) 181 Fed. 804.

The sufficiency of the facts found to support the judgment cannot be reviewed. *West v. Houston Oil Co.*, (C. C. A. 1905) 136 Fed. 343.

An assignment of error that the court "erred in rendering judgment in favor of the plaintiff and against the defendant" presents no question which can be reviewed. *Fitzgerald v. Bassford*, (C. C. A. 1906) 142 Fed. 134.

**Rulings and exceptions.**—Objections to the admission or exclusion of evidence, or to the court's rulings on propositions of law, in a case tried to the court without a jury, must appear by bill of exceptions in order to be reviewed. *Paul v. Delaware, etc., R. Co.*, (1904) 130 Fed. 951.

But where a case is tried to the court without a jury, a bill of exceptions cannot be used to bring up the entire testimony for review. *Paul v. Delaware, etc., R. Co.*, (1904) 130 Fed. 951.

**Necessity.**—On writ of error to review a judgment of a Circuit Court in an action tried by stipulation to the court without a jury, as provided by R. S. secs. 649, 700, where there was a general finding, in the absence of a bill of exceptions, the record presents only the question whether the pleadings support the finding and judgment. *Mexico Nat. R. Co. v. U. S.*, (C. C. A. 1903) 125 Fed. 1004; *Mexico Nat. R. Co. v. O'Leary*, (C. C. A. 1903) 126 Fed. 363; *Marinette Sawmill Co. v. Scofield*, (C. C. A. 1909) 174 Fed. 562.



## Vol. IV, p. 458, sec. 701.

**Applicable to Circuit Courts of Appeals.**—*American Trust, etc., Bank v. Zeigler Coal Co.*, (1908) 165 Fed. 512.

In *Farrar v. Wheeler*, (C. C. A. 1906) 145 Fed. 482, it was said: "The series of statutes resulting in section 701 of the Revised Statutes was formally considered in *Ballew v. U. S.*, (1895) 160 U. S. 187, 198, 16 S. Ct. 283, 40 U. S. (L. ed.) 388, and sequence, and the flexible powers of the Supreme Court, which powers we hold by the Act establishing the Circuit Court of Appeals, was fully explained. At page 202 of 160 U. S., page 263 of 16 S. Ct., 40 U. S. (L. ed.) 388, the conclusion is as follows: 'From this, and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, it follows as a necessary conclusion that general authority was given to it on a writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require.'"

**Modifying judgment.**—Where all questions of fact have been tried and determined without error, the incorporation in the judgment of provisions which are unauthorized does not necessitate a new trial, but only a modification of the judgment. *Mason City, etc., R. Co. v. Boynton*, (C. C. A. 1907) 158 Fed. 599.

On affirmance of a judgment of conviction in a criminal case, the Circuit Court of Appeals may, at least with the consent of the United States attorney, authorize the trial

judge to modify the sentence imposed. *Scott v. U. S.*, (C. C. A. 1908) 165 Fed. 172.

**Execution of costs.**—The rules of the Supreme Court and Circuit Courts of Appeals provide that when costs are allowed the clerk shall insert the amount in the mandate, with the bill of items annexed. Rule 24, Supreme Court Rules, 3 S. Ct. xiii; Rule 31, Court of Appeals Rules, 150 Fed. cxxxiii, 79 C. C. A. cxxxiii. Therefore it has been held that to authorize a Circuit Court to issue execution for costs awarded by the Circuit Court of Appeals, the mandate should contain a special provision directing the same. *American Trust, etc., Bank v. Zeigler Coal Co.*, (1908) 165 Fed. 512.

In *Corn Products Refining Co. v. Chicago Real Estate Loan, etc., Co.*, (C. C. A. 1911) 185 Fed. 63, it was held that where, on appeal to the Circuit Court of Appeals, the bill of costs was taxed by the clerk and annexed to the mandate as required by the Circuit Court of Appeals Rule 29 (5), 150 Fed. cviii, 79 C. C. A. cviii, the mandate was sufficient, both for incorporation of the costs in the order with reference to costs in the Circuit Court, and for the issuance of an execution out of the Circuit Court for the collection of the residue after a set-off.

**Final judgment.**—An appellate court, on reversal of a judgment, will not direct the judgment to be entered below, unless it can thereby finally dispose of the case. *Exchange Mut. L. Ins. Co. v. Warsaw-Wilkinson Co.*, (C. C. A. 1910) 185 Fed. 487.

## Vol. IV, p. 459, sec. 702.

**Jurisdiction over Oklahoma courts.**—In *Es p. Moran*, (C. C. A. 1906) 144 Fed. 594, it was said: "The Supreme Court has jurisdiction to review the final decisions of the Supreme Court of Oklahoma in certain classes of cases by writs of error or by appeals. This court has like jurisdiction in other and more numerous cases. Neither court has this power in cases of the conviction of capital crimes. But since each of these courts has appellate jurisdiction over the Supreme Court

of Oklahoma and hence over the subordinate courts within its jurisdiction, the Supreme Court of the United States and this court each has the power to issue writs of habeas corpus to inquire into the power of any court in Oklahoma territory to imprison a person convicted of a capital crime."

This section has been cited in *Royal Ins. Co. v. Martin*, (1904) 192 U. S. 156, 24 S. Ct. 247, 48 U. S. (L. ed.) 385.

## Vol. IV, p. 460, sec. 2.

**Method of review.**—The findings of a territorial District Court, having been adopted and affirmed by the Supreme Court of the territory, serve the purpose of the statement of facts required by the Act of April 7, 1874, 18 Stat. L. 27, ch. 80, on appeal to the federal Supreme Court. *Eagle Min., etc., Co. v. Hamilton*, (1910) 218 U. S. 513, 31 S. Ct. 27, 54 U. S. (L. ed.) 1131.

The Supreme Court, in *Stringfellow v. Cain*, (1878) 99 U. S. 610, 25 U. S. (L. ed.) 421, in *Hecht v. Boughton*, (1881) 105 U. S. 235, 26 U. S. (L. ed.) 1018, and in *Bonnifield v. Price*, (1882) 154 U. S. 672, 14 S. Ct. 1194, 26 U. S. (L. ed.) 1022, has held that by virtue of this statute the appellate jurisdiction

of the Supreme Court over the judgment or the decree rendered by a territorial court in a case not tried by a jury can only be exercised by appeal, and dismissed cases of that nature which had been brought before it on writs of error. *Shields v. Mongollon Exploration Co.*, (C. C. A. 1905) 137 Fed. 539.

**Oklahoma.**—The manner of reviewing judgments, in civil cases, of the Supreme Court of the territory of Oklahoma, is specially provided for by the ninth section of the Act of May 2, 1890, 26 Stat. L. 81, 85, ch. 182, providing a territorial government for Oklahoma, and is not governed by the Act of Congress of 1874. *Comstock v. Eagleton*, (1905) 196 U. S. 99, 25 S. Ct. 210, 49 U. S.

(L. ed.) 402; *Oklahoma City v. McMaster*, (1905) 196 U. S. 529, 25 S. Ct. 324, 49 U. S. (L. ed.) 587.

**Questions for review.**—On an appeal from a judgment of a territorial Supreme Court, affirming the judgment of the court of first instance, which, after hearing the evidence, found all the issues in a suit for specific performance in favor of the defendants, the Supreme Court of the United States will ordinarily, in reviewing the facts, confine itself to questions of the admissibility of evidence and whether there was any evidence to sustain the conclusion reached, where such is the practice in the territorial court. *Halsell v. Renfrow*, (1906) 202 U. S. 287, 26 S. Ct. 610, 50 U. S. (L. ed.) 1032.

In *De la Rama v. De la Rama*, (1906) 201 U. S. 303, 26 S. Ct. 485, 50 U. S. (L. ed.) 765, it was said: "Since that Act was passed we have always held that the jurisdiction of this court on an appeal from the Supreme Court of a territory did not extend to a re-examination of the facts, but was limited to determining whether the findings of fact supported the judgment, and to reviewing errors in the admission or rejection of testimony, when exceptions have been duly taken to the action of the court in this particular." Citing *Stringfellow v. Cain*, (1878) 99 U. S. 610, 25 U. S. (L. ed.) 421; *Eilers v. Boatman*, (1884) 111 U. S. 356, 4 S. Ct. 432, 28 U. S. (L. ed.) 454; *Idaho, etc., Land Imp. Co. v. Bradbury*, (1889) 132 U. S. 509, 10 S. Ct. 177, 33 U. S. (L. ed.) 433; *Mammoth Min. Co. v. Salt Lake Foundry, etc., Co.*, (1894) 151 U. S. 447, 14 S. Ct. 384, 38 U. S. (L. ed.) 229; *Young v. Amy*, (1898) 171 U. S. 179, 18 S. Ct. 802, 43 U. S. (L. ed.) 127.

The jurisdiction of the federal Supreme Court under the Act of April 7, 1874, 18 Stat.

L. 27, ch. 80, on an appeal from a territorial court, is limited to the inquiry whether the findings of fact made by the court below support its judgment, and to a review of exceptions which have been duly taken to rulings upon the admission or rejection of evidence. *Eagle Min., etc., Co. v. Hamilton*, (1910) 218 U. S. 513, 31 S. Ct. 27, 54 U. S. (L. ed.) 1131.

**Alaska.**—The appellate jurisdiction of this court over appeals and writs of error from the District Courts of Alaska is not ruled by the Act of April 7, 1874, but by chapter 51 of the Act of June 6, 1900, 31 Stat. L. 414, ch. 786, 1 Fed. Stat. Annot. 147, providing a Civil Code for Alaska. *Shields v. Mongollon Exploration Co.*, (C. C. A. 1905) 137 Fed. 539.

**Philippine Islands.**—This Act has no application to the Philippine Islands, appeals from the Supreme Court of which are regulated by section 10 of the Act of July 1, 1902, 5 Fed. Stat. Annot. 722. *De la Rama v. De la Rama*, (1906) 201 U. S. 303, 26 S. Ct. 485, 50 U. S. (L. ed.) 765.

**Porto Rico.**—In *Garzot v. De Rubio*, (1908) 209 U. S. 283, 28 S. Ct. 548, 52 U. S. (L. ed.) 794, it was said: "While the suggestion that because there is no intermediate reviewing court between this and the District Court of the United States for Porto Rico, differing from what is generally the case in the territories of the United States, a wider scope of authority should exist in reviewing by appeal the decrees of the District Court of Porto Rico, may have cogency, it affords no ground for disregarding the plain command of the statute of 1874, which is here applicable, as expounded by many previous decisions of this court."

## Vol. IV, p. 462, sec. 705.

This section has been cited in *Columbia Heights Realty Co. v. Rudolph*, (1910) 217 U. S. 547, 30 S. Ct. 581, 54 U. S. (L. ed.) 877.

## Vol. IV, p. 463, sec. 2.

**Federal question involved.**—"It is clear from the express words of those enactments that this court may review the final judgment of the Supreme Court of one of the territories of the United States in any case, without regard to the sum or value in dispute, where the Constitution or a statute or treaty is brought in question, and in every other case whatever where the sum or value in dispute exceeds \$5,000, exclusive of costs." *Royal Ins. Co. v. Martin*, (1904) 192 U. S. 149, 24 S. Ct. 247, 48 U. S. (L. ed.) 385.

**Constitutionality of territorial enactment.**—A controversy as to the constitutional right of a territorial legislature to pass a specified law under the broad legislative power conferred by R. S. sec. 1851 involves the validity of an authority exercised under the United States within the meaning of this section. *New Mexico v. Denver, etc., R. Co.*, (1906) 203 U. S. 38, 27 S. Ct. 1, 51 U. S. (L. ed.) 78.

**"Matter in dispute."**—That part of a judgment of a territorial District Court, in favor of plaintiff in an action to recover taxes, which was disallowed by the judgment of the territorial Supreme Court, reversing the judgment below except as to an item which was not contested, is the "matter in dispute," within the meaning of this section. *New Mexico v. Atchison, etc., R. Co.*, (1906) 201 U. S. 41, 26 S. Ct. 386, 50 U. S. (L. ed.) 651.

Some sum of value must be in dispute in order to sustain the appellate jurisdiction of the United States Supreme Court over the Supreme Courts of the territories which is conferred by this section. *New Mexico v. Denver, etc., R. Co.*, (1906) 203 U. S. 38, 27 S. Ct. 1, 51 U. S. (L. ed.) 78.

A suit in which the matter in dispute is the right of consignors to have a consignment shipped by a common carrier to its destination involves a valuable right, measurable in

money, and therefore satisfies the requirements of this Act. *New Mexico v. Denver, etc., R. Co.*, (1906) 203 U. S. 38, 27 S. Ct. 1, 51 U. S. (L. ed.) 78.

The liability to a fine on a judgment of ouster in quo warranto proceedings, or the possible effect of such judgment in subsequent litigation over the emoluments of the office, does not make the matter in dispute in the quo warranto proceedings after the term of office has expired measurable by some sum or value in money, and thus bring the judgment within the scope of the provisions of this section. *Albright v. New Mexico*, (1906) 200 U. S. 9, 26 S. Ct. 210, 50 U. S. (L. ed.) 346.

**Oklahoma territory.**—The jurisdiction to review by writs of error or by appeal the final judgments of the Supreme Court of the territory of Oklahoma is divided between the

Supreme Court of the United States and this court. The former has jurisdiction to revise in that way cases which involve the validity of a treaty, a statute, or an authority exercised under the United States, and civil cases which are not reviewable by the Circuit Courts of Appeals in which the matter in dispute exceeds \$5,000. *Ex p. Moran*, (C. C. A. 1906) 144 Fed. 594.

This court has the power to review in that way final decisions of the Supreme Court of Oklahoma in all cases in which the jurisdiction below is dependent upon the citizenship of the opposite parties to the suit, in all admiralty cases, in all cases arising under the patent laws, the revenue laws and the bankruptcy laws, and in all cases arising under the criminal law except in cases of the conviction of a capital crime. *Ex p. Moran*, (C. C. A. 1906) 144 Fed. 594.

## Vol. IV, p. 466, sec. 8.

This section is evidently superseded by Judicial Code, sec. 250, *ante*, title JUDICIARY, vol. 1, p. 235, of this Supplement, and this note should be read in connection with that section and the note thereto.

As to section 233 of the District of Columbia Code mentioned in Judicial Code, sec. 250, above cited, "in effect that section [233] was but a re-enactment of the then existing provisions of the 8th section of the Act of Feb. 9, 1893 [27 Stat. L. 436, 4 Fed. Stat. Annot. 466], which established the Court of Appeals of the District of Columbia." *Metropolitan R. Co. v. District of Columbia*, (1904) 195 U. S. 322, 25 S. Ct. 28, 49 U. S. (L. ed.) 219.

The procedure referred to in this section is that found in section 705, Rev. Stat., which provides that such writs or appeals shall be allowed in the "same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in a Circuit Court." *Columbia Heights Realty Co. v. Rudolph*, (1910) 217 U. S. 547, 30 S. Ct. 581, 54 U. S. (L. ed.) 877.

**Cases arising under the patent laws.**—In *Moore v. Heany*, (1909) 34 App. Cas. 31, the Court of Appeals refused to allow an appeal, holding that none would lie, from its decree which reversed a decree of the Supreme Court of the District of Columbia, enjoining the Commissioner of Patents from striking certain applications for patents from the files of his office, and proceeding with an investigation as to whether the applications had been fraudulently altered or changed. *Following Durham v. Seymour*, (1896) 161 U. S. 235, 16 S. Ct. 452, 40 U. S. (L. ed.) 682, cited in 4 Fed. Stat. Annot. 464.

A suit in which the validity of a regulation established by the Commissioner of Patents, under the authority of R. S. sec. 483, for the conduct of proceedings in the Patent Office, is assailed, is one in which there is drawn in question the validity of an authority exercised under the United States within the meaning of this Act. *U. S. v. Allen*,

(1904) 192 U. S. 543, 24 S. Ct. 416, 48 U. S. (L. ed.) 555.

**Final judgment or decree.**—A decree of the Court of Appeals of the District of Columbia on an appeal from the Commissioner of Patents, which affirms the latter's decision and directs the clerk of the court to "certify this opinion and proceedings in this court in the premises to the Commissioner of Patents, according to law," is not "final" within the meaning of this Act; as decisions on such appeals do not preclude any person interested from contesting the validity of the patent in court, and a remedy by bill in equity is given where a patent is refused. *Frasch v. Moore*, (1908) 211 U. S. 1, 29 S. Ct. 6, 53 U. S. (L. ed.) 65.

A judgment of the Court of Appeals of the District of Columbia, affirming the decision of the Commissioner of Patents in an interference proceeding, and directing that its own decision be certified to the commissioner, as required by law, is not final for the purpose of a writ of error from the federal Supreme Court. *Johnson v. Mueser*, (1909) 212 U. S. 283, 29 S. Ct. 390, 53 U. S. (L. ed.) 514.

A decision of the Court of Appeals of the District of Columbia on an appeal from a decision of the Commissioner of Patents in proceedings arising under an application made pursuant to the Act of Feb. 20, 1905, 33 Stat. L. 724, ch. 592, sec. 1, for the registration of a trademark, which affirms the latter's decision, and directs the clerk to certify its opinion to the commissioner, according to law, is not final for the purpose of an appeal to, or writ of error from, the federal Supreme Court, since the proceedings under that Act are governed by the same rules of practice and procedure as in patent cases. *Atkins v. Moore*, (1909) 212 U. S. 285, 29 S. Ct. 390, 53 U. S. (L. ed.) 515.

"*Shall be final in all cases*" in the Judicial Code, sec. 250, *ante*, title JUDICIARY, vol. 1, p. 235, of this Supplement, apparently includes cases arising under the trademark laws. And see *Hutchinson v. Loewy*, (1910)

217 U. S. 457, 30 S. Ct. 613, 54 U. S. (L. ed.) 838. Compare *Atkins v. Moore*, (1909) 212 U. S. 285, 29 S. Ct. 390, 53 U. S. (L. ed.) 515; *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, (1911) 220 U. S. 446, 31 S. Ct. 456, 55 U. S. (L. ed.) 536.

The jurisdictional limit upon writs of error and appeals to or from the Court of Appeals of the District of Columbia is \$5,000, exclusive of interest and costs. *Wallach v. Rudolph*, (1910) 217 U. S. 561, 30 S. Ct. 587, 54 U. S. (L. ed.) 883.

A writ of error was dismissed for want of a jurisdictional amount in dispute, under the facts stated in the case, in *Wallach v. Rudolph*, (1910) 217 U. S. 561, 30 S. Ct. 587, 54 U. S. (L. ed.) 883; *Morgan v. Adams*, (1909) 211 U. S. 627, 29 S. Ct. 213, 53 U. S. (L. ed.) 362.

The amount in dispute was held sufficient in *Harten v. Löffler*, (1909) 212 U. S. 397, 29 S. Ct. 351, 53 U. S. (L. ed.) 568.

The amount in dispute in a suit for equitable relief because of fraud in a sale of real property exceeds the sum of \$5,000, which is essential, under this Act, to enable the Supreme Court of the United States to review a judgment of the Court of Appeals of the District of Columbia, although the bill prays for the conveyance of a strip of land of slight value, where, if such relief is denied, the complainant seeks, in the alternative, to have the contract rescinded and the payment decreed of the sum of \$6,000, the purchase money, with costs and interest. *Shappirio v. Goldberg*, (1904) 192 U. S. 232, 24 S. Ct. 259, 48 U. S. (L. ed.) 419.

*In mandamus proceedings.*—The value of the matter in dispute in a proceeding to compel, by mandamus, the Secretary of State to seek to obtain \$500,000 damages from the German Empire in redress of petitioner's alleged wrongful imprisonment while on a visit to that country, is not such as will bring the cause within the appellate jurisdiction over judgments of the Court of Appeals of the District of Columbia conferred upon the federal Supreme Court by D. C. Code, sec. 233, in cases in which the matter in dispute, exclusive of costs, exceeds \$5,000. *U. S. v. Hay*, (1904) 194 U. S. 373, 24 S. Ct. 681, 48 U. S. (L. ed.) 1025.

*In criminal cases.*—In *Sinclair v. District of Columbia*, (1904) 192 U. S. 16, 24 S. Ct. 212, 48 U. S. (L. ed.) 322, it was said: "We were of opinion that section 8 of the Act establishing the Court of Appeals of the District of Columbia, and the Act of March 3, 1885, ch. 355, 23 Stat. L. 443, were the same in their meaning and legal effect. . . . The meaning of both statutes is that, in the cases enumerated, the limitation on the amount is removed, but both alike refer to cases where there is a pecuniary matter in dispute, measurable by some sum or value, and they alike have no application to criminal cases."

Validity of any authority exercised under the United States was not drawn in question so as to sustain the appellate jurisdiction of the federal Supreme Court by a petition for mandamus to compel the restoration to her position in the classified civil service of a clerk whose contention was not that the President and his representatives were without authority to dismiss her, but that her dismissal was illegal because the requisite formalities prescribed by the civil service regulations were not observed. *U. S. v. Taft*, (1906) 203 U. S. 461, 27 S. Ct. 148, 51 U. S. (L. ed.) 269.

*Prize cases.*—In *U. S. v. Sampson*, (1902) 19 App. Cas. 419, it was held that the Supreme Court of the District of Columbia, sitting as a District Court of the United States, had jurisdiction of a libel for the condemnation of prizes of war and to adjudicate the question of prize or no prize, and that an appeal from its decree would not lie to the Court of Appeals of the District of Columbia, but must be taken direct to the federal Supreme Court.

*Method of review.*—Writ of error, and not appeal, is the only mode of review in a judgment of the Court of Appeals of the District of Columbia, sustaining an assessment and award in condemnation proceedings instituted under the Act of Congress of June 6, 1900, 31 Stat. L. 668, ch. 810, in view of the provision of District of Columbia Code, sec. 233, quoted at the head of this note, because "the proceeding in question was legal in its nature." *Metropolitan R. Co. v. District of Columbia*, (1904) 195 U. S. 322, 25 S. Ct. 28, 49 U. S. (L. ed.) 219.

### Vol. IV, p. 466. [*District of Columbia court of appeals cases reviewable on certiorari, etc.*]

This section is now embodied in Judicial Code, sec. 251, *ante*, p. 236 of this Supplement.

This statute authorizes the Supreme Court to issue writs of certiorari in cases made final in the Court of Appeals in the District of Columbia, to bring them up for review and determination, and such authority has been carried into section 234 of the District Code. *Sinclair v. District of Columbia*, (1904) 192 U. S. 16, 24 S. Ct. 212, 48 U. S. (L. ed.) 322.

*Table of certiorari cases.*—See cases cited under this catchline in note to section 6 of

the Circuit Court of Appeals Act of 1891, *supra*, this title, p. 1339.

Following are all the reported cases heard by the United States Supreme Court on certiorari to the Court of Appeals of the District of Columbia since the creation of the latter court.

*Cases of importance.*—*Capital Traction Co. v. Hof*, (1899) 174 U. S. 1, 19 S. Ct. 580, 43 U. S. (L. ed.) 873, "a serious and important question" of the validity and construction of an Act of Congress.

*Division of opinion in Court of Appeals in same case.*—*Winston v. U. S.*, (1899) 172 U.

S. 303, 19 S. Ct. 212, 43 U. S. (L. ed.) 456 (conviction of murder); *Baker v. Cummings*, (1901) 181 U. S. 117, 21 S. Ct. 578, 45 U. S. (L. ed.) 776 (judgment of dismissal as a bar); *Hartford F. Ins. Co. v. Wilson*, (1903) 187 U. S. 467, 23 S. Ct. 189, 47 U. S. (L. ed.) 261 (as to whether there can be a conditional delivery of a policy of insurance); *Crawford v. U. S.*, (1906) 212 U. S. 183, 29 S. Ct. 260, 53 U. S. (L. ed.) 465 (questions of criminal law and procedure); *Gompers v. Bucks Stove, etc., Co.*, (1911) 221 U. S. 418, 31 S. Ct. 492, 55 U. S. (L. ed.) 797 (determining validity of an injunction restraining continuance of a

boycott, and reversing a judgment of imprisonment for contempt).

*Other cases.*—*Willis v. Eastern Trust, etc., Co.*, (1898) 169 U. S. 295, 18 S. Ct. 347, 42 U. S. (L. ed.) 752 (landlord and tenant); *Roberts v. U. S.*, (1900) 176 U. S. 221, 20 S. Ct. 376, 44 U. S. (L. ed.) 443 (audit certificates, mandamus to United States treasurer); *U. S. v. Cadarr*, (1905) 197 U. S. 475, 25 S. Ct. 487, 49 U. S. (L. ed.) 842 (criminal case, motion to quash indictment, construction of District of Columbia Code); *U. S. v. Evans*, (1909) 213 U. S. 297, 29 S. Ct. 507, 53 U. S. (L. ed.) 803 (constitutionality of an Act of Congress).

## Vol. IV, p. 467, sec. 707.

The finality of a judgment of the Court of Claims cannot be contested by the defendant on account of the filing of amended findings of fact, where this was done at his own request in connection with a motion for a new

trial and he also consequently took an appeal from the judgment after his motion for new trial was overruled. *U. S. v. St. Louis, etc., Transp. Co.*, (1902) 184 U. S. 247, 22 S. Ct. 350, 46 U. S. (L. ed.) 520.

## Vol. IV, p. 467, sec. 709.

This section is re-enacted in the Judicial Code, sec. 237, *ante*, p. 230 of this Supplement, and is expressly repealed by section 297 of said Code, *ante*, p. 250.

Citation on writ of error issued by the Supreme Court to a state court, see *infra*, this title, p. 1446, annotation sec. 999.

- I. GENERAL AUTHORITY TO REVIEW STATE COURT DECISIONS, 1379.
- II. FINAL JUDGMENTS OR DECREES IN ANY SUIT IN THE HIGHEST COURT OF A STATE, 1379.
- III. FICTITIOUS OR MOOT QUESTIONS, 1380.
- IV. VALIDITY OF STATUTE OR TREATY OF, OR AUTHORITY EXERCISED UNDER, UNITED STATES, 1381.
- V. VALIDITY OF STATUTE OF, OR AUTHORITY EXERCISED UNDER, STATE, 1381.
- VI. TITLE, RIGHT, PRIVILEGE, OR IMMUNITY CLAIMED UNDER CONSTITUTION, TREATY, OR STATUTE OF, OR AUTHORITY EXERCISED UNDER, UNITED STATES, 1383.
- VII. DRAWN IN QUESTION OR SPECIALLY SET UP AND CLAIMED, 1387.
- VIII. DECISION OF STATE COURT, 1391.
- IX. JUDGMENT ON ERROR, 1402.
- X. EFFECT OF WRIT OF ERROR, 1402.

### I. GENERAL AUTHORITY TO REVIEW STATE COURT DECISIONS.

"The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of federal rights, whether those pertaining to the constitutionality of federal or state statutes, or to certain rights, immunities, and privileges of federal origin specially set up in the state court, and denied by the rulings and judgment of that court." *Waters-Pierce Oil Co. v. Texas*, (1909) 212 U. S. 86, 29 S. Ct. 220, 53 U. S. (L. ed.) 417.

"The question of citizenship is immaterial

as affecting the jurisdiction of this court under section 709." *Barrington v. Missouri*, (1907) 205 U. S. 483, 27 S. Ct. 582, 51 U. S. (L. ed.) 890, dismissing a writ of error, although it was sued out by an alien who alleged violation of constitutional rights.

Who may invoke appellate jurisdiction.—A West Virginia County Court and its members have no personal interest in a controversy over the validity, under the Federal Constitution, art. 1, sec. 10, 8 Fed. Stat. Annot. 29, as affecting county bondholders, of a state statute limiting the amount which may be raised by taxation, so as to sustain a writ of error from the federal Supreme Court to review a judgment of the West Virginia Supreme Court of Appeals, awarding a mandamus to compel the County Court to change its assessment to conform to the requirements of the statute. *Braxton County Ct. v. West Virginia*, (1908) 208 U. S. 192, 28 S. Ct. 275, 52 U. S. (L. ed.) 450, dismissing a writ of error, where the court said: "That the act of the state is charged to be in violation of the National Constitution, and that the charge is not frivolous, does not always give this court jurisdiction to review the judgment of a state court. The party raising the question of constitutionality and invoking our jurisdiction must be interested in, and affected adversely by, the decision of the state court sustaining the act, and the interest must be of a personal, and not of an official, nature."

Method of review.—"The only remedy to correct the decision of the highest court of the state is by writ of error, in chancery cases as well as in actions at law." *Chicago, etc., R. Co. v. Swanger*, (1908) 157 Fed. 783, 789.

### II. FINAL JUDGMENTS OR DECREES IN ANY SUIT IN THE HIGHEST COURT OF A STATE.

Final judgments.—The judgment of the highest court of a state, affirming, on a third appeal, a judgment of the trial court, entered on a verdict in favor of plaintiff, is the first

final judgment in the action which is the subject of review in the federal Supreme Court, where the highest state court, on the first appeal, reversed the order of the lower court, granting a petition for the removal of the action to a federal Circuit Court, and remanded the case for trial, and, on the second appeal, reversed a judgment entered on a directed verdict in favor of defendant, although the court, on such third appeal, regarded itself as bound by its prior decision as the law of the case, and declined again to consider the federal question. *Chesapeake, etc., R. Co. v. McCabe*, (1909) 213 U. S. 207, 29 S. Ct. 430, 53 U. S. (L. ed.) 765.

A judgment of the highest state court reversing the decree of the trial court in an equity cause, and remanding the cause for further proceedings in harmony with its opinion, is not final in such a sense as will sustain a writ of error from the federal Supreme Court, although equity causes are heard on appeal *de novo* in the state court, and the successful party is entitled to a decree in that court if he moves for it, where no such decree was applied for or rendered, and, under the state practice, newly discovered evidence may be introduced in the court below, and the pleadings amended after the cause is remanded. *Schlosser v. Hemphill*, (1905) 198 U. S. 173, 25 S. Ct. 654, 49 U. S. (L. ed.) 1000.

"There is a long line of decisions in that court [Supreme Court] to the effect that a judgment of a Supreme Court of a state reversing a judgment, order, or decree of a trial court, and remanding the case for farther proceedings either at law or in equity, is not a final decision, and cannot be reviewed by the Supreme Court of the United States." *Morgan v. Thompson*, (1903) 124 Fed. 203, 205, 59 C. C. A. 672, citing numerous cases. See further as to what constitutes finality for the purpose of appeal or error, note to section 6 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 510, *supra*, p. 1339.

**Highest court of a state.**—The federal Supreme Court has jurisdiction, upon writ of error, to re-examine the final judgment of a subordinate state court denying a federal right specially set up or claimed, if, under the local law, that court is the highest court of the state entitled to pass upon such claim of federal right. "This must be so, else it will be in the power of a state to so regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution, and improperly denied in a subordinate state court, although specially set up and claimed." *Kentucky v. Powers*, (1906) 201 U. S. 1, 5 Ann. Cas. 692, 26 S. Ct. 387, 50 U. S. (L. ed.) 633.

An inferior state court is the final court of the state where the federal question involved can be decided, and therefore is the court to which a writ of error from the federal Supreme Court must be directed, where the highest state court, although discussing the federal question in its opinion, and declaring it to be without merit, dismissed a writ of error to the inferior court solely and expressly for want of jurisdiction. *Western Union Tel. Co.*

*v. Hughes*, (1906) 203 U. S. 505, 27 S. Ct. 162, 51 U. S. (L. ed.) 294.

The judgment of the trial court was held to be that of the highest court of the state, for the purpose of a writ of error under section 709, where the highest state tribunal denied a writ of error to the trial court, under local practice, because the court thought the judgment was plainly right. *Western Union Tel. Co. v. Crovo*, (1911) 220 U. S. 364, 31 S. Ct. 399, 55 U. S. (L. ed.) 498.

The Court of Civil Appeals of the state of Texas is the highest court of the state for the purpose of a review in the federal Supreme Court in a case in which the Supreme Court of the state has dismissed, for want of jurisdiction, an application to review the judgment of the Court of Civil Appeals. *Sullivan v. Texas*, (1908) 207 U. S. 416, 28 S. Ct. 215, 52 U. S. (L. ed.) 274.

### III. FICTITIOUS OR MOOT QUESTIONS.

**Generally.**—The enactment by a state of a new inheritance tax law after a decision of the highest court of the state sustaining the previous legislation on that subject as against the contention that it denied the equal protection of the laws guaranteed by the Fourteenth Amendment, does not convert such federal question into a moot question, so as to preclude a review by the federal Supreme Court, unless it is obvious that such new legislation relieved the plaintiffs in error from their obligations under the earlier law. *Campbell v. California*, (1906) 200 U. S. 87, 26 S. Ct. 182, 50 U. S. (L. ed.) 382.

The federal Supreme Court may review a decision of a state court sustaining the enforcement against a railway company of an alleged charter obligation to pay over the surplus profits to the state, which could not have been reached except by erroneously construing the charter, without relying on subsequent legislation flagrantly repugnant to the Federal Constitution, and challenged for that reason, where the state court clearly did rely upon that legislation to some extent, although it put forward in its judgment the untenable construction more than the unconstitutional statutes. "To hold otherwise would open an easy method of avoiding the jurisdiction of this court." *Terre Haute, etc., R. Co. v. Indiana*, (1904) 194 U. S. 579, 24 S. Ct. 767, 48 U. S. (L. ed.) 1124,  *citing to the quoted sentence, Louisville Gas Co. v. Citizens' Gas-Light Co.*, (1885) 115 U. S. 683, 697, 6 S. Ct. 265, 29 U. S. (L. ed.) 510.

Objections to the valuation of national bank stock for taxation, as being in excess of the actual value, exorbitant and unjust, and not in proportion to other like personal property but grossly in excess thereof, and constituting unfair and unequal taxation, do not raise any federal question that will sustain a writ of error to the state court, where no mention of the National Bank Act was made, nor of any right or privilege claimed under it, and the provisions of the United States Revised Statutes were not invoked, by name or otherwise, and there was no assertion that the local statutes under which the assessment was

made were repugnant to R. S. sec. 5219, 5 Fed. Stat. Annot. 157, or to the Federal Constitution. *Estherville First Nat. Bank v. Estherville*, (1910) 215 U. S. 341, 30 S. Ct. 152, 54 U. S. (L. ed.) 223.

A federal question may have been so explicitly foreclosed by prior decisions as to afford no basis for a writ of error under section 709. *Leonard v. Vicksburg, etc., R. Co.*, (1905) 198 U. S. 416, 25 S. Ct. 750, 49 U. S. (L. ed.) 1108.

A writ of error will not be dismissed on the ground that the federal question relied upon to confer jurisdiction has been so conclusively foreclosed by prior decisions of the federal Supreme Court as to cause it to be frivolous, where analysis and exposition are necessary in order to make clear the decisive effect of such prior decisions upon the issue presented, and there is some conflict in the opinions of the various state courts of last resort upon the question, and a division of opinion in the court below. *Louisville, etc., R. Co. v. Melton*, (1910) 218 U. S. 36, 30 S. Ct. 676, 54 U. S. (L. ed.) 921.

**Unsubstantial question.** — The question whether the California legislature could enact the Act of April 2, 1866, ratifying conveyances made by the corporate authorities of the city of Monterey of pueblo lands confirmed to that city by the United States, and afterwards patented to it, its successors and assigns, was held not to be so far unsubstantial as to justify dismissal of a writ of error to a state court. *Monterey v. Jacks*, (1906) 203 U. S. 360, 27 S. Ct. 67, 51 U. S. (L. ed.) 220.

#### IV. VALIDITY OF STATUTE OR TREATY OF, OR AUTHORITY EXERCISED UNDER, UNITED STATES.

**Delegation of legislative power.** — Whether or not legislative power was unconstitutionally delegated to the American Railway Association and the Interstate Commerce Commission by the provision of the Safety Appliance Act of March 2, 1893, ch. 196, sec. 5, 27 Stat. L. 531, 6 Fed. Stat. Annot. 755, that, after a date named, only cars with drawbars of uniform height shall be used in interstate commerce, and that the standard shall be fixed by the association and declared by the commission, was clearly a federal question, so as to sustain a writ of error under section 709. *St. Louis, etc., R. Co. v. Taylor*, (1908) 210 U. S. 281, 28 S. Ct. 616, 52 U. S. (L. ed.) 1061.

**Exclusive legislative power of Congress.** — A contention, on a motion for a directed verdict, that the session to the United States in N. J. Act March 12, 1846, of jurisdiction over a certain strip of land at Sandy Hook, vested in the United States exclusive legislative jurisdiction over the littoral waters extending three miles to the eastward of the coast line, presents a question respecting the exclusive legislative power of Congress under U. S. Const., art. 1, sec. 8, cl. 17, which will sustain a writ of error from the federal Supreme Court. *Hamburg-American Steamship Co. v.*

*Grube*, (1905) 196 U. S. 407, 25 S. Ct. 352, 49 U. S. (L. ed.) 529.

**Refusal to give effect to judicial proceedings of federal courts.** — The contention that full faith and credit were not given to the judgment of a federal court dismissing an action by a foreign corporation because of its failure to register within the state before entering into the contract in suit, by a decision of a state court holding that such judgment was not a bar to a second action between the same parties upon the same contract, where the corporation had brought itself within the curative provisions of Pa. Act of May 23, 1907, was not so far frivolous as not to serve as the basis of a writ of error from the federal Supreme Court to the state court. *West Side Belt R. Co. v. Pittsburgh Constr. Co.*, (1911) 219 U. S. 92, 31 S. Ct. 196, 55 U. S. (L. ed.) 107.

Whether the provisions of Pa. Act of May 23, 1907, validating contracts of foreign corporations, extended to a contract which had previously been adjudged invalid by a federal court because of the corporation's failure to register within the state before entering into such contract, will be determined by the federal Supreme Court for itself on a writ of error to a state court, presenting the question whether full faith and credit were given to such judgment by the decision of the state court that it was not a bar to a second action between the same parties on the same contract, after the corporation had brought itself within the terms of such statute. *West Side Belt R. Co. v. Pittsburgh Constr. Co.*, (1911) 219 U. S. 92, 31 S. Ct. 196, 55 U. S. (L. ed.) 107.

"A judgment of a federal court awarding property or rights, when set up in a state court, if its effect is denied, presents a claim of federal right which may be protected in this court." *Waterman v. Canal-Louisiana Bank, etc., Co.*, (1909) 215 U. S. 33, 30 S. Ct. 10, 13, 54 U. S. (L. ed.) 80.

#### V. VALIDITY OF STATUTE OF, OR AUTHORITY EXERCISED UNDER, STATE.

**Impairing contracts.** — The affirmance by the highest state court of an order awarding a peremptory writ of mandamus to compel the reduction of railroad rates to conform to the schedule made by the Act under which the railroad was incorporated, on the ground that by its incorporation under that Act the company became subject to its provisions, is not based on nonfederal grounds so as to preclude a review in the federal Supreme Court, where the company relied upon the provisions of a prior Act authorizing the incorporation of the purchasers of a railroad after a sale in foreclosure proceedings, with the rights and privileges of the original company as a contract right, protected from impairment by the Federal Constitution. *Grand Rapids, etc., R. Co. v. Osborn*, (1904) 193 U. S. 17, 24 S. Ct. 310, 48 U. S. (L. ed.) 598.

The question whether a provision in a railway charter exempting the company from liability for the death of any person in its ser-

vice versa if correct. If the state court rendered a contract right in error and the action on the contract failed, the federal court's decision is sufficient to sustain a writ of error under section 709. *Texas, etc. v. R. Co. v. M. & C. R. Co.*, 1911, 221 U. S. 426, 31 S. Ct. 534, 55 U. S. L. ed. 704; *Texas, etc. v. R. Co. v. C. & G. R. Co.*, 1911, 221 U. S. 417, 31 S. Ct. 534, 55 U. S. L. ed. 704. Both cases holding, however, that the writ below described correctly that no such contract right was created by the charter.

Whether or not municipal taxation under a subsequent statute is a joint tax within the meaning of a covenant by the lease of a municipality to pay the public taxes which shall become due on the land is a question which the federal Supreme Court will determine for itself on writ of error to a state court in a case involving the question of the impairment of contract obligations by the enforcement of the tax. *J. W. Perry Co. v. Norfolk*, 1911, 221 U. S. 472, 31 S. Ct. 465, 55 U. S. L. ed. 545.

A decree of a state court adverse to the contention that, if the state constitution confers on one railway company an exemption from a special tax granted in aid of another railway company, it impairs contract obligations, is reviewable in the federal Supreme Court, although the state court rested its decision in part upon the ground that the latter railway company had not acquired all of its contract rights before the adoption of the state constitution. "Of course, this court must satisfy itself upon that point, and therefore has jurisdiction." *Arkansas Southern R. Co. v. Louisiana, etc. R. Co.*, (1910) 218 U. S. 431, 31 S. Ct. 56, 54 U. S. L. ed. 1097, citing *Sullivan v. Texas*, (1908) 207 U. S. 416, 423, 28 S. Ct. 215, 52 U. S. L. ed. 274, 277.

The contention that an attempt in the state constitution to limit taxation impairs the obligation of contracts with a municipal school board does not present a case for a writ of error to review a decree of a state court which refused mandamus to compel the levy of a tax to pay claims and judgments based upon such contracts, which rests mainly on the grounds that the relators were guilty of laches, and that the statute relied upon as authorizing such contracts did not empower the school board to make contracts in such wise as to bind the municipality to levy the tax, neither the constitution nor any subsequent legislation having been invoked or enforced by the court. *Fisher v. New Orleans*, (1910) 218 U. S. 438, 31 S. Ct. 57, 54 U. S. L. ed. 1099.

Only when a judgment of a state court gives effect to a law subsequent to that (or it may be a constitution) which it is alleged constitutes a contract, can the federal Supreme Court review the judgment and decide the question of contract. *Mobile, etc. R. Co. v. Mississippi*, (1906) 210 U. S. 187, 28 S. Ct. 650, 52 U. S. L. ed. 1016.

Municipal legislation carried into effect by mandamus, which requires a railroad company to make repairs in a viaduct at its own expense, in accordance with plans adopted and

approved by the municipal council, cannot be sustained as a mere repudiation by the municipality of its agreement to maintain the viaduct, so as to defeat the appellate jurisdiction of the federal Supreme Court over a state court, invoked on the ground that contract obligations were thereby impaired. *Northern Pac. R. Co. v. Minnesota*, (1908) 208 U. S. 543, 28 S. Ct. 341, 52 U. S. L. ed. 630, *affirming St. Paul Gaslight Co. v. St. Paul*, (1901) 191 U. S. 142, 21 S. Ct. 575, 45 U. S. L. ed. 730, and *Dawson v. Columbia Ave. San. Fund, etc. Co.*, (1905) 197 U. S. 175, 25 S. Ct. 829, 49 U. S. L. ed. 713.

No federal question respecting the impairment of contract obligations, which will sustain a writ of error under section 709, is presented by the contention that the obligation of the contract made by bonds of the state is impaired by a joint resolution of the state legislature directing the state treasurer to write off the books in his office certain of such bonds, and to carry no longer such bonds on the books as a debt of the state, since such law merely directed a change of entries in the books of the treasurer, and could in no respect impair or affect the rights of the holders. *Smith v. Jennings*, (1907) 206 U. S. 274, 27 S. Ct. 610, 51 U. S. L. ed. 1061.

Decision giving effect to state law.—A decision of a state court dismissing, on the ground that the suit was one against the state, and therefore not within its jurisdiction, a bill which sought to enjoin a state oil inspector from enforcing a state inspection law, on the theory that such law, if applied to the facts in controversy, violated the commerce clause of the Federal Constitution, was a decision giving effect to such law, and was reviewable by the federal Supreme Court under section 709. *General Oil Co. v. Crain*, (1908) 209 U. S. 211, 28 S. Ct. 475, 52 U. S. L. ed. 754.

Regulation of interstate commerce.—The adequacy of the local facilities existing at a station at which a through interstate railroad train is required to stop by an order made under state authority, though not inherently a federal question, may be considered by the federal Supreme Court on writ of error to a state court in so far as the existence of such adequate local facilities is involved in the determination of the federal question as to whether the order does or does not directly regulate interstate commerce. *Atlantic Coast Line R. Co. v. Wharton*, (1907) 207 U. S. 328, 28 S. Ct. 121, 52 U. S. L. ed. 230, citing *Mississippi R. Commission v. Illinois Cent. R. Co.*, (1906) 203 U. S. 335, 27 S. Ct. 90, 51 U. S. L. ed. 209.

Due process of law.—The contention that the due process of law clause in the Fourteenth Amendment was violated by West Va. Const., art. 13, and Code, ch. 105, for the forfeiture to the state of lands not listed by the owner for taxation for five successive years, with liberty to the owner to intervene and redeem, having been decided adversely in *King v. Mullins*, (1898) 171 U. S. 404, 18 S. Ct. 925, 43 U. S. L. ed. 214, a writ of error based on that contention was dismissed for want of jurisdiction in *King v. West Vir-*



ginia, (1910) 216 U. S. 92, 30 S. Ct. 225, 54 U. S. (L. ed.) 396.

The due process of law clause in the Fourteenth Amendment does not authorize the federal court to review a conviction by a state court on account of errors involving the competency of jurors, or to determine whether a proposed execution of a death sentence, after the expiration of a reprieve, is in pursuance of law. *In re Buchanan*, (1895) 146 N. Y. 264, 40 N. E. 883.

The construction by the Iowa Supreme Court of the annual charge imposed by Iowa Code, sec. 5007, upon cigarette dealers and upon the real property and the owner thereof whereon cigarettes are sold, the payment of which is not to bar criminal proceedings, as being a tax upon the traffic, and not a penalty, was held not to be so clearly erroneous as to justify the federal Supreme Court in adopting a different construction on a writ of error to the state court, in which such statute is asserted to deny due process of law. *Hodge v. Muscatine County*, (1905) 196 U. S. 276, 25 S. Ct. 237, 49 U. S. (L. ed.) 477.

The construction given by the Maryland Court of Appeals to Maryland Code 1904, art. 43, sec. 99, making it a misdemeanor to attempt to practice medicine without registration, as not being subject to the limitation of section 80 of that article, relating to the sending of notice to unregistered physicians, is conclusive upon the federal Supreme Court on writ of error to the state court. *Watson v. Maryland*, (1910) 218 U. S. 173, 30 S. Ct. 644, 54 U. S. (L. ed.) 987.

Federal questions of serious import are not involved in contentions that riparian owners were denied due process of law or the equal protection of the laws by the decision of a state court awarding a municipality paramount rights in the waters of a stream under Spanish and Mexican laws, confirmed by the United States to the municipality as the successor of a Spanish pueblo. *Los Angeles Farming, etc., Co. v. Los Angeles*, (1910) 217 U. S. 217, 30 S. Ct. 452, 54 U. S. (L. ed.) 736, dismissing a writ of error.

A specific contention on the trial of a criminal cause in a state court, that the denial to the accused of the benefit of his plea of former jeopardy operates to deprive him of his liberty without due process of law raises a federal question which will sustain a writ of error from the federal Supreme Court to review the judgment of the highest court of the state affirming the conviction below. *Keerl v. Montana*, (1909) 213 U. S. 135, 29 S. Ct. 469, 53 U. S. (L. ed.) 734.

The contention that a state court, in appointing a receiver of a foreign corporation convicted of violating state anti-trust laws, upon the testimony already heard and the conviction already had, deprives the corporation of rights under the Fourteenth Amendment, presents no substantial question as to deprivation of due process of law. *Waters-Pierce Oil Co. v. Texas*, (1909) 212 U. S. 112, 29 S. Ct. 227, 53 U. S. (L. ed.) 431, dismissing a writ of error.

The time or manner in which a state court

sees fit to approve the bond of a receiver of the property of a corporation convicted of violating the state anti-trust laws does not present a substantial question as to due process of law so as to sustain a writ of error from the federal Supreme Court. *Waters-Pierce Oil Co. v. Texas*, (1909) 212 U. S. 112, 29 S. Ct. 227, 53 U. S. (L. ed.) 431.

The decision of a state court will not be deemed to present a question respecting due process of law which will sustain a writ of error under section 709, on the theory that such decision gave retroactive effect to a statute passed since the argument of the appeal before the state court, where the language of the court's opinion may equally well be interpreted as a declination to pass upon a question not necessary to the decision, which had been set at rest for the future by legislation. *Stickney v. Kelsey*, (1908) 209 U. S. 419, 28 S. Ct. 508, 52 U. S. (L. ed.) 863.

Questions respecting the impairment of contract obligations and the denial of due process of law because of the additional burden of taxation to which the citizens and taxpayers of a lesser city annexed under the authority of Pa. Act of Feb. 7, 1906, to an adjoining and larger city, would be subjected, was not so unsubstantial and devoid of all color of merit as to require the dismissal of a writ of error from the federal Supreme Court. *Hunter v. Pittsburgh*, (1907) 207 U. S. 161, 28 S. Ct. 40, 52 U. S. (L. ed.) 151.

Demurring to an indictment in a state court on the ground that by reason of the inconsistency, multiplicity, and repugnancy of the different courts in such indictment the defendant is being proceeded against in violation of his constitutional right to be specially informed of the nature and cause of the accusation against him, does not raise a federal question. *Barrington v. Missouri*, (1907) 205 U. S. 483, 27 S. Ct. 582, 51 U. S. (L. ed.) 890.

The contention that the proceedings taken under Conn. Gen. Stat., secs. 3694, 3695, by a railway company which was the lessee of another railway, and the owner of three-fourths of its stock, to condemn the outstanding shares owned by a person who refused to agree to the terms of purchase, violated the due process of law clause of the Fourteenth Amendment, and impaired contract obligations, was held not so frivolous as to require the dismissal of a writ of error from the federal Supreme Court to a state court. *Offield v. New York, etc., R. Co.*, (1906) 203 U. S. 372, 27 S. Ct. 72, 51 U. S. (L. ed.) 231.

#### VI. TITLE, RIGHT, PRIVILEGE, OR IMMUNITY CLAIMED UNDER CONSTITUTION, TREATY, OR STATUTE OF, OR AUTHORITY EXERCISED UNDER, UNITED STATES.

In general. — "Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this

respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. . . . In no other manner can a uniform construction of the statute laws of the United States be secured so that they shall have the same meaning and effect in all the states of the Union." *St. Louis, etc., R. Co. v. Taylor*, (1908) 210 U. S. 281, 28 S. Ct. 616, 52 U. S. (L. ed.) 1061.

**Assertion of right and immunity in general.**—"A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of section 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary." *Nutt v. Knut*, (1906) 200 U. S. 13, 26 S. Ct. 216, 50 U. S. (L. ed.) 348.

**Rights under federal statute in general.**—A decision of a state court in a case in which rights under a statute of the United States were claimed by the defendant is reviewable in the federal Supreme Court, where that statute was referred to by the highest state court and was an element in its decision. *Hammond v. Whittredge*, (1907) 204 U. S. 538, 27 S. Ct. 396, 51 U. S. (L. ed.) 606.

**Under territorial statute.**—A judgment of the Texas Supreme Court, which, reversing the judgment of the Court of Civil Appeals of that state, affirmed the judgment of the trial court entered on a verdict in favor of the plaintiff in an action against a railway company for the negligent killing of an employee in the territory of New Mexico, is reviewable by the federal Supreme Court as necessarily deciding against a federal right specially set up, where the trial court sustained a demurrer to a plea setting up a defense under a statute for the territory, which, if applicable, was a complete bar to the action, because of noncompliance with its requirements, although the decision of the state Supreme Court proceeded upon the theory that the case was controlled by the federal Employers' Liability Act, which it held to be valid. *Atchison, etc., R. Co. v. Sowers*, (1909) 213 U. S. 55, 29 S. Ct. 397, 53 U. S. (L. ed.) 695; *El Paso, etc., R. Co. v. Gutierrez*, (1909) 215 U. S. 87, 30 S. Ct. 21, 54 U. S. (L. ed.) 106.

A claim by a railway company in a state court of immunity from liability for the negligent killing of an employee in the territory of New Mexico, because of noncompliance with the requirements of a statute of that territory governing actions for personal injuries received therein, presents a federal question, which, when adversely adjudicated, confers jurisdiction on the federal Supreme Court of a writ of error to the state court. *El Paso, etc., R. Co. v. Gutierrez*, (1909) 215 U. S. 87, 30 S. Ct. 21, 54 U. S. (L. ed.) 106.

**Mining claim.**—The mere fact that the suit was brought under R. S. sec. 2326, 5 Fed. Stat. Annot. 35, to try adverse rights to a mining claim, does not necessarily involve a federal question so as to sustain a writ of error from the federal Supreme Court. *McMillen v. Ferrum Min. Co.*, (1905) 197 U. S. 343, 25 S. Ct. 533, 49 U. S. (L. ed.) 784.

**Homestead exemption.**—A decision of a state court sustaining a homestead exemption claimed under the state statutes, which rested on the effect, as *res judicata*, of an order of a court of bankruptcy sustaining such exemption in proceedings begun prior to a sale of the property to satisfy the lien of a general judgment, could not be reviewed on a writ of error under section 709, where the only federal right specially claimed, if any, was one of immunity from the discharge in bankruptcy. *Smalley v. Laugenour*, (1905) 196 U. S. 93, 25 S. Ct. 216, 49 U. S. (L. ed.) 400, where the court said: "We are not able to perceive that the state Supreme Court denied in any way a right of plaintiffs in error specially set up or claimed under the Constitution or laws of the United States. All that was determined, and all that the state court was called on to determine, was the question of exemption under the state statutes. Its acceptance of the judgment of the federal court in that regard does not bring the case within section 709."

**Under Oregon Donation Act, etc.**—A decision of the Washington Supreme Court adverse to a claim founded upon the invalidity, under the Oregon Donation Act of Sept. 27, 1850, 9 Stat. L. 496, ch. 76, of a deed of the plaintiff's ancestor conveying land to the territory of Washington, and upon the incapacity of the territory to accept the deed under the Act of March 2, 1853, 10 Stat. L. 172, ch. 90, by which such territory was organized, was held reviewable on a writ of error under section 709. *Sylvester v. Washington*, (1909) 215 U. S. 80, 30 S. Ct. 25, 54 U. S. (L. ed.) 101.

**Under federal land patent.**—The federal question presented by a claim of right and title under a patent from the United States to land within the place limits of the grant made by the Act of July 1, 1862, 12 Stat. L. 489, ch. 120, and the amendatory Act of July 2, 1864, 13 Stat. L. 356, ch. 216, in aid of branch railroads—which rested upon the theory that such grant was not one *in presenti*, and that therefore the title did not pass upon completion of the railroads and compliance with the terms and conditions of the grant, but the land remained in the jurisdiction of the Land Department, which, up to a short time before the execution of the patent, had assumed and exercised jurisdiction over controversies respecting the land—was not so frivolous as to require the dismissal of a writ of error from the federal Supreme Court to review a decision of a state court against the right or title claimed. *Missouri Valley Land Co. v. Wiese*, (1908) 208 U. S. 234, 28 S. Ct. 294, 52 U. S. (L. ed.) 466; *Missouri Valley Land Co. v. Wrich*, (1908) 208 U. S. 250, 28 S. Ct. 299, 52 U. S. (L. ed.) 473.

**Under congressional grant.**—Contentions in a suit between two railway companies, each claiming the same right of way through an Indian reservation, that the congressional grant to one company was abandoned by the grantee and that the circumstances show an estoppel to claim under it, do not present federal questions. *Spokane, etc., R. Co. v. Washington, etc., R. Co.*, (1911) 219 U. S. 166, 31 S. Ct. 182, 52 U. S. (L. ed.) 159.

**Fifth Amendment.**—No federal question which will confer jurisdiction on the federal Supreme Court of a writ of error under section 709 is involved in a contention in the highest state court that, by the judgment of the trial court, private property is taken for public use without just compensation, in violation of the Fifth Amendment to the Federal Constitution, since this amendment operates solely as a restriction upon federal powers, and not upon those of the several states. *Winous Point Shooting Club v. Caspersen*, (1904) 193 U. S. 189, 24 S. Ct. 431, 48 U. S. (L. ed.) 675.

No federal question which will sustain a writ of error from the federal Supreme Court is involved in the contention that the defendant in a criminal case was compelled to be a witness against himself, contrary to the Fifth Amendment, since this amendment does not operate as a restriction of the powers of the state, but was intended to operate solely upon the federal government. *Barrington v. Missouri*, (1907) 205 U. S. 483, 27 S. Ct. 582, 51 U. S. (L. ed.) 890.

**Privilege or immunity under Constitution.**—The judgment of the highest court of a state, sustaining, as a legitimate exertion of the police power of the state, a statute the validity of which was challenged as repugnant to the Federal Constitution, is reviewable in the federal Supreme Court by a writ of error. *Western Turf Assoc. v. Greenberg*, (1907) 204 U. S. 359, 27 S. Ct. 384, 51 U. S. (L. ed.) 520.

**Construction of Bankruptcy Act.**—A judgment of the highest state court in favor of a trustee in bankruptcy in an action brought by him to recover the value of an alleged voidable preference may be reviewed by the federal Supreme Court as a decision against a federal right or immunity, specially set up or claimed, where the state court answered some of the defendant's contentions by the construction which it gave to the Bankruptcy Act. *Eau Claire Nat. Bank v. Jackman*, (1907) 204 U. S. 522, 27 S. Ct. 391, 51 U. S. (L. ed.) 596.

An action brought by a trustee appointed under the bankruptcy law of the United States, seeking to recover what is asserted to be an asset of the bankrupt estate under that law, presents a federal question, and the denial of the asserted right is a denial of a right or title specially claimed under a law of the United States. *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527.

**Claims by the United States**, in proceedings under the supply lien law of a state, to establish the rights of creditors furnishing supplies for the construction of vessels build-

ing for the United States, that under the contract for the construction of one of the vessels the title vested in the government as fast as paid for; that a lien was reserved to the government under the contracts for building the other vessels superior to the claim of the supply lien creditors under the state law; that the right of the government to its superior claims could not be affected by, and was not subject to, such law; and that the state had no power to retard, impede, or control the operation of the federal government in making and carrying out such contracts—are assertions of rights and immunities, the creation of federal authority, and, when denied by a state court, present a case for writ of error under section 709. *U. S. v. Ansonia Brass, etc., Co.*, (1910) 218 U. S. 452, 31 S. Ct. 49, 54 U. S. (L. ed.) 1107.

**Liability of national bank officers.**—The express denial of an immunity claimed in both the trial and appellate courts, under R. S. sec. 5239, 5 Fed. Stat. Annot. 180, by officers and directors of a national bank in respect to the rule of liability applied for making false official reports as to the bank's condition, is sufficient to sustain the exercise by the federal Supreme Court of its appellate jurisdiction over state courts. *Yates v. Jones Nat. Bank*, (1907) 206 U. S. 158, 27 S. Ct. 638, 51 U. S. (L. ed.) 1002.

The contention that the congressional consent in the Act of June 28, 1834, 4 Stat. L. 708, ch. 126, to the agreement or compact between the states of New Jersey and New York respecting their territorial limits and jurisdiction, vested exclusive jurisdiction in the federal government over the sea adjoining the two states, does not raise a federal question, where there is nothing in the agreement and confirmatory state statutes abdicating rights in favor of the United States, and the transaction simply amounted to fixing the boundaries between the two states. *Hamburg-American Steamship Co. v. Grube*, (1905) 196 U. S. 407, 25 S. Ct. 352, 49 U. S. (L. ed.) 529.

**Individual liability of national bank stockholders.**—A decision of a state court that the statute of limitations applicable to the right to enforce the individual liability of stockholders in national banks is put in motion by a delay of the Comptroller of the Currency in making an assessment involves a federal question which will sustain a writ of error from the federal Supreme Court. *Rankin v. Barton*, (1905) 199 U. S. 228, 26 S. Ct. 29, 50 U. S. (L. ed.) 163.

**Under removal statute.**—"Beyond peradventure a question of a federal nature . . . was raised by the contention, denied by the state court, that a right or privilege existed under a statute of the United States to remove the cause into the Circuit Court of the United States." *Williams v. Pauls Valley First Nat. Bank*, (1910) 216 U. S. 582, 30 S. Ct. 441, 54 U. S. (L. ed.) 625.

**Under Safety Appliance Act.**—Where, in an action for injuries to a passenger, defendant alleged that its train, on which plaintiff was injured, was engaged in interstate com-

meres, and in accordance with Act of March 2, 1893, ch. 196, 27 Stat. L. 531, 6 Fed. Stat. Annot. 753, defendant had equipped all its passenger engines and cars with automatic couplers and driving wheel brakes, so required by the Interstate Commerce Commission, and that such equipment greatly increased the hazard to passengers, which plaintiff assumed, and a judgment rendered against defendant was affirmed by the highest state court to which an appeal might be taken, the case was one in which defendant claimed an immunity under a statute of the United States, and was therefore reviewable under section 709. *Mathew v. Wabash R. Co.*, (Mo. 1904) 81 S. W. 646.

**Denial of equal protection of laws.**—On a writ of error upon the contention that the exemption of banks or trust companies and *bona fide* mortgages from the operation of Conn. Pub. Acts 1907, ch. 238, prohibiting exacting more than fifteen per cent. on loans, or accepting a note for a greater amount than that actually loaned, with intent to evade this provision, denied the equal protection of the laws guaranteed by U. S. Const., Fourteenth Amendment, the court said: "The particular classification here assailed has not been the subject of express consideration in any prior decision of this court, and hence the power to make it cannot be said to have been so explicitly foreclosed as to cause contention on the subject to be obviously frivolous." *Griffith v. Connecticut*, (1910) 218 U. S. 563, 572, 31 S. Ct. 132, 134, 54 U. S. (L. ed.) 1151, 1155.

**Giving effect to records, etc., of other states.**—"When a party asserts that due faith and credit have not been given to a judgment rendered in an action between him and the other party, he asserts a right under the Constitution of the United States, and necessarily this raises a federal question." *West Side Belt R. Co. v. Pittsburgh Constr. Co.*, (1911) 219 U. S. 92, 31 S. Ct. 196, 55 U. S. (L. ed.) 107.

"We have repeatedly held that the mere construction by a state court of a statute of another state, without questioning its validity, does not, with possibly some exceptions, deny to it the full faith and credit demanded by the statute in order to give this court jurisdiction." *Allen v. Alleghany Co.*, (1905) 196 U. S. 458, 25 S. Ct. 311, 49 U. S. (L. ed.) 551. To the same point see *Smithsonian Inst. v. St. John*, (1909) 214 U. S. 19, 29 S. Ct. 601, 53 U. S. (L. ed.) 892.

The exercise by a state court of its independent judgment in interpreting the statute of another state upon which the cause of action is based can present no federal question under the full faith and credit clause of the Federal Constitution, where there is no local statute controlling the construction of statutes of other states, and no settled construction of the statute by the courts of the state enacting it is pleaded or proved. *Louisville, etc., R. Co. v. Melton*, (1910) 218 U. S. 36, 30 S. Ct. 676, 54 U. S. (L. ed.) 921.

Whether or not a corporate contract entered into in contravention of the statutes

regulating foreign corporations was, under the proper construction of such statutes, *ipso facto* void, and therefore unenforceable in the courts of another state, does not present a question under the full faith and credit clause of the Federal Constitution which will sustain a writ of error under section 709. "The validity of these statutes was not denied. The case turned upon their construction and the effect to be given to them in another state." *Allen v. Alleghany Co.*, (1905) 196 U. S. 458, 25 S. Ct. 311, 49 U. S. (L. ed.) 551.

A decision of a state court sustaining the validity of a statute of another state, which is asserted to violate the constitution of that state, does not necessarily involve a decision respecting the full faith and credit to be given such constitution, so as to sustain a writ of error from the federal Supreme Court, where the state court did not question the validity of the state constitution, but, rightly or wrongly, held that the statute was not repugnant to it. *Smithsonian Inst. v. St. John*, (1909) 214 U. S. 19, 29 S. Ct. 601, 53 U. S. (L. ed.) 892.

The federal Supreme Court has jurisdiction of a writ of error sued out to review the decision of a state court adverse to the contention that no recovery against the plaintiff in error can be had if the judgment of a court of a sister state be given the full faith and credit to which it is entitled under the Constitution and laws of the United States. *American Express Co. v. Mullins*, (1909) 212 U. S. 311, 15 Ann. Cas. 536, 29 S. Ct. 381, 53 U. S. (L. ed.) 525.

No refusal by the courts of one state to give full faith and credit to the judgment of that of another is shown, so as to give the federal Supreme Court jurisdiction to review their final judgment dismissing a proceeding by a wife to set aside a judgment annulling her marriage, because such judgment determined the question of the legality of her marriage against her, where it appears that such other court, being a court of competent jurisdiction, and having jurisdiction of the parties and the subject-matter, dismissed a suit by her for separate maintenance while she was living apart from her husband for alleged justifiable cause, in which the defense was that she never became the wife of defendant, because at the time of her alleged marriage to him she had a husband living, which allegation was supported by evidence at the hearing, although the dismissal might have been merely upon the ground that she was not justified in living apart from him, if she made no attempt to prove that it was in fact upon such ground. *Everett v. Everett*, (1909) 215 U. S. 203, 30 S. Ct. 70, 54 U. S. (L. ed.) 158.

**Under Enabling Act.**—The claim of a right under an "authority exercised under the United States" was presented by a contention that a Montana statute was authorized by the Enabling Act of Feb. 22, 1889, 25 Stat. L. 676, ch. 180, and was therefore valid, even if repugnant to the constitution of that state. *Montana v. Rice*, (1907) 204 U. S. 291, 27 S. Ct. 281, 51 U. S. (L. ed.) 490.

# VII. DRAWN IN QUESTION OR SPECIALLY SET UP AND CLAIMED.

**Necessity.**—The appellate jurisdiction of the federal Supreme Court under section 709 cannot be based upon the supposed denial of a federal right which was not urged in the trial court, or called to the attention of or decided by the state appellate court. *Cincinnati, etc., R. Co. v. Slade*, (1910) 216 U. S. 78, 30 S. Ct. 230, 54 U. S. (L. ed.) 390.

A question which the federal Supreme Court can review on writ of error to a state court does not arise under the Act of March 2, 1893, ch. 196, 27 Stat. L. 531, 6 Fed. Stat. Annot. 753, requiring interstate carriers to equip their cars with automatic couplings, where no right under such Act, or dependent upon its construction, was specially set up or claimed, and denied by the state court. *Southern R. Co. v. Carson*, (1904) 194 U. S. 136, 24 S. Ct. 609, 48 U. S. (L. ed.) 907.

The necessity of invoking the protection of the commerce clause of the Federal Constitution, if the repugnancy to that clause of certain state legislation is to be considered by the federal Supreme Court on writ of error to a state court, is not obviated by a reference to the Fourteenth Amendment as invalidating such legislation. *Cox v. Texas*, (1906) 202 U. S. 446, 26 S. Ct. 672, 50 U. S. (L. ed.) 1009.

The refusal by an inferior state court of an application to remove a cause to a federal Circuit Court presents no federal question which will sustain a writ of error to review a judgment of the highest state court affirming the judgment below, where there is nothing in the record to indicate that the question of the right of removal was brought to the attention of the highest state court, and that court could not have considered the question even if presented, because, at the time the appeal from the final judgment was taken, it was too late to review the order refusing the removal. *Chesapeake, etc., R. Co. v. McDonald*, (1909) 214 U. S. 191, 29 S. Ct. 546, 53 U. S. (L. ed.) 963.

A decision of a state court that there was probable cause for beginning a trademark infringement suit in the federal courts in which a final decree was entered dismissing the bill on the merits after a temporary injunction had been dissolved is not reviewable in the federal Supreme Court, where the record does not show that any claim of right under the Federal Constitution or laws was made in the state court, on the theory that such court, by its reasoning, implies that it finds probable cause, in its own opinion, that the decree of the federal court was wrong, whereas not to assume it to be correct is to fail to give it the full faith and credit which R. S. sec. 905, 3 Fed. Stat. Annot. 37, requires. *Burt v. Smith*, (1906) 203 U. S. 129, 27 S. Ct. 37, 51 U. S. (L. ed.) 121, dismissing a writ of error.

The defense to an action by a state to recover possession of a tract of land, so far as based upon a Spanish grant, involves no question of a federal nature which can be considered in the federal Supreme Court on writ of error to a state court, where neither

the validity or construction of any treaty of the United States nor the validity of the grant were challenged. *O'Connor v. Texas*, (1906) 202 U. S. 501, 26 S. Ct. 726, 50 U. S. (L. ed.) 1120.

**Time to raise question or make claim.**—A federal question is presented in time and in the proper form by requested instructions in a state court, asserting rights under the Federal Constitution, which, if they actually exist, entitle the party asserting them to an instruction directing a verdict in its favor. *National Mut. Bldg., etc., Assoc. v. Brahan*, (1904) 193 U. S. 635, 24 S. Ct. 532, 48 U. S. (L. ed.) 823.

A federal question which will sustain a writ of error cannot be first raised in the assignment of errors in the federal Supreme Court. *Mallers v. Commercial L. & T. Co.*, (1910) 216 U. S. 613, 30 S. Ct. 438.

Raising the federal question for the first time in the petition for a writ of error to a state court and in the accompanying assignment of errors is not sufficient to enable the federal Supreme Court to consider that question, even though another federal question has been properly raised and brought up by the same writ of error. *Montana v. Rice*, (1907) 204 U. S. 291, 28 S. Ct. 281, 51 U. S. (L. ed.) 490.

In *Rogers v. Clark Iron Co.*, (1910) 217 U. S. 589, 30 S. Ct. 693, the entire *per curiam* opinion was as follows: "Writ of error dismissed for want of jurisdiction. The case is reported below in (1908) 104 Minn. 198, where the facts are set forth at length. We hold that no federal question was decided either in express terms or by necessary implication, and that the attempt to raise a federal question was made in this court for the first time, which was too late."

The objection that the trustee in bankruptcy had no right to attack the validity of a chattel mortgage given by the bankrupt, because it did not appear that he represented any but simple contract creditors, is too late to be available on a writ of error from the federal Supreme Court to a state court, when the point was not made in the trial court. *Frank v. Vollkommer*, (1907) 205 U. S. 521, 27 S. Ct. 596, 51 U. S. (L. ed.) 911.

The suggestion of a violation of a federal right, first made in a petition for the review, in the highest state court, of the judgment of an intermediate appellate court, is too late to serve as a basis for the exercise of the appellate jurisdiction of the federal Supreme Court, where it does not affirmatively appear that the state court passed upon the federal question, and the denial of the petition may well have been upon the ground that the question, not having been suggested in the court below, could not be made available on appeal. *Chicago, etc., R. Co. v. McGuire*, (1905) 196 U. S. 128, 25 S. Ct. 200, 49 U. S. (L. ed.) 413.

The suggestion of a federal question, first made in a petition for rehearing, filed in the highest state court, is too late to sustain a writ of error from the federal Supreme Court. *Barrington v. Missouri*, (1907) 205 U. S. 483, 27 S. Ct. 582, 51 U. S. (L. ed.) 890.

A federal question, though first raised on a motion for rehearing in the highest state court, is in time to confer jurisdiction on the federal Supreme Court of a writ of error under section 709, where the state court entertained the motion and decided the question. *Leigh v. Green*, (1904) 193 U. S. 79, 24 S. Ct. 390, 48 U. S. (L. ed.) 623; *McKay v. Kalyton*, (1907) 204 U. S. 458, 27 S. Ct. 346, 51 U. S. (L. ed.) 566; *Sullivan v. Texas*, (1908) 207 U. S. 416, 28 S. Ct. 215, 52 U. S. (L. ed.) 274; *Illinois Cent. R. Co. v. Kentucky*, (1910) 218 U. S. 551, 31 S. Ct. 95, 54 U. S. (L. ed.) 1147; *Kentucky Union Co. v. Kentucky*, (1911) 219 U. S. 140, 31 S. Ct. 171, 55 U. S. (L. ed.) 137.

An attempt to assign new errors in a petition for rehearing in a state court which is overruled without an opinion passing on federal questions cannot avail to import such questions into the record so as to sustain a writ of error from the federal Supreme Court to the state court. *Waters-Pierce Oil Co. v. Texas*, (1909) 212 U. S. 112, 29 S. Ct. 227, 53 U. S. (L. ed.) 431.

"It is not enough that the federal question was first presented by a petition for rehearing unless that question was thereupon considered and passed on adversely by the court. *Corkran Oil, etc., Co. v. Arnaudet*, (1905) 199 U. S. 182, 26 S. Ct. 41, 50 U. S. (L. ed.) 143." *Montana v. Rice*, (1907) 204 U. S. 291, 27 S. Ct. 281, 51 U. S. (L. ed.) 490.

"It has been many times held in this court that an attempt to introduce a federal question into the record for the first time by a petition for rehearing is too late. . . . There is an exception to this rule when it appears that the court below entertained the motion for rehearing, and passed upon the federal question. But it must appear that such federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies. *Mallett v. North Carolina*, (1901) 181 U. S. 589, 21 S. Ct. 730, 45 U. S. (L. ed.) 1015; *Leigh v. Green*, (1904) 193 U. S. 79, 24 S. Ct. 390, 48 U. S. (L. ed.) 623; *Corkran Oil, etc., Co. v. Arnaudet*, (1905) 199 U. S. 182, 26 S. Ct. 41, 50 U. S. (L. ed.) 143, 144; *McMillen v. Ferrum Min. Co.*, (1905) 197 U. S. 343, 25 S. Ct. 533, 49 U. S. (L. ed.) 784; *Waters-Pierce Oil Co. v. Texas*, (1909) 212 U. S. 112, 29 S. Ct. 227, 53 U. S. (L. ed.) 431, 434." *Forbes v. Virginia State Council*, (1910) 216 U. S. 396, 30 S. Ct. 295, 54 U. S. (L. ed.) 534.

A federal question first raised by a petition for a rehearing in the highest state court is too late to support the appellate jurisdiction of the federal Supreme Court, where the state court, in denying the petition, made no reference to the federal question. *McMillen v. Ferrum Min. Co.*, (1905) 197 U. S. 343, 25 S. Ct. 533, 49 U. S. (L. ed.) 784.

Counsel's inadvertence in relying in the state court on the Fifth Amendment to the Federal Constitution as invalidating a provision of the state constitution was not corrected in time to sustain a writ of error from the federal Supreme Court, by alleging a vio-

lation of the Fourteenth Amendment in a petition for rehearing in the highest state court, which was denied without any observations. *Corkran Oil, etc., Co. v. Arnaudet*, (1905) 199 U. S. 182, 26 S. Ct. 41, 50 U. S. (L. ed.) 143.

An order of the highest state court, made in passing upon a petition for rehearing, which recites that "on mature consideration" the prayer of said petition is denied, does not show that the court passed upon the federal questions first raised by such petition, so as to sustain a writ of error under section 709. *Forbes v. Virginia State Council*, (1910) 216 U. S. 396, 30 S. Ct. 295, 54 U. S. (L. ed.) 534, where the court said: "Except that the order is said to be upon 'mature' consideration, it is almost word for word the order on rehearing reviewed in *McCorquodale v. Texas*, (1908) 211 U. S. 432, 29 S. Ct. 146, 53 U. S. (L. ed.) 269, which was held to amount to no more than a denial of the motion."

An affidavit in support of a petition for rehearing in the highest state court, stating that, in the brief as well as upon oral argument, a specified federal question had been presented and dismissed, will not support a writ of error from the federal Supreme Court, where the state court denied the petition, with the statement that no federal question had been raised in that court, which may be construed as denying that any such matter was brought to its attention, as stated in the affidavit, or as holding that it presented no federal question. *Smithsonian Inst. v. St. John*, (1909) 214 U. S. 19, 29 S. Ct. 601, 53 U. S. (L. ed.) 892.

The federal Supreme Court has no jurisdiction of a writ of error in a case in which the only suggestion that a federal question was involved was put forward after the highest state court had affirmed, on a second appeal, a judgment rendered by the court below in strict obedience to its mandate, compliance with such mandate being in fact the only question open to and determined by the highest court. *Bonner v. Gorman*, (1909) 213 U. S. 86, 29 S. Ct. 483, 53 U. S. (L. ed.) 709.

The proper way to raise the question or make the claim. — In respect of a case in the second class of those provided for in section 709, viz., "where is drawn in question the validity of a statute of," etc., the court said: "It has been frequently held that in cases coming within this class less particularly is required in asserting the federal right than in cases of the third class, wherein a right, title, privilege, or immunity is claimed under the United States, and the decision is against such right, title, privilege, or immunity. In the latter class the statute requires such right or privilege to be 'specially set up and claimed.' Under the second class it may be said to be the result of the rulings in this court that if the federal question appears in the record in the state court, and was decided, or the decision thereof was necessarily involved in the case, the fact that it was not specially set up will not preclude the right of review here. *Columbia Water Power Co. v. Columbia Electric St. R., etc., Co.*, (1899)

172 U. S. 475 (19 S. Ct. 247, 43 U. S. (L. ed.) 521), and cases cited on page 488. Nevertheless, it is equally well settled that the right of review dependent upon the adverse decision of a federal question exists only in those cases wherein a decision of the question involved was brought, in some proper manner, to the attention of the court, and decided, or it appears that the judgment rendered could not have been given without deciding it." *Harding v. Illinois*, (1904) 196 U. S. 78, 25 S. Ct. 176, 49 U. S. (L. ed.) 394.

"If a party relies upon a federal right, he must specially set it up, and a denial of liability under the law is not a compliance with that requirement." *Louisville, etc., R. Co. v. Smith*, (1907) 204 U. S. 551, 27 S. Ct. 401, 51 U. S. (L. ed.) 612.

The mere claim of a right under the Constitution of the United States in the objections filed to the confirmation of an assessment for a public improvement, which was never afterwards brought to the attention of the trial court or the Supreme Court of the state, is not sufficient to sustain a writ of error from the federal Supreme Court to the state court. *Hulbert v. Chicago*, (1906) 202 U. S. 275, 26 S. Ct. 617, 50 U. S. (L. ed.) 1026.

Statements in the writ of error and the petition for citation are insufficient to show that a federal question was raised and decided by a state court which will sustain a writ of error from the federal Supreme Court. *Hulbert v. Chicago*, (1906) 202 U. S. 275, 26 S. Ct. 617, 50 U. S. (L. ed.) 1026.

The defense in an action against the maker of a promissory note given in consideration of a promise to have cigars called for by a certain contract manufactured in Key West, that it was contemplated that such cigars were to be removed from the factory without compliance with the regulations prescribed by R. S. secs. 3390, 3393, 3 Fed. Stat. Annot. 745, 747, does not amount to the special assertion of a right, title, privilege, or immunity under a federal statute, within the meaning of section 709, since defendant could derive no personal rights under those sections to enforce the repudiation of his note, even though, on grounds of public policy, it was illegal and void. *Allen v. Arguimbau*, (1905) 198 U. S. 149, 25 S. Ct. 622, 49 U. S. (L. ed.) 990.

A showing at every stage of the litigation in the state courts of the intention of a national bank to rely upon the United States banking laws for immunity against liabilities arising out of the ownership of shares in a partnership is sufficient to sustain the appellate jurisdiction of the federal Supreme Court, although the bank did not, in the first instance, anticipate the specific and qualified form in which the immunity finally was denied—especially where the highest state court, by a certificate, made part of its record and judgment, stated that the federal question was involved. *Merchants' Nat. Bank v. Wehrmann*, (1906) 202 U. S. 295, 26 S. Ct. 613, 50 U. S. (L. ed.) 1036.

Where it clearly and unmistakably appears from the opinion of the state Supreme Court

that the federal question was assumed to be in issue was decided against the claim of federal right, and that the decision of the question was essential to the judgment rendered, this is enough to give the federal Supreme Court authority to examine that question on a writ of error. *Montana v. Rice*, (1907) 204 U. S. 291, 27 S. Ct. 281, 51 U. S. (L. ed.) 490; *Chambers v. Baltimore, etc., R. Co.*, (1907) 207 U. S. 142, 28 S. Ct. 34, 52 U. S. (L. ed.) 143.

An assignment of error in a state court which has refused to give effect to a judgment of a federal Circuit Court in deciding a controversy before it, which states the refusal of the trial court to give proper and full credit to the judgment of the Circuit Court, thereby denying to the complaining party "a right arising under the authority of the United States," does not lack certainty of specification, so as to prevent the federal Supreme Court from taking jurisdiction of the cause. *Virginia-Carolina Chemical Co. v. Kirven*, (1909) 215 U. S. 252, 30 S. Ct. 78, 51 U. S. (L. ed.) 179.

A decision of the Michigan Supreme Court that a foreign mutual insurance company which had not been authorized to do business in the state as provided by the state statutes could not maintain a suit to collect assessments due on a policy issued by one of its agents in another state on request of an insurance broker in Michigan who was unable to place the whole line in his own authorized companies, could not be reviewed in the federal Supreme Court, where the only showing of a federal question raised before judgment was made by a request for a finding as matter of law that the state statutes do not and could not under the Federal Constitution prohibit the insured from going or sending outside the state and there procuring insurance of its property located in the state from an insurance company not authorized to do business therein, which is entirely inadequate for the purpose. *Swing v. Weston Lumber Co.*, (1907) 205 U. S. 275, 27 S. Ct. 497, 51 U. S. (L. ed.) 799.

The objection that no federal right was "specially set up and claimed" within the meaning of section 709 could not successfully be maintained, where judicial proceedings in New Jersey were clearly relied upon in New York by executors in an "appeal to the surrogate" as a defense to the assessment of the New York transfer tax, although such right was not in terms stated to be one claimed under the Federal Constitution—especially where the constitutional right was specifically claimed in writing while the surrogate still had the "appeal" under consideration, and its denial was made the subject of exceptions. *Tilt v. Kelsey*, (1907) 207 U. S. 43, 28 S. Ct. 1, 52 U. S. (L. ed.) 95.

References to the Dartmouth College case in the opinions of the state courts in discussing the question whether a certain educational institution is public or private, the decision of which question would determine the validity of state legislation under the state constitution, do not show that the contract clause of the Federal Constitution was

relied upon to invalidate such legislation, so as to sustain a writ of error from the federal Supreme Court. *Osborne v. Clark*, (1907) 204 U. S. 565, 27 S. Ct. 319, 51 U. S. (L. ed.) 619.

The assertion, on a motion for a new trial, that a state statute is contrary to the Federal Constitution, without pointing out the provision of that instrument which it is claimed to violate, does not present a federal question which will confer jurisdiction of a writ of error under section 709. *Harding v. Illinois*, (1904) 196 U. S. 78, 25 S. Ct. 176, 49 U. S. (L. ed.) 394.

The full faith and credit clause of the Federal Constitution must be pleaded, or the attention of the court below directed to the fact that, in connection with the proper construction of a statute of another state, reliance was placed upon that clause, in order to present a federal question for review. *Louisville, etc., R. Co. v. Melton*, (1910) 218 U. S. 36, 30 S. Ct. 876, 54 U. S. (L. ed.) 921.

In a criminal case in a state court the judgment of the state Supreme Court did not contain the slightest allusion to any federal question, but in a statement in a bill of exceptions allowed by the state Supreme Court it appeared that exceptions were taken to certain parts of the charge to the jury, because they "in effect deprived the plaintiff in error of his liberty without due process of law," and that the question thus raised was discussed before the Supreme Court of the state. Dismissing a writ of error, the federal Supreme Court said: "Something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the state courts to give us the limited authority to review their judgments which exists under the Constitution and is regulated by section 709 of the Revised Statutes. A mere claim in the court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment to the Constitution." *Thomas v. Iowa*, (1908) 209 U. S. 263, 28 S. Ct. 487, 52 U. S. (L. ed.) 783.

The question as to the validity of a state law under the Federal Constitution is not necessarily involved so as to sustain a writ of error from the federal Supreme Court to a state court merely because the state law logically might have been assailed as invalid under the Federal Constitution upon grounds more or less similar to those actually taken. *Osborne v. Clark*, (1907) 204 U. S. 565, 27 S. Ct. 319, 51 U. S. (L. ed.) 619.

A carrier's denial that "it was bound by law," as alleged by complainant, to receive, as a connecting and ultimate carrier, a certain interstate shipment, and forward and deliver it to its ultimate destination, does not amount to the assertion of a right under the Act to regulate commerce, so as to sustain a writ of error to review the judgment of a state court adverse to such contention. *Louisville, etc., R. Co. v. Smith*, (1907) 204 U. S. 551, 27 S. Ct. 401, 51 U. S. (L. ed.) 612.

**Must appear in record.**—Neither the petition for a rehearing, nor the petition for the writ of error, nor the assignments of error in the federal Supreme Court, nor the certification of briefs by the clerk of the state court, can cure the failure of the record to show that a federal question was raised and decided which would confer jurisdiction on the federal Supreme Court of a writ of error to the state court. *Harding v. Illinois*, (1904) 196 U. S. 78, 25 S. Ct. 176, 49 U. S. (L. ed.) 394.

"Neither the petition for writ of error in the state court after judgment nor the assignments of error in this court can supply deficiencies in the record of the state court, if such exist." *Appleby v. Buffalo*, (1911) 221 U. S. 524, 31 S. Ct. 699, 701, 55 U. S. (L. ed.) 838.

"In such cases it is thoroughly well settled that the record of the state court must disclose that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment. *Sayward v. Denny*, (1895) 158 U. S. 180, 183, 15 S. Ct. 777, 39 U. S. (L. ed.) 941, 942; *Harding v. Illinois*, (1904) 196 U. S. 78, 25 S. Ct. 176, 49 U. S. (L. ed.) 394; *Waters-Pierce Oil Co. v. Texas*, (1909) 212 U. S. 86, 97, 29 S. Ct. 220, 53 U. S. (L. ed.) 417, 424." *Appleby v. Buffalo*, (1911) 221 U. S. 524, 31 S. Ct. 699, 55 U. S. (L. ed.) 838.

"In any of the classes of cases mentioned in section 709 it is essential that the record disclose that the federal question involved was decided, or that the judgment necessarily involved the federal right, and decided it adversely to the claim of the plaintiff in error." *Chesapeake, etc., R. Co. v. McDonald*, (1909) 214 U. S. 191, 29 S. Ct. 546, 53 U. S. (L. ed.) 963.

"It is well settled in this court that a review of the judgment of a state court is confined to the assignments of error made and passed upon in the judgment of the state court brought here for review. The assignment of errors in this court cannot bring into the record any new matter for our consideration. *Harding v. Illinois*, (1904) 196 U. S. 78, 25 S. Ct. 176, 49 U. S. (L. ed.) 394." *Waters-Pierce Oil Co. v. Texas*, (1909) 212 U. S. 112, 29 S. Ct. 227, 53 U. S. (L. ed.) 431.

A motion to quash an indictment against a negro for disqualification of the grand jurors, who must be electors, because of a change in the state constitution respecting the qualifications of electors, alleged to violate the Act of Congress of June 25, 1868, 15 Stat. L. 73, ch. 70, does not present any question of the denial of a federal right, where there is nothing in the record to show that the grand jury as actually impaneled contained any person who was not qualified as an elector under the earlier constitution, or that it was so made up as to exclude negro citizens on account of their race. *Franklin v. South Carolina*, (1910) 218 U. S. 161, 30 S. Ct. 640, 54 U. S. (L. ed.) 980.

An order of the highest court of a state, on a motion for rehearing, which recites that the cause came on to be heard on such motion, and, "the same being considered by the



court, said motion is overruled," does not show that the court passed on the federal question first raised by such petition; "it expresses no more than would be implied from a simple denial of the motion." *McCorquodale v. Texas*, (1908) 211 U. S. 432, 29 S. Ct. 146, 53 U. S. (L. ed.) 269.

Assignments of error which simply allege in various forms that the state court erred in its decision of the cause present no federal question for consideration on a writ of error under section 709. *Stickney v. Kelsey*, (1908) 209 U. S. 419, 28 S. Ct. 508, 52 U. S. (L. ed.) 863.

The federal Supreme Court is without jurisdiction on a writ of error to a state court to consider a federal question entirely outside the record and having no connection with any federal question which is raised in the record. *Hunter v. Pittsburgh*, (1907) 207 U. S. 161, 28 S. Ct. 40, 52 U. S. (L. ed.) 151.

The petition for a writ of error from the federal Supreme Court to a state court, and the assignment of errors therein, form no part of the record on which to determine whether a federal question was decided by the state court. *Corkran Oil, etc., Co. v. Arnau-det*, (1905) 199 U. S. 182, 26 S. Ct. 41, 50 U. S. (L. ed.) 143.

The fact that the chief justice of the highest state court allowed a writ of error from the federal Supreme Court does not help out the failure of the record to show that a federal question was raised and decided. *Hulbert v. Chicago*, (1906) 202 U. S. 275, 26 S. Ct. 617, 50 U. S. (L. ed.) 1026.

Effect of certificate from state court.—"Nothing is more firmly established" than that a certificate of the presiding judge of a state court that a federal question which was first raised by a petition for rehearing was duly considered and decided cannot confer jurisdiction on the federal Supreme Court of a writ of error to the state court, where, from the face of the record proper and from the opinions, the reasonable inference is that the court may have denied the application in the mere exercise of its discretion, or may have declined to pass upon the federal question in terms because it was suggested too late. *Fulleton v. Texas*, (1905) 196 U. S. 192, 25 S. Ct. 221, 49 U. S. (L. ed.) 443.

"It is elementary that the certificate of a court of last resort of a state may not import a federal question into a record where otherwise such question does not arise; it is equally elementary that such a certificate may serve to elucidate the determination whether a federal question exists." *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527.

The certificate of the chief justice of the highest court of a state cannot help out the total failure of the record to show that a federal question was raised which would sustain a writ of error from the federal Supreme Court. *Louisville, etc., R. Co. v. Smith*, (1907) 204 U. S. 551, 27 S. Ct. 401, 51 U. S. (L. ed.) 612.

The certificate of the chief justice of the highest state court that the judgment of that court denied a title, right, privilege, or im-

munity specially set up and claimed under a federal statute is not in itself sufficient to confer jurisdiction on the federal Supreme Court of a writ of error to that court. *Allen v. Arguimbau*, (1905) 198 U. S. 149, 25 S. Ct. 623, 49 U. S. (L. ed.) 990.

The certificate of a state court that the defendant railway company, in a suit to recover damages for the infection of cattle because of a violation of the quarantine regulations promulgated by the Secretary of Agriculture under cover of the Act of Feb. 2, 1903, ch. 349, 10 Fed. Stat. Annot. 34, insisted that such statute was constitutional, and that, even if unconstitutional, it did not authorize such regulations or give a remedy in damages, removes any doubt as to whether a federal question was raised within the meaning of section 709, where, after a demurrer to the answer of the railway company setting forth the unconstitutionality of the law and the action of the secretary thereunder had been sustained, verdict and judgment were rendered against the defendant. *Illinois Cent. R. Co. v. McKendree*, (1906) 203 U. S. 514, 27 S. Ct. 153, 51 U. S. (L. ed.) 298; *Illinois Cent. R. Co. v. Edwards*, (1906) 203 U. S. 531, 27 S. Ct. 159, 51 U. S. (L. ed.) 305.

A certificate of the highest court of a state to the effect that it necessarily considered the federal question relied upon to sustain a writ of error from the federal Supreme Court, which the record shows was raised, removes any objection that such question was raised too late under the local procedure. *Cincinnati, etc., Packet Co. v. Bay*, (1906) 200 U. S. 179, 26 S. Ct. 208, 50 U. S. (L. ed.) 428.

The certificate of a state court of last resort may serve to remove any doubt whether rights under the federal bankrupt law were so relied upon and passed upon in affirming, without opinion, a judgment dismissing a suit brought by a trustee in bankruptcy to recover an alleged asset of the bankrupt estate, as to sustain a writ of error under section 709. *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 26 S. Ct. 289, 50 U. S. (L. ed.) 527.

#### VIII. DECISION OF STATE COURT.

**Must be adverse to right claimed.**—Whether or not a statute of a sister state, alleged to create contract obligations protected against impairment by the contract clause of the Federal Constitution, has been repealed by subsequent legislation, presents no federal question, where there was neither allegation nor proof that the court of last resort in the state where the legislation was enacted had considered the question or made any ruling upon it. *Texas, etc., R. Co. v. Miller*, (1911) 221 U. S. 408, 31 S. Ct. 534, 55 U. S. (L. ed.) 789; *Texas, etc., R. Co. v. Gross*, (1911) 221 U. S. 417, 31 S. Ct. 536, 55 U. S. (L. ed.) 796.

**Decision when adverse.**—A decision of a state court that the statute of limitations making adverse possession of real property for seven years a bar to its recovery operates to defeat an action brought under R. S. sec. 2326, 5 Fed. Stat. Annot. 35, to try title to conflicting mining claims, in which the de-

feated party relied on the relocation, under R. S. sec. 2324, 5 Fed. Stat. Annot. 19, of a forfeited claim, necessarily involves a denial of rights asserted by him under the latter section so as to make a case for a writ of error from the federal Supreme Court, where the state court treated as irrelevant and immaterial evidence tending to show that the premises in dispute were embraced in the forfeited location, and that possession of that claim was held and retained from a time at least contemporaneous with the initiation of the conflicting locations almost up to the relocation. *Lavagnino v. Uhlig*, (1905) 198 U. S. 443, 25 S. Ct. 716, 49 U. S. (L. ed.) 1119.

An adequate presentation of a federal question to a state court to make a case for a writ of error from the federal Supreme Court sufficiently appears where the record clearly shows that the trial court considered that the unsuccessful party was specially claiming rights under R. S. sec. 2326, 5 Fed. Stat. Annot. 35, authorizing an adverse of an application for a patent to mineral lands, and the highest state court necessarily acted upon that assumption in delivering its opinion. *Lavagnino v. Uhlig*, (1905) 198 U. S. 443, 25 S. Ct. 716, 49 U. S. (L. ed.) 1119.

A decision sustaining the validity, under the *ex post facto* clause of the Federal Constitution, of Fla. Act of May 30, 1901, amending Fla. Rev. Stat., sec. 970, so as to prevent collateral attack of a judgment for a disqualification which does not appear of record in the cause, is not so necessarily involved in the denial by the highest state court of a petition to vacate a decree entered before the amendment, for the relationship existing between the judges and one of the parties, which was not known at the time, as to sustain a writ of error under section 709. *Caro v. Davidson*, (1905) 197 U. S. 197, 25 S. Ct. 428, 49 U. S. (L. ed.) 723.

A decree of the state court requiring defendants to vacate certain lands, and enjoining them from further mining thereon, which was the relief prayed in a bill proceeding on the theory that the corporation holding a mining lease under which defendants justified their occupation as its agents was no longer in existence, is not reviewable in the federal Supreme Court as involving a denial of the claim that in proceeding to determine the case without making the corporation a party defendant it will be deprived of its property without due process of law, since, not being a party, the rights of the corporation are not affected by such decree. *Iron Cliffs Co. v. Negaunee Iron Co.*, (1905) 197 U. S. 463, 25 S. Ct. 474, 49 U. S. (L. ed.) 836.

The question whether a state court, consistently with the Act to regulate commerce, can grant relief to a shipper because of the exaction by a common carrier of an alleged unreasonable freight rate for an interstate shipment, when such rate has been filed with the Interstate Commerce Commission and promulgated as provided by the Act to regulate commerce, and has not been found to be unreasonable by the commission, will sustain a writ of error from the federal Supreme Court to a state court, where such question was pre-

sented by the pleadings, was passed upon by the trial court, was expressly and necessarily decided by the highest state court, and is essentially involved in the case. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.*, (1907) 204 U. S. 426, 27 S. Ct. 350, 51 U. S. (L. ed.) 553.

**Other grounds of decision.**—"It is well settled in this court that where a state court decides a case upon an independent ground not within the federal objections taken, and that ground is sufficient to maintain the judgment, this court will not review the case. *Leathe v. Thomas*, (1907) 207 U. S. 93, 28 S. Ct. 30, 52 U. S. (L. ed.) 118; *Eustis v. Bolles*, (1893) 150 U. S. 361, 14 S. Ct. 131, 37 U. S. (L. ed.) 1111; *Giles v. Teasley*, (1904) 193 U. S. 146, 24 S. Ct. 359, 48 U. S. (L. ed.) 655." *Waters-Pierce Oil Co. v. Texas*, (1909) 212 U. S. 112, 29 S. Ct. 227, 53 U. S. (L. ed.) 431.

"Where the disposition of a federal question was not necessary to the determination of the cause, and the judgment is based on a distinct ground or grounds broad enough to sustain it, over which this court has no jurisdiction, the writ of error cannot be maintained." *Rogers v. Jones*, (1909) 214 U. S. 196, 29 S. Ct. 635, 53 U. S. (L. ed.) 965.

"When a state court decides a case upon two grounds, one federal and the other non-federal, this court will not disturb the judgment if the nonfederal ground, fairly construed, sustains the decision." *Berea College v. Kentucky*, (1908) 211 U. S. 45, 29 S. Ct. 33, 53 U. S. (L. ed.) 81.

The federal Supreme Court will not take jurisdiction where the judgment of the state court rests on two grounds, one of which does not involve a federal question, or where it does not appear on which of two grounds the judgment was based, and the nonfederal ground is sufficient in itself to sustain the judgment. *Allen v. Arguimbau*, (1905) 198 U. S. 149, 25 S. Ct. 622, 49 U. S. (L. ed.) 990.

"It is not enough that a right under the Constitution of the United States was specially set up and claimed. It must be made manifest either that the right was denied in fact, or that the judgment could not have been rendered without denying it." *Western Union Tel. Co. v. Wilson*, (1909) 213 U. S. 52, 29 S. Ct. 403, 53 U. S. (L. ed.) 693.

"According to the well-settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a federal question was necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no federal question, the same result must follow, as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong." *Arkansas Southern R. Co. v. German Nat. Bank*, (1907) 207 U. S. 270, 28 S. Ct. 78, 52 U. S. (L. ed.) 201.

"Of course, there might be cases where, although the decision put forward other reasons, it would be apparent that a federal

question was involved, whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that a state court, even if ostensibly deciding the federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction. *Johnson v. Risk*, (1890) 137 U. S. 300, 307, 11 S. Ct. 111, 34 U. S. (L. ed.) 683." *Leathe v. Thomas*, (1907) 207 U. S. 93, 28 S. Ct. 30, 52 U. S. (L. ed.) 118.

A writ of error to review a decision of a state court upholding a seizure, under the state laws, of intoxicating liquors shipped C. O. D. into that state from another state, on the ground that the sale was completed in the former state, will not be dismissed on the theory that its ruling rests upon a nonfederal ground broad enough to sustain it, where the protection of the commerce clause of the Federal Constitution was directly invoked in the state court. *American Express Co. v. Iowa*, (1905) 196 U. S. 133, 25 S. Ct. 182, 49 U. S. (L. ed.) 417; *Adams Express Co. v. Iowa*, (1905) 196 U. S. 147, 25 S. Ct. 185, 49 U. S. (L. ed.) 424.

The federal Supreme Court is without jurisdiction to review the judgment of a state court sustaining a demurrer to the petition in an action to recover damages for the refusal of a board of registrars to register a negro as an elector, on the ground that, conceding the truth of the averments of the petition that such board was appointed and qualified under a state constitution adopted for the purpose of disfranchising negroes, in violation of U. S. Const., 14th and 15th Amendments, no damage has been suffered because no refusal to register by a board constituted in defiance of the Federal Constitution could disqualify a legal voter otherwise entitled to exercise the elective franchise, since this amounts to a decision upon an independent nonfederal ground, sufficient to sustain the judgment without reference to the federal question presented. *Giles v. Teasley*, (1904) 193 U. S. 146, 24 S. Ct. 359, 48 U. S. (L. ed.) 655.

A denial by a state court of a writ of mandamus to compel a board of registrars to register a negro as an elector, because the board would have no existence and no duties to perform if the truth of the allegations of the petition as to the unconstitutional character, under the 14th and 15th Amendments, of the registration authorized under the Alabama Constitution be admitted, rests upon a ground adequate to sustain it, and wholly independent of the federal rights claimed, and is therefore not reviewable on writ of error under section 709. *Giles v. Teasley*, (1904) 193 U. S. 146, 24 S. Ct. 359, 48 U. S. (L. ed.) 655, dismissing a writ of error.

The assertion that state statutes have undertaken to confer water rights upon a municipality, and were given such effect in violation of federal rights of riparian owners,

cannot serve as the basis of a writ of error under section 709, where the state court holds that the municipal rights were not determined by the effect of those statutes, but upon the right and title secured by Spanish and Mexican laws, and the subsequent confirmation thereof under a federal statute.

The ruling of a state court that the power to penalize a railway company for failure to furnish cars on demand arose from a state statute instead of from a rule adopted by the railroad commission, which was challenged as repugnant to the Federal Constitution, does not eliminate the federal questions from the case, so as to require the dismissal of a writ of error from the federal Supreme Court, where the constitutional defenses asserted by the pleadings and embraced in the instructions asked and refused were not confined to the mere order as such, but plainly challenged the power of the state to inflict the penalty for the failure to furnish the cars under the circumstances disclosed by the pleadings. *St. Louis Southwestern R. Co. v. Arkansas*, (1910) 217 U. S. 136, 30 S. Ct. 476, 54 U. S. (L. ed.) 698.

The decision of a state court sustaining its jurisdiction of a suit against a foreign railway corporation, commenced by attaching a box car belonging to that company, does not involve a ruling upon the company's contention that the levy upon such car was invalid, as burdening interstate commerce, where the court did not pass upon the question whether the levy of the attachment was regular, or whether the property seized was subject to levy, but held, construing the state statutes relating to attachments and the decisions of the highest court of that state, that it was unnecessary to decide those questions, because they had been waived by the conduct of the railway company in giving a replevy bond and answering without protestation. *Cincinnati, etc., R. Co. v. Slade*, (1910) 216 U. S. 78, 30 S. Ct. 230, 54 U. S. (L. ed.) 390.

A judgment of a state court dismissing a suit founded upon the making and approval of a plat of a town site, although resting in some respects upon the proposition that, under the Idaho Act of Jan. 8, 1873, enacted pursuant to R. S. sec. 2387, 6 Fed. Stat. Annot. 344, to provide for the disposal of the land, there was no power given to make a survey or plat which did not conform to the lines of occupation, is reviewable in the federal Supreme Court, where the basis of the suit is that the federal laws authorize an official ascertainment of boundaries; that equitable rights under those laws vest upon condition that the owners, within a reasonable time, have their rights confirmed by the trustee upon an official survey; and that those laws require each town-site occupant to see that the official ascertainment is true before accepting confirmation. More than a mere construction of the Idaho statute is involved. *Scully v. Squier*, (1909) 215 U. S. 144, 30 S. Ct. 51, 54 U. S. (L. ed.) 131.

A decree of a state court dismissing the bill in a suit to remove a cloud on title is not reviewable in the federal Supreme Court because of a ruling that an execution sale by a

federal marshal, relied upon as the foundation of title, was made at the wrong place, where the decree is also based upon the grounds that the alleged return on the writ of fieri facias did not describe the lands in controversy, that title had not been deraigned as required by the state statute under which the suit was brought, and that the suit was barred by the state statute of limitations. *Rogers v. Jones*, (1909) 214 U. S. 196, 29 S. Ct. 635, 53 U. S. (L. ed.) 965.

The refusal of a state court to permit the filing of a plea setting up a federal question does not necessarily involve a decision of such question so as to sustain a writ of error from the federal Supreme Court, where the state court may have refused such permission either because the plea was not filed until more than nine months after the declaration, and not until the case was called for trial, or because such plea, which went in terms to the whole declaration, and prayed judgment, was clearly bad as to the second count in the declaration. *Western Union Tel. Co. v. Wilson*, (1909) 213 U. S. 52, 29 S. Ct. 403, 53 U. S. (L. ed.) 693.

A state court, by resting its decision in a suit to require railway companies to construct their railroad through a specified county seat, and to restrain them from abandoning a portion of the road, upon the ground that the petition by the railway companies to the railroad commission for approval of a consolidation, and its order thereon, constituted a binding contract, is not using a mere pretext to avoid the determination of the federal questions arising in the case under the contract and commerce clauses of the Federal Constitution, where the power of the commission and the effect of its order were necessarily presented by the case; and its decision is not reviewable by the federal Supreme Court. *Mobile, etc., R. Co. v. Mississippi*, (1908) 210 U. S. 187, 28 S. Ct. 650, 52 U. S. (L. ed.) 1016.

No federal question respecting due process of law or full faith and credit, which will sustain a writ of error under section 709, is involved in a suit in which the state court, after reversing a judgment for defendant on the ground that a judgment of a federal Circuit Court, set up as *res judicata* in a special replication to two of four pleas in set-off, is binding, decided on rehearing that, conceding the judgment of the federal court to be binding as to the two pleas to which the replication of *res judicata* applies, judgment for defendant can be upheld upon the other two pleas referring to earlier stages of the same transaction; nor does it matter that the federal Supreme Court may think the state court wrong in believing that there is evidence to support these pleas. *Leathe v. Thomas*, (1907) 207 U. S. 93, 28 S. Ct. 30, 52 U. S. (L. ed.) 118.

A judgment of a state court against a carrier for the value of a shipment of cotton which it delivered without the surrender of the bills of lading is reviewable in the federal Supreme Court, although the state court refers to, and upholds, over an objection of repugnance to the Federal Constitution, a state

statute forbidding delivery under such circumstances, where the court treats the contract of shipment itself as requiring a delivery to shipper's order and only upon the production of the bills of lading properly indorsed. *Arkansas Southern R. Co. v. German Nat. Bank*, (1907) 207 U. S. 270, 28 S. Ct. 78, 52 U. S. (L. ed.) 270, where the court also said: "If we should be of opinion, as we are, that the Supreme Court [of the state] rested its judgment upon principles of common law as it understood them, we should go no farther, although that court also upheld and relied upon the statute, whether, in our opinion, its views were right or wrong."

The decision of a state court that the federal questions alleged to be involved in mandamus proceedings were entirely put out of the case by the facts set forth in the return to the alternative writ, presenting a question obviously not of a federal character, will not be reviewed by the federal Supreme Court, where there is nothing in the case to justify a suspicion that the federal questions were sought to be avoided or were avoided by giving an unreasonable construction to the pleadings. *Vandalia R. Co. v. Indiana*, (1907) 207 U. S. 359, 28 S. Ct. 130, 52 U. S. (L. ed.) 246.

The contention that a second conviction of a public officer for failing, on demand, to pay over certain public moneys, deprives him of his liberty without due process of law, by twice subjecting him to jeopardy for the same offense, presents no federal question for a writ of error from the Supreme Court to the highest court of a state where the latter court decides that the accused was not put in jeopardy by his prior conviction because such conviction was reversed on the ground that there had been no legal demand. *Shoener v. Pennsylvania*, (1907) 207 U. S. 188, 28 S. Ct. 110, 52 U. S. (L. ed.) 163.

A state court, by deciding that a railway employee who was killed while attempting to make a coupling with a car not equipped with an automatic coupler as required by the Act of March 2, 1893, ch. 196, sec. 2, 6 Fed. Stat. Annot. 753, was, as a matter of law, guilty of contributory negligence in lifting his head a little too high after he had been warned of the danger, cannot defeat the appellate jurisdiction of the federal Supreme Court, where section 8 of that statute was specially invoked as excluding the defense of assumption of risk. *Schlemmer v. Buffalo, etc., R. Co.*, (1907) 205 U. S. 1, 27 S. Ct. 407, 51 U. S. (L. ed.) 681.

The judgment of the Ohio Supreme Court upholding the validity of the provisions of the Free Banking Act of March 21, 1851, sec. 30, as amended April 24, 1879, under which an indictment had been found against the cashier of a bank incorporated under that Act, in the face of the objection that such section, by subjecting officers of institutions so incorporated to criminal liability, when officers of other banking institutions guilty of similar acts are not so subject, denies the equal protection of the laws, cannot be reviewed by the federal Supreme Court, where the failure of the state court to file an opin-

ion leaves it doubtful whether that court may not have held that the words "any banking company," as used in the section in question, embrace all banking institutions in the state, whether incorporated under the Free Banking Act or not. *Bachtel v. Wilson*, (1907) 204 U. S. 36, 42, 27 S. Ct. 243, 246, 51 U. S. (L. ed.) 357, 360.

A federal question respecting the validity of a paving assessment against a street railway company is not open on writ of error from the federal Supreme Court to a state court, where the latter court based its ruling that the question had no standing in the case upon its view as to the scope of the application of the railway company for relief from the assessment, and of the pleadings, and it is not contended that such view is erroneous. *Fair Haven, etc., R. Co. v. New Haven*, (1906) 203 U. S. 379, 27 S. Ct. 74, 51 U. S. (L. ed.) 237.

The presence of a question respecting the construction and application of the congressional legislation as to swamp and overflowed lands gives no jurisdiction to the federal Supreme Court to review the judgment of a state court in an action of ejectment, holding defendant's title invalid, on the independent ground of noncompliance with an act of the state legislature. *Leonard v. Vicksburg, etc., R. Co.*, (1905) 198 U. S. 416, 25 S. Ct. 750, 49 U. S. (L. ed.) 1108.

**Decisions on questions of fact.**—"In cases coming from a state court we do not review questions of fact, but accept the conclusions of the state tribunals as final." *Chrisman v. Miller*, (1905) 197 U. S. 313, 25 S. Ct. 468, 49 U. S. (L. ed.) 770, a chancery case.

"On a writ of error we do not deal with the facts." *King v. West Virginia*, (1910) 216 U. S. 92, 30 S. Ct. 225, 54 U. S. (L. ed.) 396, a chancery case.

A writ of error to review a decree of a state court rejecting the contention of an owner of a mining claim that a certain vein or lode had part of its apex in his claim, was dismissed for want of jurisdiction, where the case turned upon a question of fact. *Mammoth Min. Co. v. Grand Cent. Min. Co.*, (1909) 213 U. S. 72, 29 S. Ct. 413, 53 U. S. (L. ed.) 702.

A decision of a state court, in a suit to quiet title, that the grantee from the United States, through the state of Arkansas and other grantors, took no title by virtue of riparian rights to lands lying between the government meander line and the main channel of a river, which lands the court found to be swampy, checked by bayous, subject to inundation, but reclaimable to some extent for agricultural purposes, was held not to be reviewable by the federal Supreme Court. *Chapman, etc., Land Co. v. Bigelow*, (1907) 206 U. S. 41, 27 S. Ct. 679, 51 U. S. (L. ed.) 953.

In *Chicago, etc., R. Co. v. Swanger*, (1908) 157 Fed. 783, 789, Judge Smith McPherson said: "A writ of error is for the correction of erroneous rulings in matters of law, and not for a review of questions of fact; and it can be safely predicted that in all cases, including those in equity, taken up by writ

of error, the contention will be that all questions of fact will be foreclosed. Such is the rule, and a writ of error in a case turning on questions of fact, concerning which the evidence is in conflict, will be no remedy at all. And the question naturally arises whether such will be the result. If so, then the Supreme Court is practically deprived of power in all such cases, with the result that the conflicting state court decisions will remain in force, instead of having that which is so desirable, viz., a decision by the national Supreme Court on all national questions. The real welfare of this country demands that all questions, of fact as well as of law, pertaining to our national Constitution, be ultimately decided by our national Supreme Court, to which all patriotic citizens should and do yield the most cheerful obedience. That a writ of error to a state court in a chancery as well as in a law case in which the evidence is in conflict will avail nothing, one need but read the case of *Egan v. Hart*, (1897) 165 U. S. 188, 17 S. Ct. 300, 41 U. S. (L. ed.) 680. And see *Bement v. National Harrow Co.*, (1902) 186 U. S. 70, 83, 22 S. Ct. 747, 46 U. S. (L. ed.) 1058. The only remedy to correct the decision of the highest court of the state is by writ of error, in chancery cases as well as in actions at law. In a large per cent. of these chancery cases the case turns solely on questions of fact, with reference to which the evidence is in conflict; and an important inquiry is thereby suggested as to whether, if the effort is successfully made to keep litigation involving federal questions in the state courts, depriving the national courts from passing on questions of fact in chancery cases, such party thus desiring a review is not deprived of due process of law. This is a question of great moment, but not now for discussion in this case."

"It is the settled law that this court, in an action at law, at least, has no jurisdiction to review the conclusions of the highest court of a state upon questions of fact." *Clipper Min. Co. v. Eli Min., etc., Co.*, (1904) 194 U. S. 220, 24 S. Ct. 632, 48 U. S. (L. ed.) 944.

Findings of fact made in the state court are accepted as conclusive by the federal Supreme Court. *Waters-Pierce Oil Co. v. Texas*, (1909) 212 U. S. 86, 29 S. Ct. 220, 53 U. S. (L. ed.) 417.

Upon a writ of error to review a judgment which was alleged to be repugnant to federal statutes relating to the powers and liabilities of national banks, "it is elementary that, on error to a state court of last resort, in a case of this character, the findings of fact of the state court are binding on us." *Rankin v. Emigh*, (1910) 218 U. S. 27, 30 S. Ct. 672, 54 U. S. (L. ed.) 915.

The verdict of the jury in the state court settles all questions of fact on a writ of error under section 709. *Smiley v. Kansas*, (1905) 196 U. S. 447, 25 S. Ct. 289, 49 U. S. (L. ed.) 546.

Whether a bankrupt was insolvent at the time of giving an alleged preference, and whether the creditor had reasonable cause

to believe that it was intended thereby to give a preference, are questions of fact, as to which the federal Supreme Court is concluded by the verdict of the jury in a suit by the trustee to recover the amount of such preference. *Kaufman v. Tredway*, (1904) 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190.

A finding of a state court that, when a commutation entry under the homestead laws was allowed, neither the entryman nor the land officers had actual knowledge of the amendment of R. S. sec. 2301, 4 Fed. Stat. Annot. 317 note, by the Act of March 3, 1891, 4 Fed. Stat. Annot. 317, which made such commutation premature, is a finding of fact, and, therefore, conclusive on the federal Supreme Court on a writ of error to the state court. *Hill v. McCord*, (1904) 195 U. S. 395, 25 S. Ct. 96, 49 U. S. (L. ed.) 251.

The decision of a state court in a suit in equity that a trust deed was accepted by a national bank is a finding of fact; "and this court, on a question of that character, does not review the findings of fact which have been made in the state court." *Kerfoot v. Farmers', etc., Bank*, (1910) 218 U. S. 281, 31 S. Ct. 14, 54 U. S. (L. ed.) 1042.

A decision by a state court that certain tracts of land were not within the boundaries of a land grant rests upon a question of fact, which cannot serve as the basis of a writ of error under section 709. *King v. West Virginia*, (1910) 216 U. S. 92, 30 S. Ct. 225, 54 U. S. (L. ed.) 396.

Whether or not discrimination against negroes because of their race or color was practiced by the jury commissioners in the selection of grand and petit jurors is a question of fact, the decision of which by the state court is conclusive on the federal Supreme Court on writ of error, unless so grossly wrong as to amount to an infraction of the Federal Constitution. *Thomas v. Texas*, (1909) 212 U. S. 278, 29 S. Ct. 393, 53 U. S. (L. ed.) 512.

The decision of the highest state court of a state that the determination of the trial court, based on conflicting testimony, that the original locators of a mining claim had resumed their assessment work within the meaning of R. S. sec. 2324, 5 Fed. Stat. Annot. 19, before an attempted adverse relocation, was conclusive on appeal, does not amount to a denial of the right of location claimed under that section, so as to permit a review in the federal Supreme Court on writ of error. *Yosemite Gold Min., etc., Co. v. Emerson*, (1908) 208 U. S. 25, 28 S. Ct. 196, 52 U. S. (L. ed.) 374.

The refusal of a state court to grant for local prejudice the change of venue asked for in a criminal case cannot involve a federal question of sufficient merit to sustain a writ of error from the federal Supreme Court, where the highest state court, after reviewing the testimony, decided that such refusal was not an abuse of the discretion vested in the court. *Barrington v. Missouri*, (1907) 205 U. S. 483, 27 S. Ct. 582, 51 U. S. (L. ed.) 890.

If it was necessary for a trustee in bankruptcy to represent judgment as well as simple contract creditors when attacking the

validity of a chattel mortgage given by the bankrupt, it will be presumed, on a writ of error from the federal Supreme Court to review a judgment of a state court setting aside the mortgage as in fraud of creditors, that the trial court, in passing upon all the evidence, found that he did represent both classes of creditors, where the record shows that the entire record of the proceedings in the bankruptcy court, though not returned to the federal Supreme Court, was in evidence before the trial court. *Frank v. Vollkommer*, (1907) 205 U. S. 521, 27 S. Ct. 596, 51 U. S. (L. ed.) 911.

Findings of fact upon which depends the answer to the question whether or not certain transactions were invalid under the Bankrupt Act as operating to give a creditor an unlawful preference are conclusive upon the federal Supreme Court, in reviewing by writ of error the judgment of a state court. *Eau Claire Nat. Bank v. Jackman*, (1907) 204 U. S. 522, 27 S. Ct. 391, 51 U. S. (L. ed.) 596.

A judgment of a state court will be affirmed by the federal Supreme Court on a writ of error if there is evidence sufficient to sustain it, although there may be other conflicting testimony, where no special findings of fact were made, and the proceedings in the trial court were approved by the highest state court without an opinion. *Gleason v. White*, (1905) 199 U. S. 54, 25 S. Ct. 782, 50 U. S. (L. ed.) 87.

The question whether a schedule of interstate freight rates filed with the Interstate Commerce Commission was posted as required by the Act to regulate commerce is not open in the federal Supreme Court on writ of error to a state court, where the latter court in effect declared that such schedule was conceded to have been filed and published in conformity with the statute, and it does not appear that if the court, having the evidence before it, had not treated the case as presented, it might not have considered the facts in relation to the publication of the schedule, and affirmatively found facts compelling the conclusion that the statute had been complied with, even if such inference was not sufficiently sustained by the findings of the trial court which the appellate court adopted. *Texas, etc., R. Co. v. Abilene Cotton Oil Co.* (1907) 204 U. S. 426, 27 S. Ct. 350, 51 U. S. (L. ed.) 553.

Various grounds of decision — *Res adjudicata*. — The highest court of a state may decline to reopen, on a second appeal, a question of the validity of the service of summons, which it had upheld on the first appeal, without thereby making a case for a writ of error under section 709, where the claim that such service was invalid under the Federal Constitution was first set up on the second hearing in the trial court. The Supreme Court "held the question of jurisdiction had already been determined, and that it was not bound to re-examine it. This was, of course, a ground broad enough to sustain the judgment." *Western Electrical Supply Co. v. Abbeville Electric Light, etc., Co.*, (1905) 197 U. S. 299, 25 S. Ct. 481, 49 U. S. (L. ed.) 765.

*Suit by bankrupt's trustee to avoid preference.*—The decision of the highest state court that a trustee of a bankrupt partnership can avoid a preference under the state law arising out of a sale by an individual partner of his individual property, and that such preference may be avoided without previously ascertaining the existence of creditors of the individual estate, does not rest upon a non-federal ground broad enough to sustain the judgment, so as to defeat the appellate jurisdiction of the federal Supreme Court, because the state court applied the state law in testing the existence of the preference. *Miller v. New Orleans Acid, etc., Co.*, (1909) 211 U. S. 496, 29 S. Ct. 176, 53 U. S. (L. ed.) 300.

*Defect of parties to appeal.*—There has been no decision of the federal question in the highest court of the state in which a decision in the suit could be had, where the highest state court dismissed an appeal in the suit because of a defect in the parties to such appeal. *Newman v. Gates*, (1907) 204 U. S. 89, 27 S. Ct. 220, 51 U. S. (L. ed.) 385.

*State procedure.*—A decision of the highest state court that a plea, when construed most strongly against the pleader, does not disclose the defense that the note in suit was given to a foreign corporation in pursuance of business carried on in another state without compliance with the statutory conditions upon which its right to do business there depended, involved purely a local question which will not sustain a writ of error under section 709. *Allen v. Alleghany Co.*, (1905) 196 U. S. 458, 25 S. Ct. 311, 49 U. S. (L. ed.) 551.

A decision of a state court in an action founded on a statute of another state creating an action for death, qualified by a one year's limitation, that the failure to plead the statute in the complaint was cured by its inclusion in the answers, filed more than one year after the death, presents no question as to the full faith and credit to be given such statute, so as to sustain a writ of error under section 709, but involves nothing more than a question of local pleading and practice. *Texas, etc., R. Co. v. Miller*, (1911) 221 U. S. 408, 31 S. Ct. 534, 55 U. S. (L. ed.) 789; *Texas, etc., R. Co. v. Gross*, (1911) 221 U. S. 417, 31 S. Ct. 536, 55 U. S. (L. ed.) 796.

Contentions that immunities secured by the Federal Constitution, 14th Amendment, are violated by a decision of a state court that forfeiture of a corporate franchise may be declared for nonuser, and by its ruling, following its conception of the rules of pleading, that the charges of nonuser contained in an information in the nature of quo warranto stand as confessed under the pleadings, so as to sustain a motion for final judgment of ouster, are too devoid of merit to serve as the basis of a writ of error from the federal Supreme Court. *Delmar Jockey Club v. Missouri*, (1908) 210 U. S. 324, 28 S. Ct. 732, 52 U. S. (L. ed.) 1080.

A decision of the highest state court that the defendant in a criminal case has been tried in accordance with the local procedure, although the names of all the witnesses were not indorsed on the indictment, cannot be reviewed in the federal Supreme Court on

the theory that a meritorious federal question was involved in the claim that the accused was a subject of Great Britain, and, by virtue of treaties, the law of nations, the laws and Constitution of the United States, and the laws of the state, he was entitled to know who were the witnesses against him. *Barrington v. Missouri*, (1907) 205 U. S. 483, 27 S. Ct. 582, 51 U. S. (L. ed.) 890.

Federal questions which the highest state court is, by its settled practice, justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel, will not serve as the basis of a writ of error from the federal Supreme Court. *Hulbert v. Chicago*, (1906) 202 U. S. 275, 26 S. Ct. 617, 50 U. S. (L. ed.) 1026.

A federal question, although referred to in the assignments of error in the state appellate court and in the federal Supreme Court, cannot be considered by the latter, where it does not appear that the state court dealt with the question, and it may have refused to do so on the ground that it was not raised in the trial court. *Cox v. Texas*, (1906) 202 U. S. 446, 26 S. Ct. 671, 50 U. S. (L. ed.) 1099.

*Comity.*—Whether or not the courts of one state should, on principles of comity, permit an action to be maintained on a contract entered into in contravention of the laws of another state, is not a federal question which will sustain a writ of error under section 709. *Allen v. Alleghany Co.*, (1905) 196 U. S. 458, 25 S. Ct. 311, 49 U. S. (L. ed.) 551.

*Matters of general law.*—The exclusion from evidence in a suit to quiet title of a letter written by the Secretary of the Interior to the Commissioner of the General Land Office, which is clearly *res inter alios acta*, presented no federal question to sustain a writ of error under section 709. *Chapman, etc., Land Co. v. Bigelow*, (1907) 206 U. S. 41, 27 S. Ct. 679, 51 U. S. (L. ed.) 953.

In an action by a trustee in bankruptcy to recover from the bankrupt's mortgagee the proceeds of a sale of the mortgaged property the decision of a state court as to whether a conveyance by the bankrupt was made with intent to defraud creditors does not present a federal question reviewable under section 709. *Thompson v. Fairbanks*, (1905) 196 U. S. 516, 25 S. Ct. 306, 49 U. S. (L. ed.) 577.

A decision of a state court that the general rule making the landlord responsible for the taxes has no application to the case of a perpetual leaseholder where the tenant is, in effect, the virtual owner of the property and entitled to its use forever, presents no federal question which can be reviewed by the federal Supreme Court on a writ of error. *J. W. Perry Co. v. Norfolk*, (1911) 220 U. S. 472, 31 S. Ct. 465, 55 U. S. (L. ed.) 548.

Riparian rights asserted to have been secured by the treaty of Guadalupe Hidalgo between the United States and Mexico are not rights of federal origin which, when denied, lay the basis for a writ of error under section 709, but involve only a question of state law and of general public law. *Los Angeles Farming, etc., Co. v. Los Angeles*, (1910) 217

U. S. 217, 30 S. Ct. 452, 54 U. S. (L. ed.) 736.

The contention that the disposition of the public lands by the United States is interfered with by a judgment awarding a municipality rights in the waters of a stream paramount to those of riparian owners, which rests upon the effect of the Spanish and Mexican laws governing the rights of a pueblo of which the municipality is the successor, and the subsequent confirmation thereof under the federal laws, is too clearly unfounded to support a writ of error under section 709. *Los Angeles Farming, etc., Co. v. Los Angeles*, (1910) 217 U. S. 217, 30 S. Ct. 452, 54 U. S. (L. ed.) 736, dismissing a writ of error.

A decision of a state court upon a question of law cannot be reviewed in the federal Supreme Court as presenting a question of the violation of the 14th Amendment because such decision is asserted to be wrong, and contrary to previous decisions of the same court. "There is no constitutional right to have all general propositions of law once adopted remain unchanged." *Patterson v. Colorado*, (1907) 205 U. S. 454, 27 S. Ct. 556, 51 U. S. (L. ed.) 879.

The claim of a right under the Federal Constitution to prove the truth of certain published articles held to constitute a contempt of court is too clearly unfounded to serve as the basis of a writ of error from the federal Supreme Court to a state court. *Patterson v. Colorado*, (1907) 205 U. S. 454, 27 S. Ct. 556, 51 U. S. (L. ed.) 879.

In *Chicago, etc., R. Co. v. Illinois*, (1906) 200 U. S. 561, 26 S. Ct. 341, 50 U. S. (L. ed.) 596, presenting the question as to the right to impose upon a railway company the expense attendant upon the removal and rebuilding of a bridge and culvert, made necessary by the widening and deepening of the channel of a creek to subserve the drainage of low lands, it was contended that as the state court based its judgment on the common-law duty of the railway company, and not expressly on any federal ground, it could not be said that there was any denial of the federal right claimed by the company; and consequently it was argued that the federal Supreme Court was without jurisdiction of a writ of error under section 709. But the court said: "Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the federal right or immunity specially set up, of record, is not conclusive, but this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local

or general law. And such plainly was the effect of the judgment in this case. If, as the railway company contended, the proposed action of the drainage commissioners would deprive it of property without due process of law and also deny to it the equal protection of the laws, then a judgment should have been rendered for the company. And that result could not be avoided merely by silence on the federal question, and by placing the judgment on some principle of the common law. The constitutional grounds relied on must, if sustained, displace or supersede any principle of general or local law which, but for such grounds, might be sufficient for the complete determination of the rights of the parties. The claim of a federal right or immunity specially set up from the outset went to the very root of the case and dominated every part of it. If that claim be valid, then the law is for the railway company; for the supreme law of the land must always control. Therefore a failure to recognize such federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of local or general law, then the claim of a federal right would have become immaterial, and we could not have re-examined the judgment. But the decision was otherwise, and was, in law, a denial of the claim of a federal right. For these reasons we are of opinion that this court has jurisdiction to re-examine the final judgment of the state court so far as it involved the federal right or immunity specially set up by the railway company." The foregoing views were reaffirmed in *West Chicago St. R. Co. v. Illinois*, (1906) 201 U. S. 506, 26 S. Ct. 518, 50 U. S. (L. ed.) 845, which affirmed a judgment awarding a peremptory mandamus directing a street railway company at its own expense to lower, or, at its option, remove, its tunnel under the Chicago river.

The federal Supreme Court has no jurisdiction to review a judgment of a state court involving a question of estoppel or quasi-estoppel broad enough to support the judgment without reference to any federal question. *Leonard v. Vicksburg, etc., R. Co.*, (1905) 198 U. S. 416, 25 S. Ct. 760, 49 U. S. (L. ed.) 1108, holding that a decision of a state court that defendants in ejectment, who had successfully insisted in a prior suit in a federal court that only a portion of a tract of land was in issue, cannot invoke the rule that a judgment determining the ownership of a portion of a tract is conclusive between the same parties, claiming under the same titles, as to the ownership of the entire tract, is not reviewable as denying any federal rights asserted under the federal court's judgment; as the state court merely "applied the



doctrine which forbids parties from assuming inconsistent positions in judicial proceedings."

*Matters of local law.*—The contention that a conveyance was either in fraud of creditors under the state law, or that a residuary estate remained in the grantor which would pass under an assignee's sale in proceedings in bankruptcy, presents a local and not a federal question, and cannot be considered on a writ of error under section 709. *Cramer v. Wilson*, (1904) 195 U. S. 408, 25 S. Ct. 94, 49 U. S. (L. ed.) 256.

The decision of a state court upon questions of local law is not subject to review in the federal Supreme Court on writ of error to the state court. *The Winnebago*, (1907) 205 U. S. 354, 27 S. Ct. 509, 51 U. S. (L. ed.) 836.

"The question what facts constitute a common-law marriage is purely a local one." *Keen v. Keen*, (1906) 201 U. S. 319, 26 S. Ct. 494, 50 U. S. (L. ed.) 772, dismissing a writ of error.

"Whether the state court erred in its construction of the state constitution and statutes and the common law on the subject of reading depositions of witnesses is not a federal question." *West v. Louisiana*, (1904) 194 U. S. 258, 24 S. Ct. 650, 48 U. S. (L. ed.) 965.

The misconstruction of a state statute by a state court is no ground for a writ of error from a federal Supreme Court. *King v. West Virginia*, (1910) 216 U. S. 92, 30 S. Ct. 225, 54 U. S. (L. ed.) 396.

The question whether certain property is authorized by the state statute to be taken in proceedings by eminent domain, as well as the amount of compensation to the owner, "would not ordinarily involve a federal right." *Per Harlan, J.*, in *Madisonville Traction Co. v. St. Bernard Min. Co.*, (1905) 196 U. S. 239, 25 S. Ct. 251, 257, 49 U. S. (L. ed.) 462.

The decision of the highest court of a state that a state statute is repugnant to the constitution of that state, is conclusive upon the federal Supreme Court in reviewing the judgment of the state court. *Montana v. Rice*, (1907) 204 U. S. 291, 27 S. Ct. 281, 51 U. S. (L. ed.) 490.

The conformity with the state constitution of the proceedings of the state legislature in the enactment of a law is not a federal question which will sustain a writ of error under section 709, but is a question upon which the determination of the state court is final. *Smith v. Jennings*, (1907) 206 U. S. 276, 27 S. Ct. 610, 51 U. S. (L. ed.) 1061.

The decision by a state court that a void provision of a state statute is separable from its valid provisions does not present a federal question. *King v. West Virginia*, (1910) 216 U. S. 92, 30 S. Ct. 225, 54 U. S. (L. ed.) 396.

The construction by a state court of the statutes of that state and its rulings as to the admissibility of evidence furnish no basis for a writ of error under section 709. *Los Angeles Farming, etc., Co. v. Los Angeles*, (1910) 217 U. S. 217, 30 S. Ct. 452, 54 U. S. (L. ed.) 736.

Whether or not a state court exceeded its functions under the state constitution cannot give rise to a question respecting due process of law which will sustain the appellate jurisdiction of the federal Supreme Court. *Burt v. Smith*, (1906) 203 U. S. 129, 27 S. Ct. 37, 51 U. S. (L. ed.) 121.

Questions respecting the construction of state statutes on which the title to land depends are not federal, and cannot be considered by the federal Supreme Court on writ of error to a state court. *O'Connor v. Texas*, (1906) 202 U. S. 501, 26 S. Ct. 726, 50 U. S. (L. ed.) 1120.

An attack upon the validity of a state statute creating a new school district, upon the ground that it deprived the district or municipality of the right to local self-government, guaranteed to all municipalities by the state constitution, was held to present only a local question. *Atty.-Gen. v. Lowrey*, (1905) 199 U. S. 233, 26 S. Ct. 27, 50 U. S. (L. ed.) 167.

A contention that a state statute was invalid because, in violation of the state constitution, the title to the Act indicated, and the Act itself embraced, more than one object, and the Act was broader than the title, and that the body of the Act embraced many objects not covered by the title, presented a strictly local question. *Atty.-Gen. v. Lowrey*, (1905) 199 U. S. 233, 26 S. Ct. 27, 50 U. S. (L. ed.) 167.

The federal Supreme Court has no power to review a decision of a state court which puts upon a state statute a construction which removes every question of constitutionality from it "and seems to us reasonable even if a somewhat different one could be conceived." *Tampa Water Works Co. v. Tampa*, (1905) 199 U. S. 241, 26 S. Ct. 23, 50 U. S. (L. ed.) 170.

The judgment of a state court denying the right of possession of real property under a title founded on an Act of Congress, which rests upon the ground that the title of the adverse party under a tax deed was made good by prescription under the state constitution, involves no federal question. *Corkran Oil, etc., Co. v. Arnaudet*, (1905) 199 U. S. 182, 26 S. Ct. 41, 50 U. S. (L. ed.) 143.

A decision of a state court that the formalities required by the tax laws were fully observed does not present a federal question, where the contention is not that the statutes are unconstitutional, but that the manner of their observance was a denial of due process of law; "in other words, that the statutes had not been complied with." *French v. Taylor*, (1905) 199 U. S. 274, 26 S. Ct. 76, 50 U. S. (L. ed.) 189.

The admission of evidence in a criminal case which the highest state court decided did not violate the rights of the accused under the state constitution and laws cannot involve a question of due process of law of sufficient merit to sustain a writ of error under section 709. *Barrington v. Missouri*, (1907) 205 U. S. 483, 27 S. Ct. 582, 51 U. S. (L. ed.) 890.

Whether or not the construction of a log boom in a navigable stream lying entirely

within the state is authorized by the state statutes is not a federal question. *North Shore Boom, etc., Co. v. Nicomen Boom Co.*, (1909) 212 U. S. 406, 29 S. Ct. 355, 53 U. S. (L. ed.) 574.

Whether a given corporation comes within the scope of the statutes of a state conferring the right of eminent domain, presents only a question of state law, which cannot be reviewed by the Supreme Court on a writ of error to a state court. *Stone v. Southern Illinois, etc., Bridge Co.*, (1907) 206 U. S. 267, 27 S. Ct. 615, 51 U. S. (L. ed.) 1057.

A decision sustaining the validity under the state constitution of an alleged delegation of legislative power to a building commission does not present a federal question for determination by the federal Supreme Court. *Welch v. Swasey*, (1909) 214 U. S. 91, 29 S. Ct. 567, 53 U. S. (L. ed.) 923, where the court said: "The state court holds that kind of legislation to be valid under the state constitution, and this court will follow its determination upon that question."

"The scope and effect of a state judgment is peculiarly a question of state law, and therefore a decision relating only to such subject involves no federal question." *Kenney v. Craven*, (1900) 215 U. S. 125, 30 S. Ct. 64, 54 U. S. (L. ed.) 122, holding that a judgment of a state court adverse to the plaintiff in an action in which he specially set up a title acquired by a purchase of property from a trustee in bankruptcy, under the sanction of the bankruptcy court, did not involve a decision of the federal question so set up, where the state court rested its judgment solely upon the ground that, being a purchaser *pendente lite* from the trustee, he was bound by a decree rendered against the trustee in a suit brought by him in equity to set aside certain bills of sale executed by the bankrupt, covering the same property.

Whether clauses of a state pilotage law granting discriminatory exemptions, in violation of R. S. sec. 4237, 5 Fed. Stat. Annot. 749, can be eliminated without destroying the remaining provisions is a question for the state court to decide, and cannot be reviewed by the federal Supreme Court on writ of error under section 709. *Olsen v. Smith*, (1904) 195 U. S. 332, 25 S. Ct. 52, 49 U. S. (L. ed.) 224.

Whether the Iowa constitution was violated by Iowa Code, section 5007, imposing a tax on cigarette selling, because the statute did not distinctly state the tax and the object to which it was applied, was a purely local question, which could not be considered on a writ of error under section 709. *Hodge v. Muscatine County*, (1905) 196 U. S. 276, 25 S. Ct. 237, 49 U. S. (L. ed.) 477.

Whether or not a municipal corporation has the power, under its charter, to adopt a certain ordinance, is not a question which can be considered on a writ of error from the federal Supreme Court under section 709. *Fischer v. St. Louis*, (1904) 194 U. S. 361, 24 S. Ct. 673, 48 U. S. (L. ed.) 1018; *Scheffe v. St. Louis*, (1904) 194 U. S. 373, 24 S. Ct. 676, 48 U. S. (L. ed.) 1024.

The question whether certain acts amount

to a violation of a municipal ordinance is not a federal one, which can be reviewed on writ of error under section 709. *Fischer v. St. Louis*, (1904) 194 U. S. 361, 24 S. Ct. 673, 48 U. S. (L. ed.) 1018; *Scheffe v. St. Louis*, (1904) 194 U. S. 373, 24 S. Ct. 676, 48 U. S. (L. ed.) 1024.

A decision of a state court construing the provisions of a city charter authorizing the city to prohibit the erection of cow stables and dairies "within prescribed limits," so as to permit the city to make the limits for the operation of the ordinance coincident with the city limits, presents no federal question. *Fisher v. St. Louis*, (1904) 194 U. S. 361, 24 S. Ct. 673, 48 U. S. (L. ed.) 1018; *Scheffe v. St. Louis*, (1904) 194 U. S. 373, 24 S. Ct. 676, 48 U. S. (L. ed.) 1024.

The dismissal of the petition of the owner, brought under Ky. Act of March 15, 1906, art. 3, for the assessment and taxation of his lands to escape the forfeiture provided by that statute, because such petition did not contain a description of the land sufficient to identify it, involved no federal question which could be reviewed on writ of error, unless the ruling was so arbitrary and baseless as to amount to a deprivation of due process of law. "Whether that petition contained an adequate description was a question for the state to determine in the construction of its own statute." *Kentucky Union Co. v. Kentucky*, (1911) 219 U. S. 140, 31 S. Ct. 171, 55 U. S. (L. ed.) 137.

The nature and character of the rights of the surviving wife in the community property are peculiarly local questions, not open to review by the Supreme Court when determining on a writ of error to a state court whether the imposition of an inheritance tax under the state laws denies to the wife the equal protection of the laws. *Moffitt v. Kelly*, (1910) 218 U. S. 400, 31 S. Ct. 79, 54 U. S. (L. ed.) 1086.

Whether or not the rights of a surviving wife in the community property as they existed when the marriage was celebrated were correctly subjected to a state inheritance tax law subsequently enacted cannot be reviewed by the federal Supreme Court when determining, on writ of error under section 709, the validity of such statute under the contract clause of the Federal Constitution. It was "a purely state question." *Moffitt v. Kelly*, (1910) 218 U. S. 400, 31 S. Ct. 79, 54 U. S. (L. ed.) 1086.

The contention that the confirmation of a pueblo claim under the Act of March 3, 1851, barred the municipal successor to the pueblo from setting up water rights not claimed in the petition for confirmation, was held too unfounded for a writ of error, it having been decided by the Supreme Court in several cases that the matter involved was one of local or general law. *Los Angeles Farming, etc., Co. v. Los Angeles*, (1910) 217 U. S. 217, 30 S. Ct. 452, 54 U. S. (L. ed.) 736.

The construction and effect of a prior decree of a state court, and whether or not it bound parties subsequently coming in, are matters of state procedure, the rulings upon which cannot present any question which will

sustain a writ of error under section 709. *King v. West Virginia*, (1910) 216 U. S. 92, 30 S. Ct. 225, 54 U. S. (L. ed.) 396, where the court said: "It is said that the decree established the law of the case, but that phrase expresses only the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. . . . In some states it is true that a stricter rule is applied, . . . but there is nothing in the Constitution of the United States to require it, or to prevent a state from allowing past action to be modified while a case remains in court. . . . The highest court of the state is the final judge of the powers conferred by the state laws in that regard."

The effect of a valid conveyance to the territory of Washington by a claimant, under the Oregon Donation Act of Sept. 27, 1850, after occupation for more than four years, but before he had made final proof under that Act, upon the title subsequently given him by a patent from the United States, is a question of local law, not open for review upon a writ of error from the federal Supreme Court to a state court. *Sylvester v. Washington*, (1909) 215 U. S. 80, 30 S. Ct. 25, 54 U. S. (L. ed.) 101.

No federal question was presented by a contention that the courts of Arkansas had no jurisdiction of causes arising under the laws of the Indian Territory giving a right of action for death. "Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and, specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions where the cause of action has arisen outside its borders." *St. Louis, etc., R. Co. v. Taylor*, (1908) 210 U. S. 281, 28 S. Ct. 616, 52 U. S. (L. ed.) 1061.

Whether or not a city council has determined that the board of public works has complied with the conditions of its jurisdiction to order a street improvement is not a federal question reviewable under section 709. *Londoner v. Denver*, (1908) 210 U. S. 373, 28 S. Ct. 708, 52 U. S. (L. ed.) 1103.

Questions whose determination depends upon the power of a state railroad commission, upon the petition of certain railway companies for the approval of a consolidation, and upon the order of the commission made on the petition, are local, and not federal, and cannot be reviewed on a writ of error under section 709. "There is nothing in the statutes or Constitution of the United States which prevents a state from creating a board of railroad commissioners, and what powers the board shall have will depend upon the law creating them, of which the courts of the state are the absolute interpreters." *Mobile, etc., R. Co. v. Mississippi*, (1908) 210 U. S. 187, 28 S. Ct. 650, 52 U. S. (L. ed.) 1016.

Whether railway companies waive their rights to change the line of narrow-gauge road, and are estopped to revoke such waiver, by obtaining the consent of the state, through its railroad commission, to broaden and standardize that line through its entire

length, is a local, and not a federal, question, and cannot be reviewed by the federal Supreme Court. *Mobile, etc., R. Co. v. Mississippi*, (1908) 210 U. S. 187, 28 S. Ct. 650, 52 U. S. (L. ed.) 1016.

Whether or not the amount due to the holders of certain railroad equipment bonds on the issue of an execution against the railway company can be determined in a proceeding to enforce the lien of such bonds by a sale of the railroad property is a question exclusively for the state court, and is not open on a writ of error from the federal Supreme Court. *Wabash R. Co. v. Adelbert College*, (1908) 208 U. S. 609, 28 S. Ct. 425, 52 U. S. (L. ed.) 642.

The question of the validity, under the due process of law clause of the Fourteenth Amendment, of a tax sale made upon a notice published only in a Sunday newspaper, is not open on a writ of error from the federal Supreme Court to the highest court of a state, whose decision upholding the tax title was based upon the grounds that a state statute made the tax deed, which, upon its face, was a valid instrument, *prima facie* evidence of the sufficiency of the notice, and that possession under such deed for the prescribed period met the requirements of the state statute of limitations; for the judgment proceeded solely upon the state law, and the latter was adequate to dispose of the case without reaching any federal question. *Elder v. Wood*, (1908) 208 U. S. 226, 28 S. Ct. 263, 52 U. S. (L. ed.) 464.

The objection that certain published articles did not constitute a contempt of court does not present a question which will sustain a writ of error under section 709; at least, where there is no showing that innocent conduct has been laid hold of as an arbitrary pretense for an arbitrary punishment. "What constitutes contempt, as well as the time during which it may be committed, is a matter of local law." *Patterson v. Colorado*, (1907) 205 U. S. 454, 27 S. Ct. 556, 51 U. S. (L. ed.) 879.

The objections that the information in contempt was not supported by an affidavit until after it was filed, and that the suits referred to in the published articles complained of as constituting the contempt were not then pending, present questions of local law, which are not open for re-examination by the federal Supreme Court. "The requirement in the Fourteenth Amendment of due process of law does not take up the special provisions of the state constitution and laws into the Fourteenth Amendment for the purposes of the case, and in that way subject a state decision that they have been complied with to revision by this court." *Patterson v. Colorado*, (1907) 205 U. S. 454, 27 S. Ct. 556, 51 U. S. (L. ed.) 879.

Whether an order of the North Carolina corporation commission regulating the train service of connecting carriers was arbitrary and unreasonable, as being beyond the scope of the authority delegated to the commission by the state laws, was a local and not a federal question, and not reviewable by the federal Supreme Court. *Atlantic Coast Line*

*R. Co. v. North Carolina Corp. Commission*, (1907) 206 U. S. 1, 27 S. Ct. 585, 51 U. S. (L. ed.) 933.

The federal Supreme Court cannot, independently of the federal question involved, reverse a judgment of the highest court of a state on the ground that a state statute enacted after the judgment under review was rendered had the effect of depriving the state of the power to enforce such judgment. *Campbell v. California*, (1906) 200 U. S. 87, 26 S. Ct. 182, 50 U. S. (L. ed.) 382.

"A mere contest over a state office, dependent for its solution exclusively upon the application of the constitution of a state or upon a mere construction of a provision of a state law, involves no possible federal question. *Taylor v. Beckham*, (1900) 178 U. S. 548, 20 S. Ct. 890, 1009, 44 U. S. (L. ed.) 1187." *Elder v. Colorado*, (1907) 204 U. S. 85, 27 S. Ct. 223, 51 U. S. (L. ed.) 381, dismissing a writ of error.

#### IX. JUDGMENT ON ERROR.

That the highest court of a state remanded a cause to be retried in accordance with its former decision, instead of in conformity to the opinion of the federal Supreme Court as to the mandate of that court, is not ground for reversal, where the change was not prejudicial. *Schlemmer v. Buffalo, etc., R. Co.*, (1911) 220 U. S. 590, 31 S. Ct. 561, 55 U. S. (L. ed.) 596.

The decree of a state court, enjoining a carrier from further violation of a law fixing rates for the carriage of coal within the state over the objection that the maximum

rates so fixed are inadequate and confiscatory, will be affirmed by the federal Supreme Court, where the evidence leaves the question of reasonableness in doubt, but without prejudice to the right of the carrier to reopen the case by appropriate proceedings, if, after adequate trial, it thinks it can prove more clearly the confiscatory character of the rates. *Northern Pac. R. Co. v. North Dakota*, (1910) 216 U. S. 579, 30 S. Ct. 423, 54 U. S. (L. ed.) 624.

#### X. EFFECT OF WRIT OF ERROR.

As a rule, no action can be taken by the state court as to any part of a case which has been removed by writ of error to the federal Supreme Court. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1909) 36 Utah 364, 104 Pac. 573.

Where, in an action in which defendant set up a counterclaim, an appeal was taken from the judgment dismissing the counterclaim before the issues raised by the complaint were determined, a writ of error from the federal to the state Supreme Court upon the latter's affirmance of the judgment appealed from, only removed the proceedings involving the judgment on the counterclaim to the federal court, so that the pendency of the writ of error would not stay proceedings in the trial court to determine the issues raised by the original complaint, especially where its action was not stayed by a supersedeas bond or otherwise. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1909) 36 Utah 364, 104 Pac. 573.

#### Vol. IV, p. 491, sec. 6.

The Supreme Court no longer has appellate jurisdiction of criminal cases, whether capital or other, in the inferior federal courts.—See Judicial Code, secs. 128, 238, *ante*, pp. 195, 231, of this Supplement.

Prior to the passage of this Act, no review of a criminal cause except upon a certificate of division of opinion among the judges of the Circuit Court was allowed. *Bessette v. W. B. Conkey Co.*, (1904) 194 U. S. 324, 335, 24 S. Ct. 665, 48 U. S. (L. ed.) 997; *U. S. v. Dickinson*, (1909) 213 U. S. 92, 98, 29 S.

Ct. 485, 53 U. S. (L. ed.) 711; *Bristol v. U. S.*, (C. C. A. 1904) 129 Fed. 87.

Judgment of trial court.—"It was ruled in *Cross v. U. S.*, (1892) 145 U. S. 571, 12 S. Ct. 842, 36 U. S. (L. ed.) 821, that, in view of the terms of the whole section, the allowance of a writ of error to any appellate tribunal was not contemplated, but merely to review the judgment of the trial court." *New v. Oklahoma*, (1904) 195 U. S. 252, 25 S. Ct. 68, 49 U. S. (L. ed.) 182.

#### Vol. IV, p. 493, sec. 711.

This section has been substantially re-enacted in Judicial Code, sec. 256, *ante*, p. 238 of this Supplement. See note thereat.

#### Vol. IV, p. 493, sec. 711, cl. first.

Perjury committed by a witness in the federal court is a crime against the federal laws only, and a prosecution therefor is within the exclusive jurisdiction of the federal courts. *McIntosh v. Bullard*, (1910) 95 Ark. 227, 129 S. W. 85.

A federal District Court has jurisdiction of a prosecution under R. S. sec. 5395, 5 Fed. Stat. Annot. 210, for false swearing in a

naturalization proceeding, notwithstanding the fact that such proceeding was in a state court. *Schmidt v. U. S.*, (1904) 133 Fed. 257, 66 C. C. A. 389; *Holmgren v. U. S.*, (1907) 156 Fed. 439, 84 C. C. A. 301.

Perjury committed by false swearing before a United States commissioner is not subject to the jurisdiction of a state court under Ky. Stat., sec. 1174 (*Russell's Stat.*, sec.

3708), defining and punishing perjury. *Com. v. Kitchen*, (1911) 141 Ky. 655, 133 S. W. 586.

**Felonious entry.**—In view of R. S. sec. 5456, 4 Fed. Stat. Annot. 790, an indictment charging the felonious entry of a private office from which the defendant feloniously stole certain moneys, postage stamps, and other valuable papers and checks, is not within the jurisdiction of the state court if the property stolen was in fact the property of the United States. *Ex p. Roach*, (1908) 166 Fed. 344.

**Murder.**—Under this section the federal court has exclusive jurisdiction of a prosecution for murder committed on land bought by the United States within a state for a post office and court house, and over which the state has ceded jurisdiction, the offense being created by R. S. sec. 5339, 3 Fed. Stat. Annot. 231. *Battle v. U. S.*, (1908) 209 U. S. 36, 28 S. Ct. 422, 52 U. S. (L. ed.) 670.

The federal courts have exclusive jurisdiction of cases arising under the patent or copyright laws. *Aberthaw Constr. Co. v. Ransome*, (1906) 192 Mass. 434, 78 N. E. 485; *Outcault v. Lamar*, (1909) 135 App. Div. 110, 119 N. Y. S. 930.

**Diversity of citizenship is not necessary** to give the District Court jurisdiction of a case in so far as it involves the validity of a trademark, but it is necessary to give that court jurisdiction of the issue of unfair competition. *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, (1911) 220 U. S. 446, 31 S. Ct. 456, 55 U. S. (L. ed.) 538.

If the invalidity of a patent is incidentally drawn in question in a cause properly cognizable in a state court the jurisdiction of that court is not thereby ousted. *Marshall Engine Co. v. New Marshall Engine Co.*, (1908) 199 Mass. 546, 85 N. E. 741.

It is elementary that the state courts have no jurisdiction of any matter which arises under the federal patent laws, and the issue of which depends upon the construction or administration of those statutes. The converse of the proposition just stated is equally well settled. Whenever the rights of a plaintiff depend upon contract obligations which courts of general equity jurisdiction may enforce, or for breach of which courts of common-law cognizance may award damages, the mere fact that a patent is incidentally or collaterally related to the controversy does not oust the state courts of jurisdiction. *Wise v. Tube Bending Mach. Co.*, (1909) 194 N. Y. 272, 87 N. E. 430.

**What constitutes a case arising under the patent laws.**—*Exclusive federal jurisdiction* applies only to cases arising under the patent laws upon a bill, complaint, or declaration setting up a right under the patent laws as a ground of recovery. *Robison v. Fishback*, (Ind. 1911) 93 N. E. 666.

**Ownership of letters patent.**—The state court has jurisdiction of a suit in equity to determine the ownership of letters patent and for an accounting for the use thereof. *American Circular Loom Co. v. Wilson*, (1908) 198 Mass. 182, 84 N. E. 133.

*In an action for the price of a patent right* to a machine, of the machine itself, and of certain other machinery and appliances for the operation of a patented machine, the defendants alleged that they were induced to purchase by fraudulent representations that the patented machine was not an infringement on a prior patent which plaintiff had sold. It was held that the state court, having jurisdiction of the subject-matter and the parties, had jurisdiction to determine the validity of the patent. *Pratt v. Hawes*, (1903) 118 Wis. 603, 95 N. W. 965.

*A suit to obtain a conveyance of an interest in an invention*, to enjoin the disposal of such interest, and to compel defendant to account for a sale to a third party of an interest therein, the sole issue being whether defendant had sold an interest to plaintiff, is not a suit arising under the patent laws. *Merrill v. Miller*, (1903) 28 Mont. 134, 72 Pac. 423.

In an action to compel the transfer of an interest in a patent, where both parties treated the patent as valid and it did not appear that it had been made in fraud of the provision of the United States statutes, the action is within the jurisdiction of the state court. *Fuller v. Schutz*, (1903) 88 Minn. 372, 93 N. W. 118.

**Suits for infringement.**—*Generally.*—Where a suit involves the question of infringement of patents, it is one of which a federal Circuit Court has jurisdiction under this subdivision, although it also involves the question of the ownership of the patents or other contract rights. *Harrington v. Atlantic, etc., Tel. Co.*, (1906) 143 Fed. 329.

A federal Circuit Court has jurisdiction of a suit for infringing a design patent. *National Casket Co. v. New York, etc., Casket Co.*, (1911) 185 Fed. 533.

**Sale or manufacture without license.**—Where no decree is necessary to the cancellation of a license to manufacture or sell a patented structure, the manufacture or sale thereof by the licensee after notice of cancellation would constitute an infringement, over which the federal courts have exclusive jurisdiction. *Schalkenbach v. National Ventilating Co.*, (1908) 129 App. Div. 389, 113 N. Y. S. 352.

A bill charging that, after termination of a contract between complainants and defendants for the sale of complainants' patented devices, defendants obtained large numbers of such devices from sources to complainants unknown and sold the same within the district, without right or authority, alleges an infringement of complainants' patents after the termination of the contract, and was sufficient to confer federal jurisdiction, regardless of the amount involved. *New Jersey Patent Co. v. Martin*, (1909) 172 Fed. 760.

*A suit for an injunction and accounting for the alleged infringement of a patent* by the sale of the patented article without license is one arising under the patent laws, of which a Circuit Court of the United States has jurisdiction, although the determination of the question of infringement may also involve the

construction or validity of a license contract under which defendant claims the right to sell. *Victor Talking Mach. Co. v. The Fair*, (1903) 123 Fed. 424, 61 C. C. A. 58.

*Granting additional relief.* — In a suit for infringement of a patent, of which a federal court has jurisdiction because of the subject-matter, although the parties are citizens of the same state, it has also jurisdiction to grant relief against unfair competition by imitating in the infringing article the distinctive form and appearance of complainant's patented article. *T. B. Woods Sons Co. v. Valley Iron Works*, (1909) 166 Fed. 770.

Where the acts of the defendant alleged in a bill constituted an infringement of complainant's patent and also unfair competition in trade, it was held that the cause of action for the infringement gives a federal court jurisdiction of the suit and to grant any relief to which complainant may be entitled on either ground. *Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co.*, (1910) 182 Fed. 832.

But it has been held that a bill to restrain the infringement of a patent, which thus presents a federal question, does not draw within the jurisdiction of the Circuit Court a further issue as to unfair competition growing out of the same acts of defendant. *Cushman v. Atlantis Fountain Pen Co.*, (1908) 164 Fed. 94.

*Question of infringement not raised.* — Where the question of infringement between patents does not appear to have been raised in the evidence before the master in a suit on an assignment of an original patent for an improvement and of all improvements thereon, there can be no question of an infringement of which the federal courts have exclusive jurisdiction. *Marshall Engine Co. v. New Marshall Engine Co.*, (1908) 199 Mass. 546, 85 N. E. 741.

*Ownership in doubt.* — A bill in a federal Circuit Court alleged that complainants, who were owners of certain patents, and pending applications for patents, assigned the same in trust to one of the defendants, to be by him assigned to defendant telegraph company in exchange for shares of its stock; that its codefendant wrongfully assigned the patents to it; that it refused to issue the stock, but retained the assignments and was using the inventions. The bill prayed that the assignments be declared inoperative, and for a reconveyance of the patents, and also for an injunction and accounting for infringement against the telegraph company. That company in its answer claimed ownership of the patents by virtue of the assignments. It was held that the suit could not be maintained as one for infringement, under the patent laws, until the alleged fraudulent assignments had been set aside in equity, and title to the patents, either legal or equitable, vested in complainants, and that, it being admitted that the requisite diversity of citizenship did not exist between the parties, the court was without jurisdiction to grant such relief. *Harrington v. Atlantic, etc., Tel. Co.*, (C. C. A. 1911) 185 Fed. 493.

*Suits on contracts relating to patents — Suits involving contract rights only.* — A complaint averred that plaintiff owned certain letters patent covering sliding couches, and granted defendant a nonexclusive license to manufacture and sell the same, and that he agreed not to sell or deal in any couches of that kind without attaching a license tag furnished by plaintiff at a certain price, and that he would not contest the patent, but account monthly for the couches sold and the number of tags on hand. It then charged a violation of the agreement, and prayed that defendant be required to perform the contract, that he be restrained from selling couches without attaching the tag, and that he be required to account. It was held that the case involved contract rights only, and that it was error to sustain a demurrer to the complaint on the ground that the suit was to restrain violation of patent rights, within the jurisdiction of the federal courts, as in such a case it does not matter that the construction or the validity of a patent may be collaterally involved. *Couch Patents Co. v. Barman*, (1910) 137 App. Div. 297, 121 N. Y. S. 978.

A federal court is without jurisdiction of a suit as one arising under the patent laws where the real question involved is not that of infringement, but one of contract rights arising out of a license. *American Graphophone Co. v. Victor Talking Mach. Co.*, (C. C. A. 1911) 188 Fed. 428, *affirming* 188 Fed. 431.

Where a suit is brought on a contract of which a patent is the subject-matter, either to enforce such contract or to annul it, the case arises on the contract or out of the contract, and not under the patent right laws of the United States. *Wade v. Lawder*, (1897) 165 U. S. 624, 17 S. Ct. 425, 41 U. S. (L. ed.) 851, as quoted in *Marshall Engine Co. v. New Marshall Engine Co.*, (1908) 199 Mass. 546, 85 N. E. 741.

The federal courts have no exclusive jurisdiction of an action for breach of contract based on an act which is an infringement of a patent, and such action may be brought in the state courts. *Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co.*, (1910) 141 Wis. 199, 124 N. W. 291.

The mere fact that a patent is incidentally or collaterally involved does not oust the state courts of jurisdiction. *Wise v. Tube Bending Mach. Co.*, (1909) 194 N. Y. 272, *affirming* (1907) 119 App. Div. 920, 105 N. Y. S. 1150.

*A suit on an assignment of an original patent* for an improvement in a machine and of all improvements thereon, resulting in a decree directing defendants to assign to plaintiff a patent for an improvement subsequently obtained, and enjoining them from making, vending, and otherwise dealing in the machines covered by such subsequent letters patent, is a suit on contract, and is not, because a suit for an infringement would have resulted in a similar injunction, a suit arising under the patent right laws of the United States. *Marshall Engine Co. v. New Marshall Engine Co.*, (1908) 199 Mass. 546, 85 N. E. 741.

*A bill to compel specific performance of a contract to assign a patent* and to restrain the alleged violation of a license contract under a patent states no ground for relief under the patent laws, and a federal court is without jurisdiction to grant relief thereon unless there is diversity of citizenship between the parties. *St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co.*, (C. C. A. 1908) 161 Fed. 725.

*A suit for injunctive relief against the infringement of a patent*, and incidentally for the recovery of damages arising therefrom, is one arising under the patent laws of the United States, and may be maintained in the courts of the United States. *St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co.*, (C. C. A. 1908) 161 Fed. 725.

*Suits to enforce judgment against patent rights.*—An action, by the owner of a judgment recovered against a corporation for infringement of a patent, to charge directors of such corporation with payment of the judgment on the ground that they were joint trespassers with the corporation, is not within the jurisdiction of the federal court unless there is diversity of citizenship. *H. C. Cook Co. v. Beecher*, (1909) 172 Fed. 166, *affirmed*

(1910) 217 U. S. 497, 30 S. Ct. 601, 54 U. S. (L. ed.) 855.

*Suits arising under copyright laws.*—Where plaintiff sued to enjoin the infringement of an alleged copyright by the person who assigned the same to him, but the matter was not subject to copyright, he could not claim that defendant, as assignor, was estopped from alleging that the federal court had no jurisdiction because the copyright which he sold did not cover the matter in question, and there being no requisite diversity of citizenship his bill was dismissed. *Royal Sales Co. v. Gaynor*, (1908) 164 Fed. 207, where the court said: "The jurisdiction of the court depends solely upon copyright, and no estoppel upon defendants can extend its jurisdiction to a subject not within the copyright law."

Where an action involves the question whether a combination entered into by defendants to control the sale of copyrighted books is illegal, as in restraint of trade, the state court has jurisdiction, though it may be necessary to construe the rights of parties under the copyright law. *Straus v. American Publishers' Assoc.*, (1905) 103 App. Div. 277, 92 N. Y. S. 1052, *affirming* (1904) 45 Misc. 251, 92 N. Y. S. 153.

## Vol. IV, p. 497, sec. 711, cl. eighth.

This subdivision, repealed by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 318, is reenacted in Judicial Code, sec. 256, *ante*, title JUDICIARY, vol. 1, p. 238, of this Supplement.

During the period of its repeal the state

courts had jurisdiction to hear and determine cases in civil matters, although the defendant was a consul-general of a foreign power. *De Leon v. Walters*, (1909) 163 Ala. 499, 50 So. 934.

## Vol. IV, p. 497, sec. 713.

*Generally.*—In *U. S. v. Delaware, etc., Co.*, (1908) 164 Fed. 215, 258, it was said: "The right to contract belongs to every citizen, but when a citizen becomes a member of Congress all right to contract with his government is, by R. S. sec. 3739, 6 Fed. Stat. Annot. 129, denied him. The profession of law has been held a right of which one may not be deprived by legislation, but only by decree of court. *Ex p. Garland*, (1866) 4 Wall. 333, 18 U. S. (L. ed.) 366. But when a lawyer becomes a federal judge,

the law, by R. S. sec. 713, forbids him the right to use his property and practice his profession. Such prohibitions are not restrictions of liberty or deprivations of property. They are the law's aids to public service. They make the public servant have an eye single to the public duty, voluntarily assumed, and in forbidding legislators, judges, and public carriers alike to act in a dual capacity the law but throws around them the time-proved safeguard of faithful service, that "no man can serve two masters."

## Vol. IV, p. 498, sec. 714.

The Supreme Court of the District of Columbia is "a court of the United States" within the meaning of this section. *James*

*v. U. S.*, (1906) 202 U. S. 401, 26 S. Ct. 685, 50 U. S. (L. ed.) 1079.

## Vol. IV, p. 498, sec. 716.

This section is now embodied in Judicial Code, sec. 262, *ante*, title JUDICIARY, vol. 1, p. 241, of this Supplement.

*Power of Circuit Courts of Appeals to issue writs.*—See section 12 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 430, and *supra*, this title, p. 1365.

*Supreme Court.*—See cases cited 4 Fed. Stat. Annot. 499 *et seq.* As to power of Supreme Court to issue writs of prohibition and mandamus, see R. S. sec. 688, 4 Fed. Stat. Annot. 439, and *supra*, this title, p. 1368.

"In cases over which we possess neither original nor appellate jurisdiction we cannot

grant prohibition or mandamus or certiorari as ancillary thereto." *In re Massachusetts*, (1905) 197 U. S. 482, 25 S. Ct. 512, 49 U. S. (L. ed.) 845. Followed in *In re Glaser*, (1905) 198 U. S. 171, 25 S. Ct. 653, 49 U. S. (L. ed.) 1000.

**Certiorari.**—The provision in this section is not a grant of appellate jurisdiction to the Supreme Court to review by certiorari for the mere correction of error, any or all decisions of the lower federal courts not otherwise reviewable. *U. S. v. Dickinson*, (1909) 213 U. S. 92, 29 S. Ct. 485, 53 U. S. (L. ed.) 711, holding that the writ cannot be used by the Supreme Court for the mere correction of errors in a judgment of the Circuit Court of Appeals, even though the judgment was not reviewable by the Supreme Court on a writ of error.

Under this section the Supreme Court may issue certiorari to bring up for review the denial by a Circuit Court of Appeals of an original application for mandamus to compel the judge of a Circuit Court of Appeals to proceed with and determine an action pending before it, since the power of the Supreme Court is not limited to the cases mentioned in Judicial Code, sec. 240, *ante*, p. 232. *McClellan v. Carland*, (1910) 217 U. S. 268, 30 S. Ct. 501, 54 U. S. (L. ed.) 762.

*Whitney v. Dick*, (1906) 202 U. S. 132, 26 S. Ct. 584, 50 U. S. (L. ed.) 963, was a case heard on certiorari from the Supreme Court to a Circuit Court of Appeals to review an order discharging, on writ of certiorari issued on a petition for habeas corpus and certiorari, a person convicted in a federal District Court of introducing liquors into an Indian reservation, and sentenced to fine and imprisonment.

The Supreme Court will determine a cause brought before it by certiorari to a Circuit Court of Appeals upon the record made in that court, and certified to the Supreme Court. *McClellan v. Carland*, (1910) 217 U. S. 268, 30 S. Ct. 501, 54 U. S. (L. ed.) 762.

**Prohibition.**—A Circuit Court of Appeals has no power to issue a writ of prohibition as an original or independent proceeding, but only in aid of its own jurisdiction, which is wholly appellate; and, except in cases of petitions for review in bankruptcy proceedings, can only be invoked by an appeal or writ of error. Nor can it issue such writ as ancillary to a contemplated appeal or writ of error. *Zell v. Judges*, (C. C. A. 1906) 149 Fed. 86.

**Mandamus.**—The United States Circuit Courts of Appeals have jurisdiction to issue writs of mandamus in the exercise of, and in aid of, their appellate jurisdiction. *Barber Asphalt Paving Co. v. Morris*, (C. C. A. 1904) 132 Fed. 945.

The true test of the appellate jurisdiction in the exercise or in the aid of which the Circuit Courts of Appeals may issue the writ of mandamus is the existence of that jurisdiction, and not its prior invocation; it is the existence of a right to review by a challenge of the final decisions, or otherwise, the cases or proceedings to which the applications for the writs relate, and not the prior exercise

of that right by appeal or writ of error; and the power of those courts to issue the writ is not restricted. *Barber Asphalt Paving Co. v. Morris*, (C. C. A. 1904) 132 Fed. 945.

Under this statute there remains no question as to the power to issue writs of mandamus, but by judicial construction and interpretation the power is restricted and limited to such writs as are auxiliary or ancillary in character, that shall or may be necessary to the potent exercise of jurisdiction given and acquired by other and original process. *Burnham v. Fields*, (1907) 157 Fed. 246, dismissing a petition for mandamus to require the defendant, who was the duly elected and qualified clerk of a county in Oregon, to keep open his office during certain days and to file and record a deed. To the same point see *Large v. Consolidated Nat. Bank*, (1905) 137 Fed. 168, denying an application for mandamus to compel the defendant to permit the plaintiff to have an inspection of its list of shareholders, granted upon R. S. sec. 5210, 5 Fed. Stat. Annot. 152; *Wiemer v. Louisville Water Co.*, (1903) 130 Fed. 246; *Mystic Milling Co. v. Chicago, etc., R. Co.*, (1904) 132 Fed. 289.

It is well settled that the United States courts can only grant a mandamus in aid of an existing jurisdiction. It is usually granted to enforce the collection of a judgment. Accordingly, where a receiver in bankruptcy was authorized to carry on the business of publishing a newspaper with a view to preserving its good will as an asset of the bankrupt's estate, but pending such publication the postmaster, by direction of the Postmaster-General, prohibited the circulation of the paper through the mails as unmailable matter, mandamus would not be granted to reverse such determination, though the question whether the publication was objectionable might be the subject of a difference of opinion. *In re Coleman*, (1904) 131 Fed. 151.

A writ of mandamus is, and a writ of error is not, the proper remedy for the refusal of a Circuit Court to prescribe the method and direct the service of a writ of scire facias and also for its refusal after sufficient service to take jurisdiction of and to decide the issues presented by the writ. *Collin County Nat. Bank v. Hughes*, (C. C. A. 1907) 152 Fed. 414.

The federal court cannot by mandamus compel a state official to perform even a clearly ministerial act, involving no exercise of discretion, unless the law makes it the duty of such official to perform such act. *King v. Davis*, (1905) 137 Fed. 222, 239.

A state law which prohibits the granting of a mandamus is not binding upon the federal courts, which derive their power to enforce their judgments in such cases by mandamus from section 14 of the federal Judiciary Act of 1789, nor R. S. sec. 716. *U. S. v. Capdevielle*, (C. C. A. 1902) 118 Fed. 809.

"Many of the cases are collected in 4 Fed. Stat. Annot. 503," said Mr. Justice Day, in *Covington, etc., Bridge Co. v. Hager*, (1906) 203 U. S. 109, 27 S. Ct. 24, 51 U. S. (L. ed.)



111, the court holding that the federal Circuit Courts had no jurisdiction of an original action in mandamus to compel the return of a franchise tax collected under the authority of a state statute, although the basis of the relief sought was the alleged repugnancy of the tax to the commerce clause of the Federal Constitution.

**Writ of ne exeat.**—Partly upon the authority of this section, a court of bankruptcy may issue a writ in the nature of ne exeat to restrain the bankrupt within the district, where it is shown that he intends to leave and not to appear for examination at an adjourned date, as required by an order of the referee. *In re Berkowitz*, (1908 173 Fed. 1012. See also *In re Cohen*, (1905) 136 Fed. 999. And see section 9b of the Bankruptcy Act, p. 530 of this Supplement.

**Injunction.**—This section modifies R. S. sec. 720, 4 Fed. Stat. Annot. 509, to the extent of authorizing a Circuit Court to grant an injunction restraining the plaintiff in an action in a state court from further prosecuting the action in that court, where the Circuit Court has possession of all the property involved and is lawfully operating it. *Gay v. Hudson River Electric Power Co.*, (1910) 182 Fed. 279.

**Power to issue writs of habeas corpus.**—See R. S. sec. 751, 752, 3 Fed. Stat. Annot. 162, 167, and *ante*, p. 1100 of this Supplement.

**Scire facias** to revive a judgment of a federal Circuit Court may be issued and a reasonable method prescribed for the service thereof without the district where the judgment defendant has departed therefrom, and this power cannot be restrained, limited, or rendered less efficacious by the statutes of a state. *Collin County Nat. Bank v. Hughes*, (C. C. A. 1907) 155 Fed. 389, 152 Fed. 414.

**Scire facias** may be issued by a District Court to enforce a forfeited recognizance or bail bond. *Kirk v. U. S.*, (1904) 131 Fed. 331, *affirmed* (C. C. A. 1905) 137 Fed. 753.

**Service.**—The power to issue writs of scire facias to revive judgments granted to the national courts by the fourteenth section of the Judiciary Act of 1789 (Act Sept. 24, 1789, ch. 19, § 1 Stat. L. 81) includes the power to prescribe the methods of their service and to cause them to be served either within or without the districts in which the courts sit. While the national courts may follow the methods of service prescribed by the states for similar writs issued by the state courts, they are not restricted to those methods, but may prescribe their own ways and cause them to be followed according to the course of the common law. *Collin County Nat. Bank v. Hughes*, (C. C. A. 1907) 152 Fed. 414.

Although it is expressly provided that the Supreme, Circuit, and District Courts of the United States may issue writs of scire facias, there is no provision that when issued in one district they may be served in another. *Kirk v. U. S.*, (1903) 124 Fed. 324, 337.

An order which quashes the service of a writ of scire facias by publication, without determining that the writ may not be otherwise served, and without dismissing the action, is not a final decision, and is not reviewable by writ of error. *Collin County*

*Nat. Bank v. Hughes*, (C. C. A. 1907) 152 Fed. 414.

A *fiari facias* may be issued by a federal court of equity, under this section, for the purpose of enforcing the payment of any costs that may be decreed, notwithstanding the decree may dispose of matters other than a money demand. *Western Pocahontas Corp. v. Acord*, (1910) 178 Fed. 843.

**Subpoenas duces tecum** may be issued under the authority conferred by this section. *American Lith. Co. v. Werckmeister*, (1908) 165 Fed. 426, 91 C. C. A. 376, *affirmed* (1911) 221 U. S. 603, 31 S. Ct. 676, 55 U. S. (L. ed.) 873.

R. S. sec. 4906, 5 Fed. Stat. Annot. 501, providing for the issuance by the clerk of any federal court of subpoenas for witnesses within the district, for the taking of testimony for use in any contested case pending in the Patent Office, does not authorize the issuance of a subpoena duces tecum, nor is such subpoena authorized by section 716, "which deals only with writs necessary for the exercise of the court's own jurisdiction to hear and determine a controversy before it." *In re Outcault*, (1906) 149 Fed. 228.

A writ in the nature of a writ of replevin may be issued in an action such as is authorized by R. S. sec. 4965, 2 Fed. Stat. Annot. 268, requiring the marshal to seize the alleged forfeited plates and copies, and asking in the same suit to recover the penalty for those found in the defendant's possession, even though under the state practice there is no form of action in which such double remedy can be enforced. *Hills v. Hoover*, (1911) 220 U. S. 329, 31 S. Ct. 402, 55 U. S. (L. ed.) 485, the court saying that under the broad powers conferred by section 716, "where the state statute, or practice, is not adequate to afford the relief which Congress has provided in a given statute, resort must be had to the power of the federal court to adapt its practice and issue its writs and administer its remedies so as to enforce the federal law." See also *American Tobacco Co. v. Werckmeister*, (C. C. A. 1906) 146 Fed. 375, *affirmed* (1907) 207 U. S. 284, 28 S. Ct. 72, 52 U. S. (L. ed.) 208; *Stern v. Remick*, (1908) 164 Fed. 781.

**Warrant of arrest against judgment debtor.**—Act Pa. July 12, 1842 (P. L. 339), authorizing the issuance of a warrant of arrest against a judgment debtor for specified causes after the return of an execution unsatisfied, may be enforced by the federal courts sitting in that state by virtue of this section, together with R. S. sec. 916, 4 Fed. Stat. Annot. 580. *Johnson v. Crawford*, (1907) 154 Fed. 761.

**Process on indictment under Anti-trust Act.**—Upon an indictment for conspiracy in restraint of trade under the Sherman Anti-Trust Act of 1890, 7 Fed. Stat. Annot. 336, the court has power, by virtue of this section, to issue summons to another state to bring before it corporation defendants who are citizens of such state and cannot be found or served in the state or district of the indictment. *U. S. v. Standard Oil Co.*, (1907) 154 Fed. 728; *U. S. v. Virginia-Carolina Chemical Co.*, (1908) 163 Fed. 66.

## Vol. IV, p. 506, sec. 718.

**Discretion in granting.**—The granting of a temporary restraining order, like the granting of an injunction, is within the sound judicial discretion of the court. No universal rule can be announced to govern court or judge in all cases, but each case must be decided on its own facts. *Central of Georgia R. Co. v. McLendon*, (1907) 155 Fed. 974.

**Extent of operation.**—This section clearly contemplates that a restraining order is to have no other effect than to preserve *in statu quo* the rights and property of the parties until a hearing, after notice to defendants, can be had in due form on the motion for a preliminary injunction. *Wabash R. Co. v. Hannahan*, (1903) 121 Fed. 563.

The authority given to federal courts by this section to grant temporary restraining orders pending a motion for injunction is expressly limited to cases where "there appears to be danger of irreparable injury," and will usually be exercised only to preserve the existing status. Such an order will not be granted *ex parte* in a suit by a telephone company against a state commission empowered by the state constitution to establish and regulate telephone rates, to enjoin the commission from interfering to prevent the complainant from increasing its present rates of charge, where the application for permission to make such increase has been made to the commission and denied after a hearing, the decision of the commission being entitled at least to be treated as *prima facie* correct. *Cumberland Telephone, etc., Co. v. Louisiana R. Commission*, (1907) 156 Fed. 834.

**Notice.**—Under Circuit Court Rule 30, providing that a restraining order shall be granted without notice only when such danger exists, a municipality should not be temporarily restrained without notice, at the suit of a street railroad company, from taking further proceedings to construct a competing road, where the bill fails to show that any threatened injury is likely to result before a hearing on the application can be had. *San Francisco United Railroads v. San Francisco*, (1910) 180 Fed. 948.

This section contemplates, in cases where irreparable injury may be anticipated if the *status quo* be not preserved, the issue without notice of a temporary restraining order, to be enforced only until an order to show cause on the motion for an injunction can be heard and decided. *Hutchins v. Munn*, (1908) 209 U. S. 246, 28 S. Ct. 504, 52 U. S. (L. ed.) 776.

**Laches in application.**—A temporary restraining order will not be granted *ex parte* to restrain the putting into effect of a railroad rate established by a state commission under authority given by the constitution and laws of the state after due notice and a hearing, when the commission's order by its terms was not to take effect for nearly three months after its adoption, and no application for a restraining order was made until within two days of the expiration of such time.

*Central of Georgia R. Co. v. McLendon*, (1907) 155 Fed. 974.

**Security.**—Restraining order may be granted with or without security at the discretion of the judge. *H. B. Claffin Co. v. Furtick*, (1902) 119 Fed. 429.

**Liability on bond.**—Where, on the granting of a temporary restraining order by a federal court, a bond is required, the amount of such bond is the limit of complainant's liability for damages on the dissolution of such order. *U. S. v. Lewis Pub. Co.*, (1908) 160 Fed. 939.

**Liability on an undertaking,** required as a condition of granting a restraining order pending a decision upon a motion for a temporary injunction, ceases when a new and permanent injunction is granted without reference to the restraining order, which is by its terms to be in force "until further order, to be made, if at all, after a hearing." *Houghton v. Meyer*, (1908) 208 U. S. 149, 28 S. Ct. 234, 52 U. S. (L. ed.) 432.

An undertaking accompanying a temporary restraining order directed against "the defendants and each of them" inures to the benefit of all the defendants who were included in that order, although the undertaking is expressed to be one "to make good to the defendant all damages by him suffered," where it was exacted by the court, was offered by the complainant at a time when none of the defendants knew of the pendency of the suit, and shows in its title that there was more than one defendant. *Hutchins v. Munn*, (1908) 209 U. S. 246, 28 S. Ct. 504, 52 U. S. (L. ed.) 776.

The owner of property is entitled to the benefit of an undertaking exacted by the court as a condition of granting an order temporarily restraining the continuance of the erection of an addition to a dwelling, where, although such owner was never served with subpoena or notice, either of the order to show cause or of the restraining order, such order was observed until dissolved, and inflicted injury upon her rights. *Hutchins v. Munn*, (1908) 209 U. S. 246, 28 S. Ct. 504, 52 U. S. (L. ed.) 776.

The refusal of the court of original jurisdiction to allow damages for the period during which the temporary restraining order was in force, upon the undertaking given as a condition of granting such order, cannot be sustained as an appropriate exercise of discretion, where, by such order, the Postmaster-General was restrained from refusing to transmit certain publications at second-class rates, and the result of the litigation was to establish not only the right of the government to receive additional postage pending the controversy, but also the fact that the publishers had received a very considerable service from the government in carrying the publications through the mails at a rate less than that which it was entitled to charge. *Houghton v. Meyer*, (1908) 208 U. S. 149, 28 S. Ct. 234, 52 U. S. (L. ed.) 432.

## Vol. IV, p. 509, sec. 720.

**Effect of other sections.**—In *Gay v. Hudson River Electric Power Co.*, (1910) 182 Fed. 279, it was held that section 720 was modified by section 716, and hence, where a federal court, in the exercise of its concurrent jurisdiction, has taken possession of all the property of certain corporations in receivership proceedings, it will enjoin the prosecution of suits against such corporation in the state court, by which the property so taken may be seriously impaired and the operations of the receiver seriously interfered with.

**Extent of section.**—This section prohibits the issuance of an injunction or restraining order against proceedings in a state court from the commencement of the suit until the judgment or decree is satisfied. *Security Trust Co. v. Union Trust Co.*, (1904) 134 Fed. 301.

A federal court has no power to enjoin the further prosecution of an action at law in a state court between citizens of the same state, to permit one of the parties to litigate the same question before it by making the other party a defendant in a suit in equity pending therein. *Patton v. Marshall*, (C. C. A. 1909) 173 Fed. 350.

One contract creditor cannot maintain a suit in equity in a federal court to enjoin another creditor of the same debtor from prosecuting an action on his demand in a state court on the ground that the defendant will thereby secure a prior lien on the debtor's property, both because such a case presents no ground of equity jurisdiction and because such a suit is prohibited by this section. *Maxwell v. McDaniels*, (C. C. A. 1910) 184 Fed. 311.

Neither the fact that a plaintiff, who after removal dismissed his suit without prejudice, has instituted a new suit on the same cause of action in the state court from which the removal was made, nor that he has reduced his demand to a sum below that necessary to give the federal court jurisdiction, takes the case out from the operation of this section. *Texas Cotton Products Co. v. Starnes*, (1904) 128 Fed. 183.

But a bill seeking merely to maintain the original contract under which a complainant is furnishing water to the defendant city and its citizens, and to prevent the enforcement of lower rates of compensation fixed by an ordinance, and referring to no pending suit or proceeding, is not one to stay proceedings in a state court, which this section forbids a federal court to entertain; nor is it one to enjoin criminal prosecutions, though the ordinance, by its terms, may be enforced by fines and penalties. *Palatka Waterworks v. Palatka*, (1903) 127 Fed. 161.

**Different parties.**—A decree of the Circuit Court enjoining a party from setting up any claim to the right to use a railroad switch, which the state court had held that he was entitled to use, is not an injunction of proceedings in a state court, in violation of this section, where, since the decision of the state court was made, the railroad had sold the

switch to a private owner, at whose instance the injunction was obtained. *Oman v. Bedford-Bowling Green Stone Co.*, (C. C. A. 1905) 134 Fed. 65.

**Protection of federal jurisdiction.**—An injunction to sustain the jurisdiction of a federal court already rightfully acquired is not forbidden by this section. *Stewart v. Wisconsin Cent. R. Co.*, (1902) 117 Fed. 782; *Louisiana R. Commission v. Texas, etc., R. Co.*, (C. C. A. 1906) 144 Fed. 68.

Where a federal court has first acquired jurisdiction of a suit to determine the respective rights of appropriators of water from a stream, it is its right and duty to protect such jurisdiction against interference, and it will enjoin a defendant from prosecuting a later suit brought by him against the complainant in a state court relating to the same subject-matter. *Miller v. Rickey*, (1906) 146 Fed. 575.

A federal court is not precluded by this section from granting a preliminary injunction restraining a defendant from enforcing a judgment of a state court, where necessary to preserve the rights of parties in a suit properly before it until final hearing therein. *Southern R. Co. v. Simon*, (1905) 153 Fed. 234.

This section does not prevent a federal court, having first acquired jurisdiction of the parties and the subject-matter of an action, from restraining the parties from resorting to proceedings in a state court having concurrent jurisdiction which would defeat or impair the federal court's jurisdiction. *Rickey Land, etc., Co. v. Miller*, (C. C. A. 1907) 152 Fed. 11.

Nor does it prevent a federal court from enjoining a party to an action before it from prosecuting a suit in a state court when necessary to protect its own prior jurisdiction, or to make effectual its own prior judgment, determining the rights of parties before it. *St. Louis Min., etc., Co. v. Montana Min. Co.*, (1906) 148 Fed. 450.

A party who has appeared in a federal court, and contested an action therein through both trial and appellate courts, the result being a final judgment against him, will not be permitted to render such judgment ineffectual by instituting and maintaining a new suit in a state court, the purpose of which is to relitigate the questions determined by such judgment with the same adversary. *St. Louis Min., etc., Co. v. Montana Min. Co.*, (1906) 148 Fed. 450.

A federal court has power to protect a litigant therein from seizure of his person by the authorities of a state while in attendance upon the trial of his case, whether upon process or in the exercise of the police power of the state without process, where necessary for the protection of its own jurisdiction, and where the threatened act must rest for its justification upon a proceeding the validity of which is the very matter it is called upon to determine. *Chanler v. Sherman*, (C. C. A. 1908) 162 Fed. 19.

**Incidental proceedings.**—This section does not deprive a federal court of jurisdiction to

restrain a defendant from selling, encumbering, or in any way disposing of lands purchased at a sheriff's sale, where such injunctive remedy is ancillary to the granting of relief in a suit to set aside the sheriff's deed, of which the federal court has jurisdiction. *Massie v. Buck*, (C. C. A. 1904) 128 Fed. 27.

An injunction to restrain proceedings in a state court is frequently an incident to a case of which the statutory and constitutional jurisdiction of the United States courts is unquestioned. If the federal court has jurisdiction of the case by reason of the citizenship or alienage of the parties, or otherwise, it can grant relief against a judgment of a state court obtained by fraud (or on other equitable grounds) in any case in which relief could be granted if the judgment were rendered by a United States court; and in such case a preliminary injunction may be issued against the defendants to prevent the collection of the judgment by execution or otherwise. *Lehman v. Graham*, (C. C. A. 1905) 135 Fed. 42.

**Restraint of parties.**—This section does not limit the power of the federal court to restrain parties of whom it has jurisdiction from instituting proceedings in any court. *Glucose Refining Co. v. Chicago*, (1905) 138 Fed. 209.

Enjoining, at the suit of the New York Cotton Exchange, the receipt and use by the defendant of quotations of sales on such exchange, is not forbidden to a federal Circuit Court by this section, as enjoining proceedings in a state court, because an injunction has been granted by a state court in a pending suit between the defendant and a telegraph company, restraining the latter from refusing to furnish him with such quotations. *Hunt v. New York Cotton Exch.*, (1907) 205 U. S. 322, 27 S. Ct. 529, 51 U. S. (L. ed.) 821.

A suit against the members of a state railroad commission, and the prosecuting attorney for a district of the state, to enjoin the enforcement of an order made by the commission which is unconstitutional and without authority of law is not a suit against the state within the meaning of the Eleventh Constitutional Amendment, and is within the jurisdiction of a federal court of equity. *St. Louis, etc., R. Co. v. Allen*, (1910) 181 Fed. 710.

A state law providing for the search and seizure of intoxicating liquors unlawfully held and handled within the state, does not apply to liquors transported into the state in interstate commerce while remaining in the hands of the carrier and before delivery to the consignee, and officers seizing such liquors are not protected by such Act; hence a federal injunction restraining the enforcement of the search and seizure warrants by such officers as to such liquors is not a violation of this section. *Danciger v. Stone*, (1909) 187 Fed. 853.

**What are state courts.**—A commissioners' court of a county in Texas, in declaring and publishing the result of an election, acts ministerially, and is not a court, within the meaning of this section, whose action in such

capacity may not be restrained by a federal court. *Busch v. Webb*, (1903) 122 Fed. 655.

**State railroad commission.**—The statute of Florida creating the state railroad commission vests it with executive, legislative, and quasi-judicial powers; but such judicial powers appertain only to acts of a judicial character; and the commission is not a state court, and as such exempt from the interference of a federal court by injunction, under this section, with respect to the enforcement of its orders made in a legislative capacity, as in fixing future rates to be charged by a railroad, which it is empowered to enforce only by regular proceedings in the courts. *Louisville, etc., R. Co. v. Brown*, (1903) 123 Fed. 946.

A state statute which makes it the duty of the state railroad commission, on complaint thereof, to hear and determine whether a railroad company is exacting extortionate rates, and, if it so finds, to make and fix just and reasonable rates to be charged thereafter, does not confer judicial power on the commission. *Louisville, etc., R. Co. v. Siler*, (1911) 186 Fed. 176.

A suit by railroad companies against the Louisiana state railroad commission, to enjoin the enforcement of an alleged rate made by the commission, and the collection of fines imposed by it for past violation of its orders, is not a suit against the state, within the meaning of the Eleventh Constitutional Amendment, and is within the jurisdiction of a federal court. *Louisiana R. Commission v. Texas, etc., R. Co.*, (C. C. A. 1906) 144 Fed. 68.

A proceeding before the Mississippi railroad commission does not become a proceeding in a state court, within the meaning of Rev. Stat. sec. 720, so as to prevent a federal court from enjoining the enforcement of an order of such commission which is claimed to violate the Federal Constitution, because the commission would have to resort to a state court to aid it in the enforcement of its order. *Mississippi R. Commission v. Illinois Cent. R. Co.*, (1906) 203 U. S. 335, 27 S. Ct. 90, 51 U. S. (L. ed.) 209, *affirming* (C. C. A. 1905) 138 Fed. 327.

Injunctive relief against railway passenger rates as fixed by the Virginia state corporation commission may be granted by a federal court if such rates are confiscatory, although, for some purposes, the commission is a court, since proceedings to establish rates are legislative, and therefore are not comprehended by the provision of Rev. Stat. sec. 720. *Prennis v. Atlantic Coast Line R. Co.*, (1908) 211 U. S. 210, 29 S. Ct. 67, 53 U. S. (L. ed.) 150.

**The South Carolina dispensary commission** created by Sess. Laws 1907, p. 835, No. 402, for the purpose of winding up the South Carolina state dispensary, disposing of its property, and paying its debts, is not a court of a state. *Fleischman Co. v. Murray*, (1908) 161 Fed. 152, *affirmed* (C. C. A.) 164 Fed. 1.

**In criminal cases.**—A court of equity has no power to enjoin the institution or prosecution of criminal proceedings, unless they are instituted by a party to a suit already

pending before it, and to try the same right that is in issue therein, or to prohibit the invasion of rights of property by the enforcement of an unconstitutional law. *Camden Interstate R. Co. v. Catlettsburg*, (1904) 129 Fed. 422.

A federal court is without jurisdiction to enjoin the further prosecution of criminal proceedings instituted by a city for the violation of an ordinance, although this section does not deprive it of jurisdiction to enjoin threatened proceedings, which have not yet been commenced. *Camden Interstate R. Co. v. Catlettsburg*, (1904) 129 Fed. 422.

But the jurisdiction of a federal court of equity to enjoin the enforcement of an unconstitutional state statute to protect the property rights of complainant from irreparable injury is not defeated by the fact that the means of enforcement provided by the Act are by criminal prosecutions for its violation. *Lindsley v. Natural Carbonic Gas Co.*, (1908) 162 Fed. 954.

**Cases removed.**—After the presentation of a sufficient petition and bond to the state court in a removable case, it is competent for the Circuit Court, by a proceeding ancillary in its nature, without violating this section, to restrain the party against whom the cause has been legally removed from taking further steps in the state court. *Madisonville Traction Co. v. St. Bernard Min. Co.*, (1905) 198 U. S. 239, 25 S. Ct. 251, 49 U. S. (L. ed.) 462 (citing the earlier cases).

Where, upon the face of the record, including a petition for removal duly filed, a cause appears to be removable, on the filing of such record and the docketing of the case in the federal court, it acquires jurisdiction at least for the purpose of determining that question, and, as ancillary to such jurisdiction, it may enjoin the plaintiff from proceeding in the state court until it shall hear and determine the question of its own jurisdiction. *McAlister v. Chesapeake, etc., R. Co.*, (C. C. A. 1907) 157 Fed. 740.

A proceeding to acquire land for a railroad right of way having been properly removed to the federal court after the report of commissioners had been filed in the state court, and the state court having been deprived of jurisdiction by such removal proceedings, it was held that the federal court had jurisdiction to enjoin the plaintiff from proceeding further with the action in the state court. *St. Bernard Min. Co. v. Madisonville Traction Co.*, (1904) 130 Fed. 794.

Where a cause was properly removed to a federal court, but the state court erroneously denied a motion for an order transferring the cause, the federal court has jurisdiction on the application of the party removing the cause to grant an ancillary injunction restraining the opposite party from taking further proceedings in the state court, without violating this section. *Mutual L. Ins. Co. v. Langley*, (1908) 145 Fed. 415.

**Fraudulent judgments.**—A federal Circuit Court, sitting in equity, has jurisdiction to enjoin the enforcement of an unconscionable judgment of a state or of a national court

for new causes, such as fraud, accident, or mistake, which prevented the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment. *National Surety Co. v. Humboldt State Bank*, (C. C. A. 1903) 120 Fed. 593.

But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the court which rendered the judgment or decree. *National Surety Co. v. Humboldt State Bank*, (C. C. A. 1903) 120 Fed. 593.

The national courts, sitting in equity, have the same jurisdiction and power to restrain judgment plaintiffs in unconscionable judgments of the state courts from using them to extort money from defendants who ought not to pay them, that they have to enjoin such plaintiffs in like judgments of the federal courts. *National Surety Co. v. Humboldt State Bank*, (C. C. A. 1903) 120 Fed. 593.

**Condemnation proceedings.**—This section has no application to the instance of a non-resident owner of land, entered upon by the defendant in condemnation proceedings, instituted in the state court, to which such non-resident owner is not made a party; and it does not prevent him from applying to the United States Circuit Court for an injunction to restrain the trespass upon his land. *Colorado Eastern R. Co. v. Chicago, etc., R. Co.*, (C. C. A. 1905) 141 Fed. 898.

**Proceedings in probate court.**—A federal court cannot entertain a suit for the specific enforcement of a contract by which an intestate decedent agreed to make the complainant his sole heir, while his estate is in process of administration in a probate court of the state as an insolvent estate, since, should it decree the relief prayed for, there would be no property within its jurisdiction on which its decree could operate. *Hall v. Bridgeport Trust Co.*, (1903) 123 Fed. 739.

**Proceedings under unconstitutional Act.**—The practice on an application to stay proceedings for the enforcement of a state statute alleged to be unconstitutional is now regulated by section 266 of the Judicial Code. See *ante*, title JUDICIARY, p. 242.

Equity has jurisdiction of a suit to enjoin the enforcement of a state or local law, on the ground that such enforcement will deprive the complainant of rights secured to him by the Constitution and laws of the United States. *Busch v. Webb*, (1903) 122 Fed. 655.

A suit in a federal court against an attorney-general of a state to enjoin the enforcement of an unconstitutional state statute by the institution of criminal proceedings for its violation is not within the prohibition of this section. *Lindsley v. Natural Carbonic Gas Co.*, (1908) 162 Fed. 954.

A federal court has jurisdiction of a suit by a landowner to restrain revenue officers of a state from prosecuting proceedings expressly based on a state statute to enforce the collection of taxes against such lands, on the ground that such statute, as applied to

complainant's lands, impairs the obligation of a contract with the state exempting such lands from taxation. *University of the South v. Jetton*, (1907) 155 Fed. 182.

But a federal Circuit Court, on principles of comity, should not entertain a suit by which injunctive relief is sought against railway passenger rates as fixed by the Virginia state corporation commission, in advance of the appeal to the highest state court from the order fixing the rates, which is given by the state constitution as of right to any aggrieved party. *Prentiss v. Atlantic Coast Line R. Co.*, (1908) 211 U. S. 210, 29 S. Ct. 67, 53 U. S. (L. ed.) 150.

A Circuit Court has no power to grant an injunction to stay an action, civil or criminal, pending in a state court when the bill is filed, and based on a state statute, although such statute as therein sought to be enforced is unconstitutional and an invasion of property rights. *St. Louis, etc., R. Co. v. Allen*, (1910) 181 Fed. 710.

**Collection of taxes.**—A federal court has jurisdiction of a suit by a landowner to restrain revenue officers of a state from prosecuting proceedings expressly based on a state statute to enforce the collection of taxes against such lands, on the ground that such statute, as applied to complainant's lands, impairs the obligation of a contract with the state exempting such lands from taxation. *University of the South v. Jetton*, (1907) 155 Fed. 182.

In *Union Pac. R. Co. v. Flynn*, (1910) 180 Fed. 566, it was held that where an owner of property against which a special tax bill had been ordered claimed that the proceedings were void for lack of proper notice, but had an adequate remedy at law in the state court, he could not maintain a bill in the federal Circuit Court to restrain the city clerk from attesting and the circuit clerk from filing the tax bills against his property on the theory that to do so would constitute a taking of property without due process of law.

**Multiplicity of suits.**—Where four independent actions at law were brought in a state court, by an insured against different insurance companies to recover on policies covering the same loss, two of which were removed into a federal court, the other two not being removable, it was held that the federal court was without jurisdiction, under this section, to grant an injunction on a bill subsequently filed by the insurance companies, restraining the plaintiff therein from proceeding further in the actions in the state court. *Rochester German Ins. Co. v. Schmidt*, (C. C. A. 1909) 175 Fed. 721.

**Jurisdiction over property involved.**—The jurisdiction of specific property once lawfully acquired by a court, by reducing it to its lawful custody in a suit or other proceeding before it, includes the power to protect and effectuate its decrees or judgments therein and the titles of purchasers and others thereunder against attempts to annul or impair them by proceedings in other courts or elsewhere, and a court may lawfully retain jurisdiction after its surrender of its possession of the property for that purpose. *Lang*

*v. Choctaw, etc., R. Co.*, (C. C. A. 1908) 180 Fed. 355.

This section does not apply to a suit in a state court by which it is attempted to fasten an easement on the fee of lands taken into the possession of a federal Circuit Court for the administration of an estate through a receiver, since the federal court's possession drew to it power to hear and decide all controversies relating to rights and interests in the property. *Holmes v. Dowie*, (C. C. A. 1910) 177 Fed. 182.

But the fact that a bill filed in a state court incidentally prays for relief which, if granted, might interfere with the constructive possession of property by receivers of a federal court, does not authorize the latter court to enjoin the prosecution of the suit, where the principal relief sought therein does not trench upon its jurisdiction. *Guaranty Trust Co. v. North Chicago St. R. Co.*, (C. C. A. 1904) 130 Fed. 801.

**Proceedings in foreclosure.**—The prohibition against enjoining proceedings in the state courts does not preclude a federal court, which has decreed a sale in foreclosure proceedings, from entertaining a supplemental bill, filed in the original suit by the purchaser under the decree of sale, to enjoin a sale of the property conveyed by such decree for the satisfaction of judgments rendered by state courts in suits against the mortgagor to which the purchaser was not a party, on causes of action arising subsequent to the confirmation of sale, where the decrees of sale and confirmation evince the purpose of the federal court to retain jurisdiction so far as necessary to determine all liens and demands to be paid by the purchaser, as a condition of security in the title decreed to be conveyed. *Julian v. Central Trust Co.*, (1904) 193 U. S. 93, 24 S. Ct. 399, 48 U. S. (L. ed.) 629.

A federal court which has decreed a foreclosure in a suit in which diverse citizenship was alleged and admitted may, by an ancillary suit, restrain any attack on the title of the purchaser under the decree by a suit in a state court brought by a party to the original suit, which proceeds on the theory that, by reason of his own untruthful admission of citizenship, the federal court assumed a jurisdiction which in fact it did not have. *Riverdale Cotton Mills v. Alabama, etc., Mfg. Co.*, (1905) 198 U. S. 188, 25 S. Ct. 629, 49 U. S. (L. ed.) 1008.

A court of equity which by its decree foreclosed a mortgage given by a corporation to secure an issue of bonds, in a suit against the trustee named therein, and ordered a sale of the property free from the claims of any of the parties or persons claiming through or under them, reserving jurisdiction "for the purpose of enforcing the conditions of this decree," has ancillary jurisdiction of a bill by the purchaser against bondholders under such mortgage to enjoin them from prosecuting a suit in another jurisdiction to reforeclose the mortgage on the ground that they were not personally made parties to the original suit and are not bound by the decree therein, such court having exclusive jurisdic-

tion to determine that question. *Alton Water Co. v. Brown*, (C. C. A. 1908) 166 Fed. 840.

**Enforcing decrees.**—Ancillary relief in a federal Circuit Court by way of injunction, in aid of a decree in a suit over the validity of state taxation, in which jurisdiction as to the state and its officers had been acquired as the result of the voluntary action of the state in submitting its rights to judicial determination, is not forbidden. *Gunter v. Atlantic Coast Line R. Co.*, (1906) 200 U. S. 273, 26 S. Ct. 252, 50 U. S. (L. ed.) 477.

The existence of an adequate remedy at law cannot successfully be urged to defeat ancillary relief by way of injunction in aid of a decree enjoining the collection of state taxes, since that question was foreclosed by the original decree. *Gunter v. Atlantic Coast Line R. Co.*, (1906) 200 U. S. 273, 26 S. Ct. 252, 50 U. S. (L. ed.) 477.

Where a national court is acting to enforce or protect its lawful decrees, or the titles thereunder, it may, notwithstanding this section, restrain all suits and proceedings in state courts which would have the effect to defeat or impair its jurisdiction. *Lang v.*

*Choctaw, etc., R. Co.*, (C. C. A. 1908) 160 Fed. 355.

In *Ex p. Simon*, (1908) 208 U. S. 144, 28 S. Ct. 238, 52 U. S. (L. ed.) 429, it was said: "It would be going far to say that, although the Circuit Court had power to grant relief by final decree, it had not power to preserve the rights of the parties until the final decree should be reached."

**Execution of state process.**—This section does not prevent the granting by a federal court of an injunction restraining a party from making a wrongful or inequitable use of an execution issued on a judgment of a state court. *Linton v. Safe Deposit, etc., Co.*, (1906) 147 Fed. 824.

The federal court may, through the injunctive process, restrain the plaintiff in a judgment from enforcing the same, and thereby prevent the perpetration of a wrong upon the judgment debtor, for in such case the process operates upon the person, and not against the state officers or authorities. *National Surety Co. v. Humboldt State Bank*, (1903) 120 Fed. 593, 56 C. C. A. 657; *Schultz v. Highland Gold Mines Co.*, (1907) 158 Fed. 340.

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#### I. IN GENERAL.

The general rule is that the federal courts will be governed by the laws of the state with reference to the construction placed on the constitutional or statutory provisions of the state by the highest state court, by decisions of the highest court of the state which have become rules of property, and by rules of law of local character involving domestic customs or usage. *Converse v. Mears*, (1908) 162 Fed. 767.

Where Congress has not seen fit to legislate on a subject involving no federal question, and the case presenting such subject is in the federal court merely by reason of diversity of citizenship of the parties, the court will determine the question in accordance with the declared policy of the state in which it sits, as found either in its statutes or the decisions of its highest tribunal. *Blackwell v. Southern Pac. Co.*, (1910) 184 Fed. 499.

**Local laws**—*Law to protect health.*—The construction placed by the highest court of the state upon a law enacted to safeguard natural mineral springs against waste and impairment must be accepted by the federal courts in determining the validity of such statute under the Federal Constitution. *Lindsley v. Natural Carbonic Gas Co.*, (1911) 220 U. S. 61, 31 S. Ct. 337, 55 U. S. (L. ed.) 369.

**Local improvements.**—The decision of the Supreme Court of a state, holding a local improvement statute valid under the state con-

stitution, is binding on a federal court in a suit involving an assessment made after such decision was rendered; and decisions construing and applying its provisions, although made after such assessment, will also be followed unless under exceptional circumstances. *Treat v. Chicago*, (C. C. A. 1904) 130 Fed. 443, *affirming* (1903) 125 Fed. 644.

But in determining all questions of rights under the Constitution and laws of the United States, federal courts are not controlled by the decision of state courts. *Shenandoah First Nat. Bank v. Llewellyn*, (C. C. A. 1911) 187 Fed. 16.

The rule that the construction of the constitution or laws of a state by its Supreme Court is binding upon the federal courts does not apply, where such construction affects the jurisdiction of a federal court, which is under the duty of determining such matter for itself. *U. S. v. Tully*, (1905) 140 Fed. 899.

A decree of a federal Circuit Court in a suit involving rights protected by the Constitution of the United States must be given, in the federal courts, the force and effect to which it is entitled under the principles of *res judicata* as settled by the Supreme Court of the United States, although they may differ from the doctrine announced by the courts of the state in which the Circuit Court was sitting. *Gunter v. Atlantic Coast Line R. Co.*, (1906) 200 U. S. 273, 26 S. Ct. 252, 50 U. S. (L. ed.) 477.

**Due process of law.**—State decisions cannot determine for the national courts what constitutes sufficient process of law, sufficient service of process, or sufficient appearance of parties, but they must exercise their independent judgment in deciding these questions notwithstanding the full faith and credit provisions of the Constitution. *Michigan Trust*

Co. v. Ferry, (C. C. A. 1910) 175 Fed. 667, 681.

*Interstate commerce.*—The question of what is interstate commerce is a federal question, and a decision of a state Supreme Court does not control. *In re Monongahela Distillery Co.*, (1910) 186 Fed. 220.

*Patent rights.*—A state statute giving a defendant in ejectment the right to recover the value of improvements made by him in good faith under color of title cannot be applied in a case in which the plaintiff claims under a patent issued by the United States after the improvements were made, since the power of the United States to dispose of its public lands is absolute, and the right of its grantee to possession on receiving the legal title cannot be obstructed or affected by any claim made under a law of the state. *Tegarden v. Le Marchel*, (1904) 129 Fed. 487.

*Proceeding under immigration laws.*—This section does not require the recognition and application of state statutes in an examination or proceedings before an immigration officer for the purpose of determining the right of an alien to enter or to remain in the United States under our immigration statutes; and a state law which provides that the word "minor" shall mean a male under twenty-one or a female under eighteen years of age is not, therefore, controlling or binding upon such immigration officer, when conducting such a proceeding, in determining the question whether an alien female attains her majority when she reaches the age of eighteen years; but such officer should recognize and follow the common-law rule, which fixes the age of majority at twenty-one for both sexes. *Ex p. Petterson*, (1908) 166 Fed. 536.

*Proceeding to cancel naturalization certificate issued by state court.*—Since the construction of state laws is primarily within the authority of the state courts, a court of the state having held that it had jurisdiction under a state statute of a naturalization petition, and having granted a certificate of citizenship, a federal District Court of concurrent jurisdiction, in a proceeding by the government to cancel the certificate for alleged want of jurisdiction of the state court on considerations of comity, would reach a conclusion as to the construction of the state law in conformity with that of the state court. *U. S. v. Andersen*, (1909) 169 Fed. 201.

*Whether state law superseded by federal law.*—Whether a state statute authorizing arrest of a judgment debtor on certain grounds after the return of an execution unsatisfied has been superseded by the federal bankruptcy law is a federal question, as to which state decisions are merely advisory. *Johnson v. Crawford*, (1907) 154 Fed. 761.

## II. DECISIONS OF STATE COURTS.

*Rules of property — Generally.*—Rules of property established by the highest courts of a state in considering its constitution or statutes prevail in the federal court where no question of right under the Constitution and laws of the nation and no question of general law is involved. *Traer v. Fowler*, (C.

C. A. 1906) 144 Fed. 810; *Paine v. Willson*, (1906) 146 Fed. 488, 77 C. C. A. 44; *Beckwith v. Clark*, (C. C. A. 1911) 188 Fed. 171.

*Title.*—Decisions of the highest courts of a state affecting title to real property will be followed by the federal courts, when like questions come under consideration in the latter jurisdiction. *Hubbird v. Goin*, (C. C. A. 1905) 137 Fed. 822.

So, also, it has been held that a claim of title based on execution sales is a question of local law, and the determination by the Supreme Court of the state will be followed by the United States Circuit Court. *Southern Pac. Co. v. Western Pac. R. Co.*, (1906) 144 Fed. 160.

*Title acquired by Indians under treaty.*—Decisions of the courts of a state respecting the title acquired by individual Indians under the treaty of Sept. 24, 1819, with the Chipewewa Nation, to the lands therein reserved for their use, will not be disturbed by the Supreme Court of the United States, where they have become a rule of property, and do not clearly involve a misinterpretation of the words of the treaty. *Francis v. Francis*, (1906) 203 U. S. 233, 27 S. Ct. 129, 51 U. S. (L. ed.) 165, *affirming* (1904) 136 Mich. 288, 99 N. W. 14.

*Property rights.*—Federal courts, in the exercise of bankruptcy jurisdiction, in determining property rights created by state statute, generally follow the rulings of the supreme appellate tribunal of the state. *In re Burke*, (1909) 168 Fed. 994; *Mishawaka Woolen Mfg. Co. v. Teasdale*, (1911) 145 Wis. 73, 129 N. W. 671. And see section 70a (b) of the Bankruptcy Act, *ante*, p. 823.

*Right to easements.*—The decisions of the highest court of a state that an owner of land abutting on a city street has no easement of light, air, and access as against the public use of the street, or any structure which may be erected thereon to subvert and promote that public use, are conclusive upon the Supreme Court of the United States, when determining, on writ of error to the state court, whether such abutting owner has been deprived of his property without due process of law by the erection in the street of an elevated iron viaduct for general public use under the authority of a statute which makes no provision for compensation to abutting owners. *Sauer v. New York*, (1907) 206 U. S. 536, 27 S. Ct. 686, 51 U. S. (L. ed.) 1176, *affirming* (1904) 180 N. Y. 27, 72 N. E. 579, 70 L. R. A. 717.

*Construction of deed.*—A federal court, although required to exercise an independent judgment as to the construction of a deed in the case in which the question is presented, will incline strongly to adopt the construction placed on a similar deed by the highest court of the state, where, under the ruling of the state courts, such construction becomes a rule of property. *Kuhn v. Fairmont Coal Co.*, (C. C. A. 1910) 179 Fed. 191, *affirming* (1907) 152 Fed. 1013; *Dickson v. Wildman*, (C. C. A. 1910) 183 Fed. 398.

Thus where the highest court of a state decided that a deed to coal underlying certain land did not contain an implied cove-



nant obligating the grantee to sustain the surface, it was held that such decision became a rule of property, which would be followed by the federal courts as to land located in such state when called on to determine the effect of a similar deed. *Kuhn v. Fairmont Coal Co.*, (1907) 152 Fed. 1013.

**Mortgages.** — The statutes and decisions of the courts of last resort in a state where property mortgaged is situated, and where the controversy arose, are binding on the federal courts as a rule of property. *Haggart v. Wilczynski*, (C. C. A. 1906) 143 Fed. 22.

Thus it has been held that a state rule to the effect that, if property covered by an unfilled chattel mortgage passes into the hands of a receiver, the mortgage lien is lost, and the rights of creditors are the same as if the mortgagor had given an assignment in trust for their benefit, will be regarded as a rule of property and applied in proceedings in a federal court sitting in that state to administer assets of an insolvent through a receiver, as against the holder of an unfilled conditional contract of sale of goods to the insolvent; and not the federal rule that the possession of a receiver is only that of the court, and adds nothing to the previously existing title of the mortgagee, the receiver holding for the benefit of whomsoever it shall be found to concern. *Hamilton v. David C. Beggs Co.*, (1910) 179 Fed. 949.

The validity of a chattel mortgage is determined by the decision of the highest judicial tribunal of the state in which it was made. *Dodge v. Norlin*, (1904) 133 Fed. 363, 66 C. C. A. 425; *In re Canton First Nat. Bank*, (1905) 135 Fed. 62, 67 C. C. A. 536.

And in determining whether a chattel mortgage executed by a bankrupt was fraudulent on its face, the federal courts follow the decisions of the courts of last resort of the state in which the controversy arose, the law on the subject being regarded as a rule of property. *Dugan v. Beckett*, (C. C. A. 1904) 129 Fed. 56.

**Leases.** — Whether an oral contract for a lease of real property for more than a year, not complying with the statute of frauds of the state where the property is situated, is a nullity or unenforceable only at the election of the parties, is not a question of general jurisprudence or of commercial or mercantile law, but a rule of property, which must be determined in the federal courts according to the decisions of the highest judicial tribunal of the state where such property is located. *York v. Washburn*, (C. C. A. 1904) 129 Fed. 564.

In an action for breach of covenant of quiet enjoyment in a lease of property, it was held that whether the eviction was by virtue of the act of the holder of a paramount title, for whose acts defendant was responsible, was a question relating to right and title to real estate and was determinable by the decisions of the state courts of last resort. *Pabst Brewing Co. v. Thorley*, (C. C. A. 1906) 145 Fed. 117.

**Instruments relating to mining property.** — The construction given by the highest court

of a state to a conveyance of mining property, as not including the portion of a vein beneath the surface and within the converging lines of the grantor's location, will be followed by the federal Supreme Court, on writ of error to the state court. *East Cent. Eureka Min. Co. v. Central Eureka Min. Co.*, (1907) 204 U. S. 266, 27 S. Ct. 258, 51 U. S. (L. ed.) 476.

A unanimous decision of the highest court of a state construing a writing relating to the sale of a vein of coal underlying land in that state, and holding it to be an option and not a contract of sale, establishes a rule of property, and will be followed by a federal court in construing another contract relating also to property in that state and identical in terms. *Fretts v. Shriver*, (1910) 181 Fed. 279.

**Decisions impairing obligation of contracts.** — The rule that the construction of a state statute by the highest court of the state is conclusive on a federal court does not apply where a federal question is involved, as where a complainant contends that it acquired contract rights under such statute which are protected from impairment by the Federal Constitution. *Sunset Telephone, etc., Co. v. Pomona*, (1908) 164 Fed. 581.

Where certain township railroad aid bonds were issued under a state statute, and passed into the hands of nonresident holders for value at a time when the highest court of the state had rendered no decision intimating that a provision of the constitution of the state would be subsequently so construed as to invalidate the bond act, the federal courts sitting within such state were not bound by such a decision holding that the bond act was illegally passed, the effect of which was to impair the obligation of the contract existing between the township and the bondholders. *Hertford County v. Tome*, (C. C. A. 1907) 153 Fed. 81.

A decision of the highest court of a state, holding a contract made by a city void upon the facts shown, and not upon a construction of the local statutes, is not conclusive upon a federal court, where the rights of the plaintiff under the contract were fixed prior to such decision, to which it was not a party. *Mankato v. Barber Asphalt Paving Co.*, (1905) 142 Fed. 329, 73 C. C. A. 439.

Where, in a suit to restrain a city from constructing and operating waterworks, complainant's rights were acquired under a municipal contract, and not by virtue of any constitutional or statutory provision, it was held to be immaterial that a decision of the highest court of the state construing such constitution and statutes to authorize the city to construct and maintain such waterworks was filed pending the suit in the federal court. *Sioux Falls v. Farmers' L. & T. Co.*, (1905) 136 Fed. 721, 69 C. C. A. 373.

Decisions of state courts, which so construe their statutes as to impair rights previously acquired through contracts between citizens of different states under statutes and constitutions which warranted them when they were vested, are not obligatory on the courts of the United States. *Westinghouse*

*Air Brake Co. v. Kansas City Southern R. Co.*, (C. C. A. 1905) 137 Fed. 26.

A federal court will follow the law as established by the Supreme Court of the United States, that a contract by a city to pay an annual rental to a water company does not create an indebtedness of the city, within the meaning of a provision of the state constitution which would render such an indebtedness illegal, where at the time of the making of the contract in dispute the law of the state had not been settled otherwise by its Supreme Court, although that court may have subsequently declared such contracts invalid. *Mercantile Trust, etc., Co. v. Columbus Waterworks Co.*, (1903) 130 Fed. 180.

But the decision of the highest state court that a state statute which is claimed to create a contract is valid, will be followed by the Supreme Court of the United States in determining whether any contract obligations have been impaired by subsequent legislation. *Powers v. Detroit, etc., R. Co.*, (1906) 201 U. S. 543, 26 S. Ct. 556, 50 U. S. (L. ed.) 860.

The construction of a state statute by the highest court of the state as a legislative change of the grade of a street for its full width is conclusive on the Supreme Court of the United States in determining, on writ of error to the state court, whether such statute impairs the obligation of any contract right of abutting owners to appropriate the street or an extension thereof for wharfage purposes. *Mead v. Portland*, (1906) 200 U. S. 148, 26 S. Ct. 171, 50 U. S. (L. ed.) 413.

**Decision rendered after rights accrued.**—Where rights involved in a suit in a federal court were acquired on the faith of a constitutional or statutory provision of a state, the court is not bound by a construction subsequently placed on such provision by the highest court of the state, but is required to exercise its own independent judgment as to such construction. *Wicomico County v. Bancroft*, (C. C. A. 1905) 135 Fed. 977; *Sioux Falls v. Farmers' L. & T. Co.*, (C. C. A. 1905) 136 Fed. 721; *Fleischmann Co. v. Murray*, (1908) 161 Fed. 162; *Chicago, etc., R. Co. v. Appanoose County*, (1908) 170 Fed. 665.

Thus it has been held that a decision of the highest state court that the grantor in a deed conveying the coal under a tract of land, with the right to enter upon and under said land, and to mine, excavate, and remove all of the coal, cannot maintain an action for damages in tort, founded upon the failure of the grantee or his successors to leave sufficient support to the overlying or surface land, is not binding upon the federal courts in a similar action based on almost identical facts and circumstances, the granting clause of the two deeds being in fact identical, where such decision was handed down after the deed upon which the defendant relies was executed, and after the injury complained of was sustained, and the action begun, and where the point decided had not been previously adjudged by the state Supreme Court. *Kuhn v. Fairmont Coal Co.*, (1910) 215 U. S. 349, 30 S. Ct. 140, 54 U. S. (L. ed.) 228.

In an action on town bonds by a *bona fide* purchaser for value, decisions of state Courts

of Appeal holding such bonds invalid, rendered subsequent to the issue and sale of the bonds in controversy, to which plaintiff was not a party, are inoperative to govern plaintiff's rights. *Northwestern Sav. Bank v. Centreville Station*, (C. C. A. 1906) 143 Fed. 81; *Onslow County v. Tollman*, (C. C. A. 1906) 145 Fed. 753. See also *Rees v. Olmsted*, (1905) 135 Fed. 296, 68 C. C. A. 50.

**Change of opinion after accrual of rights.**

—So, also, the federal courts, in determining the rights of parties acquired under a state statute prior to the date of a change of opinion by the Supreme Court of the state as to its construction, will exercise their own independent judgment, and are not bound to follow the latest decision of the state court. *Forest Products Co. v. Russell*, (1907) 161 Fed. 1004; *Northrop v. Columbian Lumber Co.*, (C. C. A. 1911) 186 Fed. 770.

**Decision based on common law.**—Where a decision of the highest court of a state, although based upon the common law, is deemed of an application especially local, its authority in a federal court is almost as great as would be given to it if it construed a state statute. *Percy Summer Club v. Astle*, (C. C. A. 1908) 163 Fed. 1.

**Inconsistent decisions.**—Where the decisions of the state court conflict, the latest must control. *Gay v. Hudson River Electric Power Co.*, (1910) 178 Fed. 499.

**Inconsistency in decisions of lower courts.**

—Where the constitutionality, under a state constitution, of a state law, is questioned in a federal court, and the matter has never been determined by the Supreme Court of the state, and its lower courts are divided on the question, the weight of their authority being in favor of the constitutionality of the Act, every possible presumption should be indulged in favor of its validity until its invalidity is shown beyond a reasonable doubt. *Kane v. Erie R. Co.*, (1904) 133 Fed. 681, 67 C. C. A. 653.

**Decision of intermediate appellate courts.**

—A decision of an intermediate appellate court as to the construction or effect of a state statute is not binding on a federal court, where the Supreme Court of the state, which is the court of highest jurisdiction, is not concluded thereby, but may, should the same question be presented to it, determine it differently. *State Trust Co. v. Kansas City, etc., R. Co.*, (1904) 129 Fed. 455; *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A. 1904) 132 Fed. 721; *Federal Lead Co. v. Swyers*, (C. C. A. 1908) 161 Fed. 687.

But where a state law provided that the jurisdiction of the appellate court "shall be final except where the case is transferred to the Supreme Court, or the Supreme Court on application shall order the case certified to it," it was held that, where a decision of the appellate court was not plainly in conflict with the decisions of the Supreme Court of the state, it was the duty of a federal court sitting in such state in applying the state law to follow such decision. *In re Gilligan*, (C. C. A. 1906) 152 Fed. 605.

**Decision by single judge.**—Where the highest state court is composed of a number of

judges, it has been held that a construction placed upon a statute by the opinion of one judge which is not concurred in by a majority is not binding, but leaves the question to be determined independently by a federal court. *San Jose-Los Gatos Interurban R. Co. v. San Jose R. Co.*, (C. C. A. 1907) 156 Fed. 455.

But where a taxpayer's action was brought in the federal court to determine whether a state statute increasing the salaries of judges infringed the state constitution, and before the determination of a motion to dismiss the bill the state Supreme Court decided that the act was constitutional, the Supreme Court having jurisdiction over the subject-matter and parties to the suit in which the question was determined, it was held that the validity of such determination could not be reviewed in the federal courts on the ground that the decision was rendered by a single justice as constituting the court, the other justices having refused to take any part by reason of alleged disqualification. *Henry F. Michell Co. v. Matthues*, (1905) 134 Fed. 493.

**Point not passed on.**—A federal court must decide a point for itself, when it has not been passed on by the courts of the state under which it arises. *Hamilton v. Loeb*, (1910) 179 Fed. 728.

**Dicta.**—The opinion of a state court of last resort, construing a state statute, is conclusive on the federal courts sitting in such state to the extent only of the precise question decided. *Southern R. Co. v. Simpson*, (1904) 131 Fed. 705, 65 C. C. A. 563.

Thus decisions which do not construe the particular statute in controversy are not of controlling effect in the federal courts. *Lyman v. Hilliard*, (C. C. A. 1907) 154 Fed. 339.

Decisions of the Supreme Court of a state construing and applying an amendment to the state constitution are not to be construed as determining its validity, or that it was legally adopted, where such question was not raised nor considered; and such decisions do not, therefore, affect the right and duty of a federal court to consider and determine such question in an action in which it is directly presented. *Knight v. Shelton*, (1905) 134 Fed. 423.

**Previous decision by federal court.**—Where the public policy of a state has been declared either by statute or by uniform decision, it will be recognized and followed by the federal courts as to contracts or other matters governed by the laws of such state, although it is contrary to what has been independently determined and announced by such courts as the true public policy. *McCue v. Northwestern Mut. L. Ins. Co.*, (C. C. A. 1908) 167 Fed. 435.

But in *Davis v. Commonwealth Land, etc., Co.*, (1904) 141 Fed. 711, it appears that pending a number of suits to quiet title in a federal court by the owners of a large tract of land under a patent from the state which involved the question of the boundary of such tract, and after such question had been decided in two of the suits, an action in replevin to recover a number of logs, between different

parties, was instituted in a state court, and the issues were so made as to raise the question of the boundary of the same tract of land, and a decision of such question by the highest court of the state was obtained therein, which reduced the area of the tract nearly one-half from that given it by the federal decisions. The owners of the land were not parties to such action, which was apparently brought for the purpose of obtaining such decision and was not seriously contested; and it was held that the decision of the state court, while entitled to the highest consideration, was not binding on the federal court in the suits by the owners of the land which were still pending.

### III. CONSTRUCTION AND APPLICATION OF STATE CONSTITUTION AND STATUTES.

**Construction of state constitution.**—The construction of a state constitutional provision by the highest court of such state is conclusive on both the state and federal tribunals, provided such construction does not conflict with some provision of the Federal Constitution or statutes. *Kibbe v. Stevenson Iron Min. Co.*, (1905) 136 Fed. 147, 69 C. C. A. 145; *Harrison v. Remington Paper Co.*, (C. C. A. 1905) 140 Fed. 385; *Cheatham v. Evans*, (C. C. A. 1908) 160 Fed. 802; *Western Union Tel. Co. v. Julian*, (1909) 169 Fed. 166; *Nielsen v. Chicago, etc., R. Co.*, (C. C. A. 1911) 187 Fed. 393; *Louisville, etc., R. Co. v. Central Stockyards Co.*, (1906) 97 S. W. 778, 30 Ky. L. Rep. 18.

**Adoption of amendment to state constitution.**—The fact that the speaker of the House of Representatives of the state declared a proposed amendment to the state constitution legally adopted on the canvass of the popular vote of the election at which it was submitted is not conclusive, in the absence of any constitutional, or even statutory, provision so declaring, and it is open to a federal court, equally with a state court, to consider and determine such question when it incidentally arises in a case properly brought in such court under the laws of the United States, and which cannot be disposed of without the determination of such question. *Knight v. Shelton*, (1905) 134 Fed. 423.

**Constitutionality of state statutes.**—The interpretation of a state constitution and the conformity of an enactment of the state legislature to that constitution are questions solely for the consideration of the state courts, whose decision thereon concludes the federal Supreme Court. *Montana v. Rice*, (1907) 204 U. S. 291, 27 S. Ct. 281, 51 U. S. (L. ed.) 490; *Hunter v. Pittsburgh*, (1907) 207 U. S. 161, 28 S. Ct. 40, 52 U. S. (L. ed.) 151; *Mohl v. Lamar Canal Co.*, (1904) 128 Fed. 776; *Kane v. Erie R. Co.*, (1904) 133 Fed. 681, 67 C. C. A. 653; *Hughes v. Pflanz*, (C. C. A. 1905) 138 Fed. 980.

**Validity of state statutes under Federal Constitution.**—A decision of the highest court of a state sustaining the constitutionality of a state statute, while binding on the federal courts so far as it affects the validity of the statute under the state constitution, is

not binding on the question whether the statute is in violation of the Federal Constitution. *Morenci Copper Co. v. Freer*, (1903) 127 Fed. 199.

But the scope and meaning of a state statute as determined by the highest court of the state conclude the federal Supreme Court in determining on writ of error to the state court, whether or not such statute violates the Federal Constitution. *Smiley v. Kansas*, (1905) 196 U. S. 447, 25 S. Ct. 289, 49 U. S. (L. ed.) 546; *Gatewood v. North Carolina*, (1906) 203 U. S. 531, 27 S. Ct. 167, 51 U. S. (L. ed.) 305.

**Construction of state statutes.** — A federal court, in determining questions of local statutory construction, is controlled by the decisions of the highest court of the state. *Smiley v. Kansas*, (1905) 196 U. S. 447, 25 S. Ct. 289, 49 U. S. (L. ed.) 546; *Jacobs v. Glucose Sugar Refining Co.*, (1905) 140 Fed. 766; *Yarrington v. Delaware, etc., Co.*, (1906) 143 Fed. 565; *Hager v. American Nat. Bank*, (C. C. A. 1908) 159 Fed. 396; *Spinello v. New York, etc., R. Co.*, (C. C. A. 1910) 183 Fed. 762; *Malloy v. American Hide, etc., Co.*, (C. C. A. 1911) 185 Fed. 776.

When the validity, meaning, and effect of a state statute involves no question arising under the Constitution or laws of the United States, a court of the United States should accept the meaning and effect given to such law by the highest court of the state, except in the limited class of cases when rights have vested or contracts have been made under such statute before it has received interpretation by the state court. *Hager v. American Nat. Bank*, (C. C. A. 1908) 159 Fed. 396.

**Construction regarded as part of statute.** — A construction placed upon a state statute by the highest judicial tribunal of the state, which has been adhered to without variation, and has become the settled law of the state is as binding on the federal courts as though it were written into the statute itself. *Zeiger v. Pennsylvania R. Co.*, (1907) 151 Fed. 348; *Joseph Dixon Crucible Co. v. Paul*, (C. C. A. 1909) 167 Fed. 784; *In re Scheier*, (1911) 188 Fed. 744.

The construction of a territorial statute by the local courts is of great, if not controlling, weight. *Lewis v. Herrera*, (1908) 208 U. S. 309, 28 S. Ct. 412, 52 U. S. (L. ed.) 506.

The policy, wisdom, justice, and fairness of a state statute is not subject to review or criticism by the federal Supreme Court. *Hunter v. Pittsburgh*, (1907) 207 U. S. 161, 28 S. Ct. 40, 52 U. S. (L. ed.) 151, *affirming* 217 Pa. St. 227, 66 Atl. 348.

A decision by the highest court of a state, placing a limitation upon the scope of a state statute, whether based upon a construction of its language or upon considerations of public policy, is in either case an interpretation of the statute which must be followed by the federal courts. *Zeiger v. Pennsylvania R. Co.*, (C. C. A. 1908) 158 Fed. 809.

**Taxes — Generally.** — The construction of state tax laws by the highest state court will be followed by the federal courts. *Flanigan v.*

*Sierra County*, (1905) 196 U. S. 553, 25 S. Ct. 314, 49 U. S. (L. ed.) 597; *Wheeler v. Plumas County*, (1905) 196 U. S. 562, 25 S. Ct. 316, 49 U. S. (L. ed.) 599; *Hager v. American Nat. Bank*, (C. C. A. 1908) 159 Fed. 396.

**What is a tax.** — A federal court of bankruptcy, in determining whether a state imposition is a tax, within the meaning of the Bankruptcy Act, requiring priority of payment thereof, will not be bound by the decisions of the state courts unless the state decisions have authoritatively expounded the substance of the question, and not merely given the name "tax" to an exaction which is not such. *In re Cosmopolitan Power Co.*, (C. C. A. 1905) 137 Fed. 858. And see the title *BANKRUPTCY*, sec. 64a, *ante*, p. 766.

**Uniformity.** — The conclusion of a state court that a tax is uniform, within the meaning of the requirement of the state constitution, when it is equal upon all persons belonging to the described class on which it is imposed, is not open to review upon writ of error from the Supreme Court of the United States to the state court. *Armour Packing Co. v. Lacy*, (1906) 200 U. S. 226, 26 S. Ct. 232, 50 U. S. (L. ed.) 451.

**Interference with interstate commerce.** — A decision of the state court that a statute imposing a tax on "every meat-packing house doing business in this state," does not apply to the interstate business of a foreign corporation, but only to its local business, such as the sale within the state of products already stored there, on orders received after the products are thus stored, is conclusive on the federal Supreme Court in determining, on writ of error to the state court, whether the tax is an interference with interstate commerce. *Armour Packing Co. v. Lacy*, (1906) 200 U. S. 226, 26 S. Ct. 232, 50 U. S. (L. ed.) 451, *affirming* (1904) 134 N. C. 567, 47 S. E. 53.

**Manner of levying taxes.** — A ruling by the state Supreme Court that its state board of equalization was entitled to levy taxes in percentages under the statutes of that state will be followed in the federal courts with respect to land located in that state and sold for taxes there assessed. *Paine v. Germantown Trust Co.*, (1905) 136 Fed. 527, 69 C. C. A. 303.

**Tax law construed as giving lien.** — A state tax, though in form levied upon land conveyed by the United States to a corporation for dry dock purposes, with a reserved right in the grantor to the free use of the dry dock, and a provision for forfeiture in case of the continued unfitness of the dry dock for use, or the use of the land for other purposes, will be held to create a lien upon the company's interest alone, where the highest state court so regards the effect of the tax, although it neglects to modify its judgment sustaining the tax to conform to its views. *Baltimore Shipbuilding, etc., Co. v. Baltimore*, (1904) 195 U. S. 375, 25 S. Ct. 50, 49 U. S. (L. ed.) 242, *affirming* (1903) 97 Md. 97, 54 Atl. 623.

**Relief against sale for taxes.** — Where a state statute requires the repayment of all taxes with a certain rate of interest as a con-

dition precedent to relief against a sale for taxes, such condition will be enforced in a federal court. *Hobe-Peters Land Co. v. Farr*, (1908) 170 Fed. 644.

*Repeal of tax exemption law.* — Whether a repealable exemption from state taxation has been in fact repealed by a subsequent state statute is a question of state law, upon which the decisions of the highest courts of the state, in the absence of any contract rights, are binding on the federal courts. *Wicomico County v. Bancroft*, (1906) 203 U. S. 112, 27 S. Ct. 21, 51 U. S. (L. ed.) 112.

*Private corporations — Interpretation of statute authorizing incorporation.* — The decisions of the highest courts of a state, interpreting state statutes under which a corporation was organized, are controlling on the federal courts. *Consumers' Gas Trust Co. v. Quinby*, (C. C. A. 1905) 137 Fed. 882.

*Construction of charter.* — Decisions of the highest court of the state as to the construction of the charter of an insurance company obtained under a general law of the state are binding upon the federal courts. *Equitable L. Assur. Soc. v. Brown*, (1909) 213 U. S. 25, 29 S. Ct. 404, 53 U. S. (L. ed.) 682, reversing (1907) 151 Fed. 1, 81 C. C. A. 1.

*Corporate powers.* — Rulings of the highest court of the state on questions involving the powers of corporations under the laws of that state are conclusive on the federal Supreme Court when reviewing the judgment of the state court. *Stone v. Southern Illinois, etc., Bridge Co.*, (1907) 206 U. S. 267, 27 S. Ct. 615, 51 U. S. (L. ed.) 1057, affirming (1906) 194 Mo. 175, 92 S. W. 475.

Each state may determine what powers shall be possessed by corporations organized under its authority and what effect shall attach to acts done by such corporations beyond their powers. The question is one of state policy, and therefore a matter of local and not general law. *Anglo-American Land, etc., Co. v. Lombard*, (C. C. A. 1904) 132 Fed. 721.

But a decision of the highest court of a state denying a writ of mandamus to compel certain action on the part of a water company is not an authoritative adjudication of the statutory duties and powers of the company which is binding on a federal court in a suit in equity arising under similar circumstances, where, under the statutes of the state as previously construed, the court must necessarily have held that a proceeding in mandamus would not lie against a corporation of the character of the defendant. *Wiemer v. Louisville Water Co.*, (1903) 130 Fed. 251.

*Liability of officers.* — The decision of a state Supreme Court that a statute imposing a personal liability for corporate debts on the president and secretary of a corporation for failure to file annual reports of the corporation's condition, etc., was remedial and not penal, has been held to be conclusive on all federal courts. *Proctor-Gamble Co. v. Warren Cotton Oil Co.*, (1910) 180 Fed. 543.

*Liability of stockholders.* — The nature of the liability imposed on stockholders of a cor-

poration by the constitution of Minnesota, declaring that each stockholder shall be liable to the amount of stock held or owned by him, as to whether such liability is wholly statutory or partially contractual, and therefore transitory, is a matter of general law as to which the federal courts sitting in Wisconsin are not bound to follow the decisions of the Wisconsin Supreme Court either as a matter of comity, or under R. S. sec. 721. *Converse v. Meats*, (1908) 162 Fed. 767.

Where the state Supreme Court held that a stockholder's statutory liability for debts arose at the time of the dissolution of the corporation, and that the date of the maturity of the obligation was immaterial, such decision would be followed in a federal court sitting in another state in a suit to enforce similar liability under the same statute. *Ramsden v. Knowles*, (1906) 151 Fed. 718.

*What is ultra vires.* — It is for the state courts alone to decide whether a display of exterior advertisements on automobile stages is *ultra vires* of a domestic corporation operating stage routes in a city. *Fifth Ave. Coach Co. v. New York*, (1911) 221 U. S. 467, 31 S. Ct. 709, 55 U. S. (L. ed.) 815, affirming (1909) 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. N. S. 744, 16 Ann. Cas. 695.

*Regulating railroads.* — The construction of a state law which requires railroads to erect and maintain suitable fences on both sides of the entire length of the railroad, etc., presents a local question, and a federal court will accept the construction placed thereon by the Supreme Court of the state. *New York Cent., etc., R. Co. v. Price*, (C. C. A. 1908) 159 Fed. 330.

*Regulation of foreign corporation.* — State statutes imposing requirements on foreign corporations as a condition precedent to their doing business in the state are valid, if reasonable in their provisions, and will be enforced by the federal courts, which will follow the construction placed on them by the courts of the state. *Evansville, etc., Traction Co. v. Henderson Bridge Co.*, (1904) 132 Fed. 402; *Tennis Bros. Co. v. Wetzel, etc., R. Co.*, (1905) 140 Fed. 193; *Buffalo Refrigerating Mach. Co. v. Penn Heat, etc., Co.*, (C. C. A. 1910) 178 Fed. 690.

*Service of process on corporations.* — The decision of the state Supreme Court that a local statute, relating to the service of process on corporations, applies to both foreign and domestic corporations, is binding on the federal courts if the service obtained in pursuance thereof constituted due process of law. *Swarts v. Christie Grain, etc., Co.*, (1909) 166 Fed. 338.

*Dissolution.* — Where state statutes regulating the dissolution of corporations have been construed by the highest court of such state, the construction will be adopted by the federal courts in dealing with a corporation subject to such laws. *In re Munger Vehicle Tire Co.*, (C. C. A. 1908) 159 Fed. 901.

*Right of action as against deposit required for protection of creditors.* — Where a state statute required a corporation to deposit securities with the state treasurer for the protection of creditors, and authorized the latter

on its insolvency to maintain a suit in a state court to avail themselves of such securities, such creditors who are qualified citizens of another state have the right to enforce such remedy and the trust created for their benefit in a federal court, and such court under its plenary jurisdiction as a court of equity to enforce trusts has power to take the securities into its own hands for administration at any stage of the suit when it deems such action for the best interest of the beneficiaries. *Morrill v. American Reserve Bond Co.*, (1907) 151 Fed. 305.

**Municipal and quasi-municipal corporations** — *Power.* — Whether the action of a municipality is in excess of its powers is a question of local law which, having been determined by the Supreme Court of the state, will be followed by the United States Circuit Court. *Southern Pac. Co. v. Western Pac. R. Co.*, (1906) 144 Fed. 160.

*Incurring indebtedness.* — Where a decision of the highest court in the state, construing the state constitution and laws with reference to a municipal corporation's power to incur indebtedness for waterworks, was urged as conclusive on the federal courts, it was held that the latter would not review an objection that the state action did not involve a genuine controversy, but was a friendly suit to obtain a favorable interpretation of the constitution to permit the issuance of water bonds. *Sioux Falls v. Farmers' L. & T. Co.*, (1905) 136 Fed. 721, 69 C. C. A. 373, *reversing* (1904) 131 Fed. 890.

*Bonds.* — The federal courts, in determining the validity of a legislative Act, under which municipal bonds were issued, under the state constitution, will follow the construction placed upon the constitution by the highest court of the state at the time the bonds were issued and sold. *Rees v. Olmsted*, (1905) 135 Fed. 296, 68 C. C. A. 50.

County bonds, which were authorized and valid when issued under the law of the state as declared by its Supreme Court in previous decisions, will not be declared invalid in the hands of *bona fide* holders by a federal court because the state court has since reversed its former rulings. *Henderson County v. Travelers Ins. Co.*, (C. C. A. 1904) 128 Fed. 817.

*Validity of ordinance.* — The validity, under the state laws, of an ordinance adopted by a board of county supervisors, is settled, so far as the federal courts are concerned, by a decision of the highest court of that state upholding a similar ordinance. *Flanigan v. Sierra County*, (1905) 196 U. S. 553, 25 S. Ct. 314, 49 U. S. (L. ed.) 597, *reversing* (1903) 122 Fed. 24, 58 C. C. A. 340; *Wheeler v. Plumas County*, (1905) 196 U. S. 562, 25 S. Ct. 316, 49 U. S. (L. ed.) 599, *reversing* (1903) 122 Fed. 1022, 58 C. C. A. 683.

*Submission of question to voters.* — Where the validity of an alternative submission of the question whether a city should issue bonds for the "construction or purchase" of a system of waterworks was in issue in a suit brought in the state courts to restrain the city from proceeding under such election, and a final judgment in favor of the city was affirmed on appeal to the state Supreme

Court, it was held that such decision was conclusive on the federal courts against the validity of an objection to the alternative submission of such question. *Sioux Falls v. Farmers' L. & T. Co.*, (1905) 136 Fed. 721, 69 C. C. A. 373, *reversing* (1904) 131 Fed. 890.

*Validity of assessment.* — The decision of the highest state court that the fact that members of the board levying an assessment for a local improvement were owners of property abutting on such improvement, and assessable therefor, would, at most, make the assessment voidable, and would not render it subject to collateral attack, is conclusive on the Supreme Court of the United States in reviewing the decision of the state court, foreclosing a lien on such assessment. *Hibben v. Smith*, (1903) 191 U. S. 310, 24 S. Ct. 88, 48 U. S. (L. ed.) 195, *affirming* (1902) 158 Ind. 206, 62 N. E. 447.

*Grant of water front.* — Whether the grant by a town of its water front to an individual has been ratified, confirmed, or compromised by authority of law, and to what extent, if any, it has been so done, are questions of local law, the determination of which by the Supreme Court of the state will be followed by the United States Circuit Court. *Southern Pac. Co. v. Western Pac. R. Co.*, (1906) 144 Fed. 160.

*Drains.* — The law as established by decisions in matters relating to public drains will be followed by the federal courts. *Chicago, etc., R. Co. v. Appanoose County*, (C. C. A. 1910) 182 Fed. 291, *affirming* (1908) 170 Fed. 665.

*Rights of bidder for public work.* — A federal court has jurisdiction of a suit by an unsuccessful bidder for public work to enforce any rights to which he may be entitled, to be determined according to the local law in accordance with the facts and the statutes involved as construed by the highest state tribunal. *U. S. Wood Preserving Co. v. Sundmaker*, (C. C. A. 1911) 186 Fed. 678.

*Contractual rights.* — Where an employment contract was made in New York and broken there, if broken at all, by the employer's insolvency, a federal court administering the insolvent's estate in New York will follow the New York rule as to what constitutes a breach of such contract. *Ely v. Van Kannel Revolving Door Co.*, (1911) 184 Fed. 459.

Where a contract of guaranty was made in New York, it was held that it should be construed according to the law of that state most favorably to the guarantee, though subject to the rule that, when the meaning is ascertained, the guarantor's liability is *strictissimi juris*. *In re Merrill*, (C. C. A. 1911) 186 Fed. 312.

Where plaintiff, a resident of Montana, contracted in Minnesota with defendant for the transportation of certain cattle from Minnesota, to destination in Montana, and thereafter brought suit in the Montana state courts for damages resulting from delay, which suit defendant removed to the federal Circuit Court sitting in Montana, it was held that such court would not enforce a

stipulation in the transportation contract, providing a sixty-day limitation for an action thereon, which was void under the express provisions of Civ. Code Mont., sec. 2245, though it was not prohibited by the laws of Minnesota, where the contract was made. *Northern Pac. R. Co. v. Kempton*, (C. C. A. 1905) 138 Fed. 992.

A decision by the state Supreme Court in a suit brought under a local law to enjoin the further performance of a contract made by the city with a water company and the payment of any money thereunder, on the ground of its invalidity, in which the court denied the relief prayed for on the ground that the suit was barred by limitation, and expressed the opinion that the city, by reason of its accepting performance and itself performing the contract for a number of years, was without equity to question its validity, even though not technically operating to render the question of the validity of the contract *res judicata*, will be given such effect by analogy, and followed by a federal court in a subsequent action at law by the water company against the city to recover rentals under the contract, in which its invalidity is set up as a defense. *Defiance v. McGonigale*, (C. C. A. 1907) 150 Fed. 689, *affirming* (1905) 140 Fed. 621.

A decision of the highest court of a state adjudging void a contract made by a city, as beyond its constitutional powers, is not binding on a federal court in a suit involving the rights of a citizen of another state under such contract, unless the rule applied in such decision had been so long and firmly established as to have become a rule of property in the state at the time the contract was made. *Columbia Ave. Sav. Fund, etc., Co. v. Dawson*, (1903) 130 Fed. 152.

And see *infra*, under subdivision IV., p. 1425, as to the decision of questions concerning contractual rights and obligations, as a matter of general law.

**Insurance contracts.** — A state law which provides that insurance on life is a contract by which the insurer for a stipulated sum engages to pay a certain amount of money if another dies within the time limited by the policy, and that the life may be that of the insured, or of another in whose continuance the insured has an interest, etc., and that the insured may direct the money to be paid to his personal representatives, his widow, his children, or his assignee, and upon such direction, assented to by the insurer, no other person can defeat the same, etc., is merely declaratory of the general law, and hence the federal courts are not bound by a construction thereof by the highest court of the state not in accord with the views of such federal courts. *Mutual L. Ins. Co. v. Lane*, (1907) 151 Fed. 276, *affirmed* (C. C. A.) 157 Fed. 1002.

**Rights of policy holders.** — In a suit in the federal courts to determine the rights of policy holders and the insurer, the decisions of the highest courts of the state are of controlling authority. *Polk v. Mutual Reserve Fund L. Assoc.*, (1905) 137 Fed. 273.

**Construction of policy.** — The meaning and construction of a policy of insurance issued

by a New York company, and both executed and to be carried out in that state, as declared by the highest court of the state, is of most persuasive influence, even if not of binding force, in the federal courts, in the absence of any federal question arising in the case. *Equitable L. Assur. Soc. v. Brown*, (1909) 213 U. S. 25, 29 S. Ct. 404, 53 U. S. (L. ed.) 682, *reversing* (1907) 151 Fed. 1, 81 C. C. A. 1.

**Attaching application to policy.** — Where the Supreme Court of the state in construing a statute providing that, unless a correct copy of the application is attached to life insurance policies, it shall not be considered a part of such policy or received in evidence, laid down the rule that where, under its terms, the application was not in itself admissible in evidence, the company could not be permitted to show by oral evidence statements made by the insured, which were afterwards incorporated into the application in support of a defense of fraud; and such rule had been acquiesced in regard to its correctness was held that, without regard to its correctness, such rule was binding upon the federal courts sitting within the state in actions at law of the same character. *Manhattan L. Ins. Co. v. Albro*, (C. C. A. 1904) 127 Fed. 281, *affirming* (1902) 119 Fed. 629.

**Matters affecting title to realty — Adverse possession.** — The decision of the Supreme Court of the state that, where lands are wild and uninclosed, a local statute makes seven years' successive payments of taxes under color of title equivalent to seven years' actual adverse possession, and vests the title to such land in one who shows that he has paid the taxes during the period required, is conclusive on the federal court. *Forshaw v. Layman*, (C. C. A. 1910) 182 Fed. 193.

**Right to quiet title.** — A right given by a state statute to one in possession to maintain a suit to quiet title may be enforced in the federal courts. *Kraus v. Congdon*, (C. C. A. 1908) 161 Fed. 18.

**Lis pendens.** — A state statute providing that no *lis pendens* shall bind or affect a *bona fide* purchaser of real estate for a valuable consideration, without actual notice of such *lis pendens*, unless and until a memorandum, etc., is filed in the office of the clerk of the court in the county where the land lies, has no application to federal courts sitting in Virginia; such courts having no power to enforce the registration of such memoranda. *King v. Davis*, (1905) 137 Fed. 222.

**Liens — Attorney's lien.** — Whether an attorney has a lien for services rendered on money recovered as the result of his efforts is a matter of local law, not to be disposed of on independent views entertained by the federal courts. *Cain v. Hockensmith Wheel, etc., Co.*, (1907) 157 Fed. 992.

Code Civ. Pro. N. Y., sec. 66, creating an attorney's lien on the client's cause of action, etc., and providing for the enforcement thereof on petition, is not a mere practice act, but created a right and provided a remedy for its enforcement, and was therefore controlling on the federal courts sitting in such state. *In re Baxter*, (C. C. A. 1907) 154 Fed. 22.

**Mechanics' liens.** — The construction of the New York mechanic's lien law by the New York Court of Appeals, to the effect that during the time a laborer, mechanic, materialman, or subcontractor is entitled to file his lien, he has a preferential statutory claim, in the nature of a nonperfected equitable lien, which cannot be defeated by the party against whom it might be asserted by a general assignment for the benefit of creditors, will be followed in the federal courts. *In re Grissler*, (1905) 136 Fed. 754, 69 C. C. A. 406.

**Liens on vessels.** — The Michigan Water Craft Act (Comp. Laws, ch. 298), which gives a lien to contractors and persons furnishing labor and materials in the construction of vessels, relates to contracts which are not maritime, and its construction by the Supreme Court of the state is binding on the federal courts. *The Winnebago*, (1905) 141 Fed. 945, 73 C. C. A. 295.

**Recording of liens.** — A decision of the highest court of a state, construing the recordation acts as respects what is necessary to be done to secure liens thereunder, will be followed by the federal courts. *Tygart Valley Brewing Co. v. Vilter Mfg. Co.*, (C. C. A. 1910) 184 Fed. 845, *reversing* (1909) 168 Fed. 1002.

**Decedents' estates — Generally.** — It is the settled rule that the courts of the United States will follow the decisions of the highest court of a state in the interpretation of its local statutes, and especially when they concern the descent and alienation of lands and the construction of wills and conveyances; and where there is a conflict of decision on such a matter the federal court will follow the latest, when no intervening contract rights are involved. *Yocum v. Parker*, (1904) 134 Fed. 205, 67 C. C. A. 227, *affirming* (1903) 130 Fed. 722; *Selden v. Illinois Trust, etc., Bank*, (C. C. A. 1911) 184 Fed. 872.

**Establishment of claims of foreign creditor.** — A foreign creditor may establish his claim in the courts of the United States against the personal representatives of a decedent, though the laws of the state in terms limit such right to proceedings in the local probate courts, but in such case the federal court administers the state laws and is bound by the same rules that govern the local tribunals. *Schurmeier v. Connecticut Mut. L. Ins. Co.*, (C. C. A. 1909) 171 Fed. 1.

**Conflict with federal equity practice.** — Where the laws of the state governing the descent of real property and constituting rules of property conflict with the practice of the federal courts in equity, the former control; and where there is no conflict, both are in force. *Childs v. Ferguson*, (C. C. A. 1910) 181 Fed. 795.

**Testamentary trust.** — While the federal courts adopt the local law of real property, as ascertained by the decisions of the state courts, including that pertaining to the construction of wills, such decisions merely afford a guide in applying the general rule that the intention of the testator is to be carried out to the solution of the question whether a will creates, by way of wish or recommenda-

tion, a testamentary trust. *Russell v. U. S. Trust Co.*, (1904) 127 Fed. 445.

**Negligence and liability therefor — Master and servant.** — Since, in the federal courts, negligence of a superior servant does not create liability of the master for injuries to an inferior servant, a state law providing that every person in the employ of a railroad company, having charge or control of employees in any separate branch or department, shall be held to be the superior, and not the fellow servant, of employees in any other branch or department who have no power to direct or control in the branch in which they are employed, does not create a liability of the master to an inferior servant for injuries sustained through the negligence of the superior servant, enforceable in the federal courts. *Kane v. Erie R. Co.*, (1904) 128 Fed. 474.

Where a statute of a state in which a servant was injured (for which injury action was brought in the federal court of another state) provided that, if such injury was caused by the negligence of any person in the service or employment of the master to whose orders or directions the servant at the time of the injury was bound to conform, if such injury resulted from his having so conformed, the master was liable, and the highest court in such state had held that, where a servant suffered injury through the negligence of a co-employee, such statute vested a right of action in the servant against the master without regard to the contract of hiring, which was material only as creating the relation of master and servant, such construction was binding on the federal court on the trial of the action for such injury. *Dormidy v. Sharon Boiler Works*, (1904) 127 Fed. 495.

In an action in a federal court for injuries to a servant of a railroad company, whether plaintiff and the engineer, by whose negligence plaintiff was injured, were fellow servants, depends on the law of the state where the accident occurred. *Atlantic Coast Line R. Co. v. Farmer*, (C. C. A. 1909) 176 Fed. 692.

**Employers' liability law.** — The New York employers' liability law (Laws 1902, p. 1748, ch. 600), extending and regulating the liability of employers to make compensation for personal injuries suffered by employees, having been construed by the state courts to repeal all other remedies previously available for injuries to employees within the state, and to require as a condition precedent to an action thereunder that notice of the time, place, and cause of injury shall be given within 120 days, such construction is binding on the federal courts sitting in New York in an action for injuries to an employee occurring therein. *Crosby v. Lehigh Valley R. Co.*, (1903) 128 Fed. 193. See also *Pennsylvania Steel Co. v. Lakkonen*, (C. C. A. 1910) 181 Fed. 325; *Proctor, etc., Co. v. Williams*, (C. C. A. 1910) 183 Fed. 695.

Since the sufficiency of a notice of injury to, or death of, an employee to a master preliminary to a suit required by the New York Employers Liability Act depends on the construction to be given to that statute, the federal courts in determining such question will



follow the construction of the statute approved by the state court of last resort. *U. S. Gypsum Co. v. Sliwienka*, (C. C. A. 1910) 183 Fed. 688 (construing Consol. Laws, ch. 31, art. 14).

**Fellow-servant Act.** — The Supreme Court of North Carolina having decided that the Fellow-servant Act of that state, providing that "any servant or employee of any railroad company" injured through the negligence of any other servant, employee, or agent of the company may maintain an action therefor against the company, applies to a manufacturing corporation which owns and operates a spur track on its ground as incidental to its main business, with respect to servants employed in such service, such construction of the statute is binding on the federal courts. *U. S. Leather Co. v. Howell*, (C. C. A. 1907) 151 Fed. 444.

**Failure to place lookout on locomotive.** — A state statute which requires that a lookout shall be maintained on railroad locomotives, and, when any person or other obstruction appears on the road, that the alarm whistle shall be sounded, etc., and that a failure to observe such precautions shall make the company liable for damages, having been construed by the state Supreme Court as giving damages notwithstanding contributory negligence, such construction will be followed in the federal court. *Rogers v. Cincinnati, etc., R. Co.*, (1905) 136 Fed. 573, 89 C. C. A. 321.

**Necessity of safeguarding machinery.** — The construction and effect of a state statute requiring owners of mills and factories to safeguard their machinery is not a matter of general, but of local, law, and the decisions of the highest court of the state thereon are binding on the federal courts. *Welsh v. Barber Asphalt Paving Co.*, (C. C. A. 1909) 167 Fed. 465.

**Actions for wrongful death.** — A federal court, in administering a state statute giving a right of recovery for wrongful death, will follow the decisions of the highest court of the state with respect to the measure of damages. *Quinette v. Bisso*, (1905) 136 Fed. 825, 69 C. C. A. 503.

**Recovery by nonresident alien.** — The construction by the highest state court of a statute of that state creating a right of action for death in favor of the surviving relatives of the deceased, as not extending to such relatives as are nonresident aliens, must be accepted by the federal Supreme Court on a writ of error to the state court. *Maiorano v. Baltimore, etc., R. Co.*, (1909) 213 U. S. 268, 29 S. Ct. 424, 53 U. S. (L. ed.) 792, *affirming* (1907) 216 Pa. St. 402, 65 Atl. 1077, 116 Am. St. Rep. 778; *Fulco v. Schuylkill Stone Co.*, (C. C. A. 1909) 169 Fed. 98.

**Liability of municipal corporations.** — Whether a municipal corporation in a state is responsible for negligence of its officers in any stated case is a matter of local law, which it is the duty of the federal courts within such state to follow, when made manifest by legislative action or the decisions of the highest state court. *Denver v. Porter*, (C. C. A. 1903) 126 Fed. 288; *Clark v. Atlantic City*, (1910) 180 Fed. 698.

**Public lands.** — Where an action in the federal court depends on the construction of a state statute providing for the sale of state lands, the federal court is required to adopt the construction placed on the statute by the highest court of such state. *Lockard v. Asher Lumber Co.*, (1904) 131 Fed. 689, 65 C. C. A. 517, *reversing* (1903) 123 Fed. 480.

Thus where the state Supreme Court located the boundaries of the grant of water front in determining the extent and validity of the grant, such boundaries will be followed by the Circuit Court of the United States in determining conflicting claims of parties claiming title to lands on such water front. *Southern Pac. Co. v. Western Pac. R. Co.*, (1906) 144 Fed. 160.

Where the priority of certain state grants had been settled by the Supreme Court of the state the decision is binding on the federal court sitting in such state in a suit instituted therein. *North Carolina Min. Co. v. Westfeldt*, (1907) 151 Fed. 290.

The question "What did the legislature mean by the use of the term 'ship channel'?" in the grant of the lands lying between high tide and ship channel, is a question of local law, and where the Supreme Court of the state determines it as comprising waters left free to navigation, and the definite natural boundary of such navigable waters as the line of low tide, its decision will be followed by the United States Circuit Court. *Southern Pac. Co. v. Western Pac. R. Co.*, (1906) 144 Fed. 160.

**Criminal laws — Construction.** — Upon the question of the construction of a state statute, enforceable through criminal proceedings, a federal court is bound by the construction placed thereon by the state court. *Love v. Busch*, (1906) 142 Fed. 429, 73 C. C. A. 545. See also *Ughbanks v. Armstrong*, (1908) 208 U. S. 481, 28 S. Ct. 372, 52 U. S. (L. ed.) 582.

**Misnomer in complaint.** — What constitutes a misnomer in a criminal complaint or warrant for violation of the laws of the state is a local question as to which the federal courts will follow the settled rule of the state courts, in the absence of any statute on the subject. *O'Halloran v. McGuirk*, (C. C. A. 1909) 167 Fed. 493.

**Conspiracy to defraud.** — A decision of the highest state court that a conspiracy to defraud is a crime under the laws of the state concludes the Supreme Court of the United States on habeas corpus to inquire into a detention under a conviction for that crime in a court of the state. *Howard v. Fleming*, (1903) 191 U. S. 126, 24 S. Ct. 49, 48 U. S. (L. ed.) 121.

**Offenses against United States.** — But Rev. Stat. sec. 721 has no application to criminal offenses against the United States. *U. S. v. Central Vermont R. Co.*, (1907) 157 Fed. 291.

**Accrual of cause of action.** — Where a cause of action is created by a state statute, the question when the right of action accrues, and what conditions authorize its enforcement, is one of judicial construction, as to

which the decisions of the highest court of the state are controlling on the federal courts. *Whitman v. Atkinson*, (C. C. A. 1904) 130 Fed. 759.

*The right of a third person to sue upon a contract made for his benefit* being fully established by decision in the state courts, such rule is controlling upon a federal court. *Bethlehem Iron Co. v. Hoadley*, (1907) 152 Fed. 735.

*Elements of damage.*—Where a state law required all telegraph messages to be delivered without unreasonable delay, and declared that any officer or agent of a telegraph company who wilfully violated the provisions of the Act should be guilty of a misdemeanor, and that the company should be liable in damages to the party aggrieved, it was held that, though the state court had construed such statute to entitle the plaintiff to recover nominal damages in any event, it had not construed it as conferring also the right to recover for mental damages or injured feelings, irrespective of some physical injury, but that the common law gives the right to recover for injured feelings whenever the plaintiff has either a common-law or statutory right to recover "some damages" upon any other ground. The question, therefore, whether a statutory right to recover some damages for a breach of a statutory duty affords a basis to recover also for injured feelings is a question of general jurisprudence, with regard to which the federal court was not bound by the state court's opinion. *Western Union Tel. Co. v. Sklar*, (C. C. A. 1903) 126 Fed. 295.

*Defense to action.*—A statute which provides that any employer maintaining a relief department for its employees shall be liable for the payment of all benefits to which an employee shall be entitled therefrom by reason of any sickness or injury, and that in case of injury the acceptance of such benefits shall not estop the employee to maintain an action against the employer to recover damages for its negligence causing such injury, having been held by the state court to be beyond the power of the legislature, so that an employee who had elected to accept benefits was estopped from bringing an action for damages notwithstanding the Act, the federal court should have ruled that the acceptance of benefits was a good defense to the action for damages. *Atlantic Coast Line R. Co. v. Dunning*, (C. C. A. 1908) 166 Fed. 850, reversing (1906) 150 Fed. 775.

*Statutes of limitation.*—Federal courts in suits in equity will accept the statutory regulations of the states prescribing the time within which suits may be brought, where to do so will not abrogate their own principles. *Dupree v. Mansur*, (1909) 214 U. S. 161, 29 S. Ct. 548, 53 U. S. (L. ed.) 950, reversing (1907) 150 Fed. 329, 80 C. C. A. 213; *Schurmeier v. Connecticut Mut. L. Ins. Co.*, (C. C. A. 1903) 124 Fed. 865; *McGonigale v. Defiance*, (1905) 140 Fed. 621; *U. S. v. Boomer*, (C. C. A. 1910) 183 Fed. 726, 730; *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, (C. C. A. 1910) 184 Fed. 199, modifying (1909) 171 Fed. 778; *Kentucky Coal, etc., Co.*

*v. Kentucky Union Co.*, (C. C. A. 1911) 187 Fed. 945.

*Rules of evidence — Production of books and papers.*—Whether the notice to a corporation to produce books and papers before a grand jury is broader than that provided for by the law of the state, is a question of the construction of the statute and of the notice, on which the decision of the state court is final, and not reviewable by the federal Supreme Court on writ of error. *Consolidated Rendering Co. v. Vermont*, (1908) 207 U. S. 541, 28 S. Ct. 178, 62 U. S. (L. ed.) 327, affirming (1907) 80 Vt. 55, 66 Atl. 790.

*Evidential effect of statute.*—A rule established by decision of the state courts that an engrossed act of the legislature duly approved, signed, and filed is conclusive evidence of its contents, and cannot be contradicted by any evidence whatever, is one relating to the construction of the state statutes and is binding on the federal courts. *U. S. v. Andem*, (1908) 158 Fed. 996.

*Relation of physician and patient.*—Whether the relation of physician and patient so existed as to exclude the former's testimony, under the state law, involves a question of the construction of a state statute, on which the decisions of the highest state court will be accepted on a writ of error from the Supreme Court of the United States to that court. *Supreme Lodge, etc., v. Meyer*, (1905) 198 U. S. 508, 25 S. Ct. 754, 49 U. S. (L. ed.) 1146, affirming (1904) 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 840.

*Failure to use war revenue stamps.*—Decisions of state courts that instruments, though unstamped, as required by the War Revenue Act, were admissible in evidence, have no application to federal courts. *Sackett v. McCaffrey*, (C. C. A. 1904) 131 Fed. 219.

*Anti-trust legislation.*—The construction given by the state courts to a state statute as removing the discriminatory features of prior anti-trust laws is conclusive on the federal Supreme Court in determining, on writ of error to the state court, whether such statute denies the equal protection of the laws. *National Cotton Oil Co. v. Texas*, (1905) 197 U. S. 115, 25 S. Ct. 379, 49 U. S. (L. ed.) 689; *Southern Cotton Oil Co. v. Texas*, (1905) 197 U. S. 134, 25 S. Ct. 383, 49 U. S. (L. ed.) 696.

*Division of state Supreme Court.*—Where a state statute dividing the state Supreme Court into divisions and conferring separate powers and duties on such divisions was held to be constitutional by all of the justices of such court sitting *in banc* in a case in which the question was directly involved, such decision is conclusive on the federal courts. *Williams v. Stearns*, (1903) 126 Fed. 211.

*Increasing salary of judges.*—Where a taxpayers' action was brought in the federal court to determine whether a local act, increasing the salaries of state judges, infringed the state constitution, and before the determination of a motion to dismiss the bill the state Supreme Court decided that the act was constitutional, it was held that such decision was binding on the federal court. *Henry F. Michell Co. v. Matthues*, (1905) 134 Fed. 493.

## IV. QUESTIONS OF GENERAL LAW.

**General and commercial law.**—The federal courts must render independent decisions on questions of commercial or general law, in which matters decisions of state courts are not controlling. *In re Hopper-Morgan Co.*, (1907) 154 Fed. 249; *Pennsylvania R. Co. v. Hummel*, (C. C. A. 1909) 167 Fed. 89; *Russell v. Grigsby*, (C. C. A. 1909) 168 Fed. 577; *Scherer v. Everest*, (C. C. A. 1909) 168 Fed. 822; *Shenandoah First Nat. Bank v. Liewer*, (C. C. A. 1911) 187 Fed. 16; *Guernsey v. Imperial Bank*, (C. C. A. 1911) 188 Fed. 300.

**Common law of state.**—Upon the question as to what is the common law of the state, unless the decisions of its courts have so clearly established a settled rule in the premises as to make it a part of the peculiar and local law of that state, the federal courts exercise an independent judgment, their jurisdiction being co-ordinate with, and not subordinate to, the state court. *Snare, etc., Co. v. Friedman*, (C. C. A. 1909) 169 Fed. 1.

**Contractual rights and obligations.**—The right of a party to an executory contract, on the refusal of the other party to perform, to sue for and recover his entire damages for the breach, without waiting for the expiration of the time for performance, is a question of general law, upon which the federal courts are not bound by the rule of the state courts. *H. T. Smith Co. v. Minetto-Meriden Co.*, (1909) 168 Fed. 777.

A contract of guaranty is a well-known form of commercial contract, as to the construction and effect of which the federal courts are not bound to follow state decisions not based on a local statute or usage having the force of a local law. *Johnson v. Charles D. Norton Co.*, (C. C. A. 1908) 159 Fed. 361.

A decision of an appellate state court construing a contract between the parties, while not conclusive on the federal courts of concurrent original jurisdiction, will nevertheless be given strong persuasive effect. *Henderson v. Phillips*, (1910) 178 Fed. 374.

**Insurance contracts**—*Double insurance.*—The question whether a case of double insurance is made out, so as to require contribution between the insurers, is one of general commercial law, the determination of which by the Supreme Court of the state where the question arose is not binding on the federal courts of that jurisdiction. *Meigs v. London Assur. Co.*, (1905) 134 Fed. 1021, 68 C. C. A. 249, *affirming* (1904) 126 Fed. 781.

**Assignment of policy.**—Where the validity of an assignment of a life insurance policy between citizens of Tennessee and made in that state is to be determined by a federal court sitting therein, and such validity does not depend on a local statute or usage, but is to be decided on principles of general law, the court must exercise an independent judgment, though it leads it to a different conclusion from that arrived at by the Tennessee courts. *Russell v. Grigsby*, (C. C. A. 1909) 168 Fed. 577.

The question whether or not an insurable interest in an assignee is requisite to the validity of the assignment of a policy of life

insurance originally issued to one who had an insurable interest is a question of general law, on which decisions in the state in which the assignment was made are not controlling in the federal courts. *Gordon v. Ware Nat. Bank*, (1904) 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550.

**Limitation of time to sue on insurance policy.**—Whether a provision in an insurance policy that no action shall be brought after the lapse of a year from the date of death is valid is a question of general public policy, as to which federal courts will follow federal decisions, though in conflict with the decisions of the highest courts of the state. *Spinks v. Mutual Reserve Fund L. Assoc.*, (1905) 137 Fed. 169.

**Negotiable instruments.**—The negotiability of a note is a question pertaining to the law merchant, with regard to which federal courts are not bound by local decisions, unless predicated on a special statutory enactment defining the elements of a negotiable instrument. *St. Louis State Nat. Bank v. Cudahy Packing Co.*, (1904) 126 Fed. 543.

Whether or not a certificate of deposit is a negotiable instrument, when not controlled by statute, is a question of general commercial law, upon which a federal court is not concluded by state decisions. *Forrest v. Safety Banking, etc., Co.*, (1909) 174 Fed. 345.

Where, in an action on city notes, defendant claimed that the city was not liable because the notes sued on constituted an over-issue, but the facts concerning such defense were not known to plaintiffs when they purchased the notes and they did not appear on the face thereof, plaintiffs' right to recover in a federal court is not a question of local law, but of general law concerning the rights of *bona fide* holders of commercial paper, concerning which the federal courts are not bound by local decisions. *Citizens' Sav. Bank v. Newburyport*, (C. C. A. 1909) 169 Fed. 766.

**Provision for payment of attorney fees for collection.**—A provision in a negotiable note for the payment of attorney's fees by the maker in case of collection by suit, when such note is collected in a court of admiralty in another state by the enforcement of a mortgage on a vessel securing the same, is not governed by the law of the state where the contract was made, but by the general commercial law, and will not be enforced by a federal court, and especially where, owing to the death of the maker, insolvent, the amount, if allowed, must be taken from holders of junior liens. *The Avalon*, (1909) 169 Fed. 696.

**Construction of bond.**—The question of the construction and validity of a bond given in conformity to the requirements of a state statute is one of general law, as to which a federal court is not controlled by a decision of the state courts, but must exercise its independent judgment. *Kansas City Hydraulic Press Brick Co. v. National Surety Co.*, (1906) 149 Fed. 507.

**Collateral attack on judgment.**—The right of collateral attack on a judgment is a matter of general law, as to which the decisions of

the courts of a state are not binding on a federal court. *Phoenix Bridge Co. v. Castleberry*, (C. C. A. 1904) 131 Fed. 175.

The validity of an arbitration agreement to oust the courts of all jurisdiction over the subject of a controversy, under the contract, is a matter of general law, as to which federal courts are not bound by state decisions. *Jefferson F. Ins. Co. v. Bierce*, (1910) 183 Fed. 588.

**Nonreturn of replevied property.** — Where the question of what will excuse a plaintiff for nonreturn of property replevied, on his failure in the action, is one of general law in the state, the decisions of its Supreme Court thereon are not binding on a federal court. *Three States Lumber Co. v. Blanks*, (1904) 133 Fed. 479, 66 C. C. A. 353.

The penal character of a state statute precluding its enforcement outside the state is a question of general jurisprudence uncontrolled by the decisions of the courts of the state. *Leyner Engineering Works v. Kemper*, (1908) 163 Fed. 605.

**Liability for negligence** — *Generally.* — The question of liability for negligence, when not modified or governed by statute law, is one of general law, upon which federal courts are not required to follow the state decisions, although there may be such a decision based on the identical facts. *Snare, etc., Co. v. Friedman*, (C. C. A. 1909) 169 Fed. 1.

**Master and servant.** — In the absence of a state statute governing the subject, the question of the liability of an employer for an injury to an employee is one of general law, as to which the federal courts are not bound by the decisions of the state courts. *Salmons v. Norfolk, etc., R. Co.*, (1908) 162 Fed. 722; *Illinois Cent. R. Co. v. Hart*, (C. C. A. 1910) 176 Fed. 245; *Farrar v. St. Louis, etc., R. Co.*, (1910) 149 Mo. App. 188, 130 S. W. 373.

**Liability of lessor of railroad.** — Under the holdings of the federal courts, a lessor of a railroad track is not liable for the negligence of its lessee in operating its trains on such track, and, the question being one of general law, a federal court is not controlled thereon by state decisions. *Yeates v. Illinois Cent. R. Co.*, (1905) 137 Fed. 943. See also *Curtis v. Cleveland, etc., R. Co.*, (1905) 140 Fed. 777.

**Care required at crossings.** — Upon the question of the care required of a traveler on a highway on approaching a street railway crossing, the local decisions are persuasive in a federal court. *Milford, etc., St. R. Co. v. Cline*, (C. C. A. 1907) 150 Fed. 325.

**Fellow-servant doctrine.** — The common-law fellow-servant doctrine, as construed by the Supreme Court of Louisiana, prevails in that state, and in a federal court in that state the liability of a master for injury of a servant, through the negligence of a fellow servant, and the question who are fellow servants, are questions of general law, not controlled by state decisions. *Jones v. Southern Pac. Co.*, (C. C. A. 1906) 144 Fed. 973; *Kinnear Mfg. Co. v. Carlisle*, (C. C. A. 1907) 152 Fed. 933; *Snipes v. Southern R. Co.*, (C. C. A. 1908) 166 Fed. 1; *Spring Valley Coal Co. v.*

*Patting*, (1904) 112 Ill. App. 4, *affirmed* 210 Ill. 342, 71 N. E. 371.

**Res ipsa loquitur.** — Whether the doctrine *res ipsa loquitur* applies to an action for injuries to a servant by the breaking of a ladder rung on the side of a freight car is a question of general jurisprudence, and not of local law, as to which federal courts are governed by their own decisions and not by those of the state in which the court is sitting. *Patton v. Illinois Cent. R. Co.*, (1910) 179 Fed. 530.

**On removal from state court.** — When a case involving negligence is removed from a state to a federal court, unless the action is founded on a state statute such question is one of general law on which the courts of the United States will exercise an independent judgment. *Force v. Standard Silk Co.*, (1908) 160 Fed. 992.

**Effect of previous decision by state court.** — Where an action against a carrier to recover damages for injuries to a passenger had been dismissed pursuant to the unanimous opinion of the highest state court, and the questions of negligence presented were not questions as to which the federal and state courts were at variance, it was held that comity required such decision to be followed by the federal courts in a subsequent action therein by the same parties for the same cause, though such opinion was not controlling authority. *Mearns v. New Jersey Cent. R. Co.*, (C. C. A. 1905) 139 Fed. 543.

**Measure of damages.** — The question of the measure of damages recoverable in an action of tort, where not governed by the state constitution or statutes, is one of general jurisprudence, upon which state decisions are not controlling on the federal courts. *Woldson v. Larson*, (C. C. A. 1908) 164 Fed. 548.

Under the rule of the federal courts there can be no recovery of damages from a telegraph company for mental anguish caused by failure to deliver a message, or by delay in delivery, where that is the only ground of damage; and in the absence of statutory provisions the question is one of general law, upon which state decisions are not controlling in the federal courts. *Western Union Tel. Co. v. Burris*, (C. C. A. 1910) 179 Fed. 92.

Whether a carrier is liable for exemplary damages for wanton and oppressive conduct by a servant toward a passenger is a question of general jurisprudence, and not of local law, on which the federal courts, in the absence of express statutory regulation, will exercise their own judgment uncontrolled by the decisions of state courts. *Norfolk, etc., Traction Co. v. Miller*, (C. C. A. 1909) 174 Fed. 607.

**Submission to physical examination.** — The question whether a court has at common law the power to compel a plaintiff in an action for a personal injury to submit to a surgical examination is a matter of practice and not of evidence, and, as a matter of practice relating to the power of courts, neither state statutes nor the decisions of state courts on the subject are binding on federal courts. *Chicago, etc., R. Co. v. Kendall*, (C. C. A. 1909) 167 Fed. 62.

## Vol. IV, p. 529, sec. 722.

**Application of state laws.**—Under R. S. secs. 722 and 800 the court has the right, in every case in which there is no express provision of the federal statute, to apply laws of the state in which the court is held. *U. S. v. Mitchell*, (1905) 136 Fed. 896.

## Vol. IV, p. 530, sec. 723.

**Effect of adequate remedy at law.**—In the national courts, equity will not assume jurisdiction if the law courts afford a plain, adequate, and complete remedy. *Hunter v. Robbins*, (1902) 117 Fed. 920; *Safford v. Ensign Mfg. Co.*, (C. C. A. 1903) 120 Fed. 480; *Giberson v. Cook*, (1903) 124 Fed. 988; *Miller v. Schwarner*, (1904) 130 Fed. 561; *Kane v. Luckman*, (1904) 131 Fed. 609; *American Lighting Co. v. New Jersey Public Service Corp.*, (1904) 134 Fed. 129; *Indian Land, etc., Co. v. Shoenfelt*, (C. C. A. 1905) 135 Fed. 484; *Hunt v. O'Conner*, (1907) 151 Fed. 707; *Wallula Pac. R. Co. v. Portland, etc., R. Co.*, (1906) 154 Fed. 902; *Johnston v. Corson G. Id. Min. Co.*, (C. C. A. 1907) 157 Fed. 152; *Lewis Pub. Co. v. Wyman*, (1909) 168 Fed. 756; *Stockton v. Oregon Short Line R. Co.*, (1909) 170 Fed. 627; *Gilbert v. Hopkins*, (1909) 171 Fed. 704; *Pullman Co. v. Tamble*, (1909) 173 Fed. 200; *Buchanan Co. v. Adkins*, (C. C. A. 1909) 175 Fed. 700; *Shawnee Milling Co. v. Temple*, (1910) 179 Fed. 517.

This section is merely a statutory expression of the equitable rule. In no sense does it enlarge or contract the equitable jurisdiction of the federal courts, or exclude them from any recognized field of equitable jurisdiction. *Brissell v. Knapp*, (1907) 155 Fed. 815.

It does not alter the rule that was in force prior to 1789, when it was first enacted, concerning the power of a court of equity to assume jurisdiction in a case triable at law. *Manning v. Berdan*, (1905) 135 Fed. 159.

**Nature of remedy at law required.**—But it is not enough that there is a remedy at law; such remedy must be plain, adequate, and complete, and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Hunter v. Robbins*, (1902) 117 Fed. 920; *Rochester German Ins. Co. v. Schmidt*, (1904) 126 Fed. 998; *Manning v. Berdan*, (1905) 135 Fed. 159; *Brewster v. Lanyon Zinc Co.*, (C. C. A. 1905) 140 Fed. 801; *Balfour v. San Joaquin Valley Bank*, (1906) 156 Fed. 500; *Rumbarger v. Yokum*, (1909) 174 Fed. 55; *Laws v. Fleming*, (1910) 177 Fed. 450; *Howard v. National Telephone Co.*, (1910) 182 Fed. 215; *Preston v. Sturgis Milling Co.*, (C. C. A. 1910) 183 Fed. 1.

This section does not prevent the granting of legal relief therein where jurisdiction has been acquired to grant equitable relief, and the legal remedy is not as practicable and efficient. *Salton Sea Cases*, (C. C. A. 1909) 172 Fed. 792.

The remedy may be inadequate because the procedure at law is too inflexible to suit the exigencies of the case, or because the relief

There is no ambiguity whatever in this section; nor can there be any question as to its general application. *U. S. v. Mitchell*, (1905) 136 Fed. 896.

which a common-law judgment can afford is not adaptable to the peculiar facts. When neither of these difficulties is in the way, there can be no reason for resorting to a court of equity. *Miller v. Steele*, (C. C. A. 1907) 153 Fed. 719.

**Legal and equitable suits distinguished.**—So marked is the distinction between the jurisdiction of the courts of the United States in equity and at law with respect to procedure, that the blending together in one suit in a federal court of essentially legal and equitable remedies cannot be authorized or justified by any state statute or practice on the subject; but, although no state legislation is competent to extend or restrict the jurisdiction of the federal courts, a state may create an enlargement of rights and remedies, whether equitable or legal, which may be enforced or pursued in a federal court, in the exercise of that branch of its jurisdiction which is appropriate to the case; and where a state statute creates a right and a remedy for its protection or enforcement, and such remedy substantially conforms to the procedure in chancery, it, in the absence of a plain, adequate, and complete remedy at law, may be pursued on the equity side of a federal court. Where the direct object of a suit is the judicial ascertainment of the existence and amount of a pecuniary legal demand and the enforcement of its payment by the process of the court in which the suit is brought, the proceeding is essentially an action at law and in a federal court must be so treated, regardless of state legislation. Nor is the distinctly legal nature of such a remedy lost merely because, owing to the circumstances of a given case, the purpose of the action may fail of accomplishment. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct. *Jones v. Mutual Fidelity Co.*, (1903) 123 Fed. 507.

**Extent of equitable jurisdiction.**—*Generally.*—The fact that a right may be cognizable at law by no means determines that it may not be cognizable in equity and serve as the basis for a purely equitable remedy; for in many cases a given demand or interest may constitute the foundation of a suit either at law or in equity, and whether the procedure shall be at law on the one hand, or on the other in equity, absolutely depends on the object of the suit and the nature of the relief sought. If the procedure and relief are essentially equitable the circumstance that they bear relation to a legal demand is immaterial. *Jones v. Mutual Fidelity Co.*, (1903) 123 Fed. 508.

*In aid of legal remedy.*—If a remedy is essentially legal, and in its nature fitted or adapted, in the absence of obstacles which may or may not exist, to attain the object in view, then, whatever equitable procedure may in particular cases be resorted to in aid of the legal remedy, it cannot wholly displace it. The jurisdiction of chancery to reach the equitable or legal assets of a defendant, whether a corporation or a natural person, in aid of a legal remedy for a money demand is indisputable. But such an exercise of jurisdiction is not by way of substitution for, but only in aid of, the legal remedy, and it can be resorted to only after the plaintiff has exhausted such remedy. This necessitates the obtaining of judgment for the demand, and, usually, the issuance of execution and its return unsatisfied. *Jones v. Mutual Fidelity Co.*, (1903) 123 Fed. 506.

The fact that equitable relief can be granted in aid of a legal remedy only after the plaintiff has exhausted such remedy precludes the possibility of any clash or conflict between legal jurisdiction and equitable jurisdiction, or of any blending of legal and equitable remedies in the same suit. *Jones v. Mutual Fidelity Co.*, (1903) 123 Fed. 506.

*Bill of discovery.*—In a case in which discovery and relief are sought, but the only ground for equitable relief appears to be a discovery of evidence to be used in the enforcement of a purely legal demand, the jurisdiction cannot be sustained. *Safford v. Ensign Mfg. Co.*, (C. C. A. 1903) 120 Fed. 483.

But where the subject-matter of a suit in a federal court is clearly within the jurisdiction of a court of equity, the complainant is entitled to discovery in respect to any matters relevant and necessary to his case. *Brown v. Pegram*, (1906) 149 Fed. 515.

*Relief against collection of judgment.*—It is well established that equity will entertain jurisdiction and afford relief against the collection of a judgment where in justice and good conscience it ought not to be enforced, as where there is a meritorious equitable defense thereto, which could not have been set up at law or which the party was, without fault or negligence, prevented from interposing. *Brown v. Pegram*, (1906) 149 Fed. 520.

*To prevent assessment and collection of taxes.*—Federal jurisdiction in equity to prevent the assessment and collection of taxes against complainant is not ousted because of an alleged adequate remedy in the state courts. *Western Union Tel. Co. v. Trapp*, (C. C. A. 1911) 186 Fed. 114.

*Effect of state rules.*—The elements of federal jurisdiction being present, a right of action created or enlarged by the laws of a state and made enforceable in its courts of general jurisdiction is equally enforceable in the federal courts sitting in that state; but, notwithstanding the procedure prescribed by the laws of the state, the enforcement in the federal courts can be by suit in equity only where there is not a plain, adequate, and complete remedy at law, according to the distinction between actions at law and suits in equity prevailing in those courts. *U. S. Min-*

*ing Co. v. Lawson*, (C. C. A. 1904) 134 Fed. 769 (citing the earlier decisions).

The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a state may be administered by the Circuit Courts of the United States (citing authorities). But if the case in its essence is one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of federal jurisdiction. A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; the wise policy of the Constitution gives him a choice of tribunals (citing authorities). So whenever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. *Colorado Eastern R. Co. v. Chicago, etc., R. Co.*, (C. C. A. 1905) 141 Fed. 898.

Where the procedure and relief provided by a state statute are essentially equitable, and such relief is impossible of attainment in any action at law, not owing to the existence of any accidental or abnormal obstacles or difficulties, but by reason of the essential nature of such action and legal process, a case for purely equitable cognizance under the statute is presented. *Jones v. Mutual Fidelity Co.*, (1903) 123 Fed. 508.

All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the federal courts only on their law side. Demands of this kind do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought in the same action. Such blending of remedies is not permissible in the courts of the United States. *Norton v. Colusa Parrot Min., etc., Co.*, (1908) 167 Fed. 205; *South Penn Oil Co. v. Miller*, (C. C. A. 1909) 175 Fed. 729.

Since state legislation cannot enlarge the

jurisdiction of the federal courts in equity, such legislation, if conflicting with the distinction observed in federal courts between law and equity, is unenforceable. *Kansas City Southern R. Co. v. Quigley*, (1910) 181 Fed. 190.

A state statute cannot confer on a federal court jurisdiction of a suit in equity to quiet title to real estate of which the defendant is in possession. *Giberson v. Cook*, (1903) 124 Fed. 986; *Union Pac. R. Co. v. Cunningham*, (1909) 173 Fed. 93.

**Time to object.**—In a suit in equity in a federal court, the objection that plaintiff has an adequate remedy at law is jurisdictional, and may be made at any stage of the case. *Kane v. Luckman*, (1904) 131 Fed. 609.

The defense of adequate remedy at law is one of substance in the national courts affecting the jurisdiction, and may therefore be raised at any stage of the proceedings, either by the parties, or the court of its own volition. *Marthinson v. King*, (C. C. A. 1906) 150 Fed. 49.

**Waiver of objection to equity jurisdiction.**—This section secures a privilege personal to the defendant, which he may waive. *War-math v. O'Daniel*, (C. C. A. 1908) 150 Fed. 87.

The objection that complainant had an adequate remedy at law does not—when not made until the hearing—require the dismissal of a cause the subject-matter of which is within the jurisdiction of a court of equity. *Southern Pac. R. Co. v. U. S.*, (1906) 200 U. S. 341, 26 S. Ct. 296, 50 U. S. (L. ed.) 507.

**Concurrent jurisdiction.**—An exception to the general rule that a suit in equity cannot be maintained in a federal court where there is a plain, adequate, and complete remedy at law, exists in the case of an executory contract for the sale of real estate, where the vendor has an election of remedies, and may maintain a suit in equity to enforce the obligation of the purchaser to pay the purchase

money, whenever the latter could maintain such a suit to compel a conveyance. *Nelson v. Husted*, (1910) 182 Fed. 921.

If the remedies at law and in equity are concurrent the plaintiff may choose which he will pursue. *Griessa v. New York Mut. L. Ins. Co.*, (C. C. A. 1909) 169 Fed. 514.

It was not intended to restrict the ancient jurisdiction of courts of equity, or to prohibit their exercise of a concurrent jurisdiction with courts of law in cases where such concurrent jurisdiction has been previously upheld. *U. S. v. Leslie*, (1909) 167 Fed. 673.

**Right to jury trial.**—The main purpose of this section was to emphasize the necessity for preserving to litigants in courts of the United States the right to trial by jury secured by the Seventh Amendment in suits at common law, and that, where a state statute grants to litigants in its courts an equitable remedy which does not impinge on their right to a trial by jury at common law, courts of the United States, sitting in the state as courts of equity, may grant the same statutory relief as that afforded in the state tribunals. In such cases, where the right of trial is not interfered with, the equitable remedy afforded by the statute of the state is usually so much more complete than the old remedies that the language of section 723 interposes no obstacle to equitable jurisdiction in the federal courts. *Ames Realty Co. v. Big Indian Min. Co.*, (1906) 146 Fed. 175.

**Waiver.**—The right to a trial by jury when there is a suitable remedy at law is confirmed by this section. But that right is one which the defendant may waive; and he does waive it if he answers to the merits without claiming it. This, of course, does not preclude the court from raising the objection if the case made by the bill is plainly unsuitable for the exercise of the jurisdiction of a court of equity. *Toledo Computing Scale Co. v. Computing Scale Co.*, (C. C. A. 1906) 142 Fed. 919.

## Vol. IV, p. 534, sec. 725.

**Purpose of this section.**—In *Ex p. McLeod*, (1903) 120 Fed. 130, it was said: "It is to be borne in mind that this section of the Revised Statutes was induced by the acquittal of District Judge Peck, who was impeached for imprisoning an attorney for a criticism of one of his decisions, after the case had ended in his court. The acquittal was largely due to the consideration that the common law authorized the judge to treat such criticism as a contempt of court, and that there was not sufficient evidence in other respects to show that the judge had acted corruptly or maliciously. Public opinion, which had not forgotten the passions aroused by the alien and sedition laws, and the partisanship of judges in their enforcement, looked upon the act of Judge Peck as an attempt of the judiciary to revive the principles of these obnoxious laws, and to assert common-law powers which were inconsistent with our Constitution and institutions. Congress intended by this statute to put an end to the power of

any federal court to prevent, by punishment as for contempt, criticism of judicial acts or decisions, or even mere libels on individuals concerned in the administration of justice. The statute was drawn by Mr. Buchanan, one of the managers of the impeachment, who afterwards became President. It is doubtful, to say the least of it, whether any of the eminent lawyers in the Congress which adopted this provision, taken from a similar statute in Pennsylvania, had in mind anything more than to prevent the punishment, as for a contempt, of exercises of the right of free speech and liberty of the press in criticising and denouncing judicial acts. It is questionable, to say the least of it, whether Congress intended to take away from the courts the existing common-law power to punish, as for a contempt, improper efforts, in the guise of published statements or comments, pending the trial of a particular case, to secure judgment therein, in obedience to the dictates of passion or prejudice, or to

thrust other ulterior considerations before the tribunal, against which justice and the law seeks to guard judge and jury in the trial and decision of causes."

**What constitutes contempt — Contempt by juror.**—A grand jury is only impaneled to make preliminary investigations of those things committed to its charge. These investigations require, in ordinary practice, but a few days each term to complete. The members are then discharged, and by the terms of section 812, Rev. Stat., as modified by Act June 30, 1879, ch. 52, sec. 2, 21 Stat. L. 43, a juror who has thus served a term should not be allowed to serve again until after the lapse of one year. But if the oath should be held to require perpetual secrecy on the part of such juror, and even if he might subject himself to prosecution for perjury because of its violation, he is nevertheless shielded from the power of the court to attach him for contempt so soon as the court has discharged him from further service. *Atwell v. U. S.*, (C. C. A. 1908) 162 Fed. 97.

**Contempt by witnesses.**—By the very terms of the Act a witness duly subpoenaed may be punished for contempt in refusing to obey its commands. *U. S. v. Tom Wah*, (1908) 160 Fed. 207, *affirmed* (C. C. A.) 163 Fed. 1008.

**Violation of injunction.**—A proceeding against members of labor unions to punish them for contempt for prosecuting a criminal conspiracy to violate an injunction, granted by the court in a civil suit, restraining them from interfering with the business or employees of the complainant therein, is a criminal proceeding within the meaning of R. S. sec. 860, which provides that no discovery or evidence obtained from a party or witness by means of a judicial proceeding shall be given in evidence or in any manner used against him in any court of the United States in any criminal proceeding. *Hammond Lumber Co. v. Sailors' Union of the Pacific*, (1909) 167 Fed. 809.

**Disobeying order for stay of proceedings.**—The sheriff and night jailer in charge of a prisoner under sentence of death in a state court are chargeable with contempt of the mandate of the Supreme Court of the United States staying all proceedings pending an appeal from an order of a federal Circuit Court denying relief by habeas corpus, where such officials made no preparation to prevent the murder of the prisoner by a mob, actuated by the intent to prevent the delay attendant upon such appeal, although such action was reasonably to be anticipated, and made no effort to resist the mob, to save the prisoner, or to identify the participants in the crime. *U. S. v. Shipp*, (1909) 214 U. S. 386, 29 S. Ct. 637, 53 U. S. (L. ed.) 1041.

Lack of jurisdiction in the federal Circuit Court of a petition for habeas corpus, or in the Supreme Court of the appeal from the order denying the writ, does not enable persons to disregard, without liability to process for contempt, the order of the Supreme Court that "all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal," since that

court necessarily has jurisdiction to decide whether the case is properly before it. *U. S. v. Shipp*, (1906) 203 U. S. 563, 27 S. Ct. 165, 51 U. S. (L. ed.) 319.

**Participants in the murder of a prisoner under sentence of death** in a state court, after an appeal to the Supreme Court of the United States from an order of a federal Circuit Court denying relief by habeas corpus has been allowed and the proceedings stayed, are guilty of contempt of the Supreme Court, where their crime was actuated by the intent to prevent the delay attendant upon such appeal. *U. S. v. Shipp*, (1909) 214 U. S. 386, 29 S. Ct. 637, 53 U. S. (L. ed.) 1041.

**Bankruptcy.**—Contempts in bankruptcy proceedings have been considered under section 41 of the Bankruptcy Act. See *ante*, the title BANKRUPTCY, p. 589 of this Supplement.

The words "so near thereto."—The inherent power of the court to punish for contempt is based upon the theory that it is essential that the court should possess ample authority to secure the free and unobstructed exercise of its functions in the enforcement of the law. Therefore it is only such acts as tend to interfere with the orderly proceedings of the court or with the due administration of justice that can be properly punished as a contempt of court. Words written or spoken at a place other than where the court is held, and not so near thereto as to interfere with the proceeding of the court, do not render the author liable. Any loud noise or other disturbance in the presence of the court, or in the street or other place so near thereto as to interfere with the orderly proceedings of the court, would undoubtedly tend to obstruct the administration of justice, and under such circumstances the court is empowered to summarily punish for contempt. That newspapers sometimes engage in unwarranted criticism of the courts cannot be denied. In some instances they construe the liberty of the press as a license to authorize them to engage in a wholesale abuse of the court; but these instances are rare, and do not warrant a departure from the well-settled principles of the law as declared by Congress and construed by the courts. If judges charged with the administration of the law are not to be criticised on account of their official conduct, the liberty of the press is abridged, and the rights of individuals imperiled. While all citizens should entertain due respect for the courts of the land, it does not follow that editors and public speakers are to refrain from legitimate criticism of the acts of any tribunal. Such criticism should be invited by public officials, in order that the people may fully understand what is being done by those who are acting as their agents in the administration of the law. *Cuyler v. Atlantic, etc., R. Co.*, (1904) 131 Fed. 95.

A direct attempt by a person to bribe or persuade a witness to testify contrary to the truth in a cause pending and then on trial, or to influence the jury or any member thereof to find a verdict in favor of one party or the other, made on the street in the immediate vicinity of the court, constitutes a direct contempt, and the mere denial of the charge



by the accused under oath is not sufficient to exonerate him, but the matter should be heard and determined upon all the testimony produced. *U. S. v. Carroll*, (1906) 147 Fed. 947.

But a bare attempt, without success, to induce a third person to do what he could to influence jurors in a pending case in a federal court, does not obstruct the administration of justice so as to constitute a contempt under the rule that, to constitute such contempt, the act done by the accused must naturally and directly tend to such obstruction. *U. S. v. Carroll*, (1906) 147 Fed. 947.

Neither the taking of a deposition to be used in a federal court in another state, in pursuance of a conspiracy to impose upon the court, nor the filing and publication of such deposition, is a misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice, punishable as a contempt under this section; but to constitute such contempt the deposition must have been used or offered in evidence. *Doniphan v. Lehman*, (1902) 179 Fed. 173.

**Limitation of power.**—This section is in the nature of a limitation of the power of the court to punish for contempt. *Cuyler v. Atlantic*, etc., R. Co., (1904) 131 Fed. 95.

While courts are vested by common law with inherent powers to protect themselves and enforce their mandates, there can be no question that this power may be limited by legislative authority, and it cannot be further questioned that this section has limited such power in federal courts to a greater extent than it has been limited by any other government where the common law prevails. While this is true, it must be conceded by all that this power cannot be absolutely destroyed. *Atwell v. U. S.*, (C. C. A. 1908) 162 Fed. 97.

In *U. S. v. Zavelo*, (1910) 177 Fed. 536, it was said that this section limits the jurisdiction of the federal court to punish for contempt to three classes of cases: (1) Misbehavior of any person in the presence of the court or so near thereto as to obstruct the administration of justice; (2) misbehavior of officers of the court in their official transactions; and (3) disobedience or resistance to any lawful writ, process, order, rule, decree, or command of the court by any person.

A federal court is without power to punish for contempt a person not an officer of the court, nor a suitor therein, on a rule which charges him only with using or attempting to use its process to obstruct the administration of justice in a state court. *In re Riggsbee*, (1907) 151 Fed. 701.

**Determination.**—Accusations of contempt where of criminal import must be supported by evidence sufficient to convince the mind of the trier beyond a reasonable doubt of the actual guilt of the accused, and to establish every element of the offense including the criminal intent. *U. S. v. Carroll*, (1906) 147 Fed. 947.

**Methods of procedure.**—A proceeding in equity for civil contempt consisting in doing that which was forbidden by an injunction, where the only remedial relief possible was a

fine payable to the complainant, must be dismissed without prejudice to the power and right of the court granting the injunction to punish for contempt by proper proceedings, where there has been a complete settlement between the parties of all the matters involved in the original equity cause. *Gompers v. Bucks Stove, etc., Co.*, (1911) 221 U. S. 418, 31 S. Ct. 492, 55 U. S. (L. ed.) 797.

An affidavit for a warrant of arrest for contempt of court in disobeying an injunctive order against interfering with work by lawless acts of intimidation need not be made by a party to the injunction suit, but by any one knowing the facts; the acts forbidden being themselves offenses. *Castner v. Pocahontas Collieries Co.*, (1902) 117 Fed. 184.

Contempt of a federal court is an offense, within R. S. sec. 1014, which, with Act May 28, 1896, 29 Stat. L. 184, authorizes a United States commissioner to arrest, imprison, or bail for an offense against the United States. *Castner v. Pocahontas Collieries Co.*, (1902) 117 Fed. 184.

**Punishment.**—The power of the national courts to enforce obedience, and to punish disobedience, of their orders, is not derived from this section, but from the grant to them of all the judicial power of the nation by section 1 of article 3 of the Constitution, which declares that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The grant of the judicial power of the United States to these courts *ex vi termini* vested them with authority to enforce obedience to their orders and to punish disobedience and contempt of their authority by fine and imprisonment, because this authority is an attribute of judicial power as inherent and indispensable as a judge. The power to punish for contempts is inherent in all courts. Its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of the courts and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. *In re Nevitt*, (C. C. A. 1902) 117 Fed. 448.

A decree adjudging each defendant guilty of the independent acts set out in separate paragraphs of a petition charging them with contempt of an injunction order, and consolidating sentence without indicating how much of the punishment was imposed for the disobedience in any particular instance, should be reversed if it appears that the defendants have been sentenced on any charge which, in law or in fact, does not constitute a disobedience of the injunction. *Gompers v. Bucks Stove, etc., Co.*, (1911) 221 U. S. 418, 31 S. Ct. 492, 55 U. S. (L. ed.) 797.

A punitive sentence appropriate only to a proceeding at law for criminal contempt, where the contempt consisted in doing that which had been prohibited by an injunction,

cannot properly be imposed in contempt proceedings which are instituted, entitled, tried, and, up to the moment of sentence, treated, as a part of the original cause in equity. *Gompers v. Bucks Stove, etc., Co.*, (1911) 221 U. S. 418, 31 S. Ct. 492, 55 U. S. (L. ed.) 797.

**Review.**—Writ of error, and not appeal, is the proper mode of reviewing a judgment or order of a federal court finding a person not a party to the suit guilty of contempt in violating a restraining order of that court, and imposing a fine therefor. *Bessette v. W. B. Conkey Co.*, (1903) 194 U. S. 324, 24 S. Ct. 665, 48 U. S. (L. ed.) 997.

The Circuit Court of Appeals cannot, in advance of the final decree in the suit, review an order of a federal Circuit Court which adjudges the defendants in such suit guilty of contempt in disobeying an order for the production of certain books and papers for inspection for the benefit of the plaintiff, and imposes a fine or imprisonment in the event of failure to produce such books or papers by a specified date, since this is not a final order rendered in a proceeding criminal in

its nature, and as such within the appellate jurisdiction of the Circuit Court of Appeals, under the Act of March 3, 1891 (26 Stat. L. 828, ch. 517), sec. 6, but was intended to secure the rights of the party to the suit for whose benefit the original order was made. *Doyle v. London Guarantee, etc., Co.*, (1906) 204 U. S. 599, 27 S. Ct. 313, 51 U. S. (L. ed.) 641.

The judgment or order of a federal Circuit Court, finding a person not a party to the suit guilty of contempt in violating a restraining order of that court, and imposing a fine therefor, is reviewable in the appropriate Circuit Court of Appeals, under the Act of March 3, 1891, 26 Stat. L. 826, ch. 517, sec. 6, giving that court appellate jurisdiction of final decisions in all cases other than those specified in section 5, which provides for a direct review in the Supreme Court, and limits such review in criminal proceedings to convictions of capital and otherwise infamous crimes. *Bessette v. W. B. Conkey Co.*, (1903) 194 U. S. 324, 24 S. Ct. 665, 48 U. S. (L. ed.) 997.

## Vol. IV, p. 549, sec. 726.

**Power to grant new trials.**—Under this section federal courts have power to grant new trials for reasons for which new trials have been usually granted in the courts of law, or, in the language of the Seventh Amendment to the Constitution of the United States, "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." The action of the court

is not reviewable. New trials at law are granted when the trial court erred in stating the law, or when the verdict of the jury has no evidence to sustain it, or when the great preponderance of the evidence is against the verdict, or when the verdict is due to passion, prejudice, or partisan feeling. *Pringle v. Guild*, (1903) 119 Fed. 962. See also *Murhard Estate Co. v. Portland, etc., R. Co.*, (C. C. A. 1908) 163 Fed. 194.

## Vol. IV, p. 552, sec. 737.

**Nonjoinder.**—This section is but a legislative affirmation of the rule previously established by the Supreme Court that the nonjoinder of persons who are not inhabitants of the district, but are mere formal parties or even necessary parties whose interests are separable from those before the court, will not prevent the court from proceeding to final trial and adjudication, as between the parties before it, when it can proceed to a decree and do complete and final justice without affecting the rights of others. *Minnesota v. Northern Securities Co.*, (1902) 184 U. S. 190, 22 S. Ct. 308, 46 U. S. (L. ed.) 499. But, notwithstanding this statute and the rule, the court cannot proceed without the presence of indispensable parties. It can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights. *Shields v. Barrow*, (1854) 17 How. 140, 15 U. S. (L. ed.) 158. This is not because the court may not have jurisdiction, but on the broader ground that no court can adjudicate directly upon the rights of a person without his being either

actively or constructively before it. Nor should it make a decree which leaves the controversy in such a condition that the final determination may be wholly inconsistent with equity and good conscience. *McAulay v. Moody*, (1911) 185 Fed. 144.

A nonresident heir cannot be regarded as such an indispensable party defendant that his absence will defeat the jurisdiction of a federal court of chancery over a suit brought by an heir against the executor and other heirs, to determine her interest in an alleged lapsed legacy and the consequent increase in the residuary estate, in view of the provisions of this section and of equity rule 47. *Waterman v. Canal-Louisiana Bank, etc., Co.*, (1909) 215 U. S. 33, 30 S. Ct. 10, 54 U. S. (L. ed.) 80.

The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First, when a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court,

when the case is subject to a special rule. Secondly, where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party, if possible, and the court will not proceed to a decree without him, if he can be reached. Thirdly, where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant. *Slater Trust Co.*

### Vol. IV, p. 554, sec. 740.

This section has been re-enacted in section 52 of the Judicial Code, *ante*, p. 153 of this Supplement.

Where suit must be brought. — Where jurisdiction is founded only on the fact that the action is between citizens of different

*v. Randolph-Macon Coal Co.*, (1908) 166 Fed. 171.

This section has been cited in *Edwards v. Mercantile Trust Co.*, (1903) 124 Fed. 381; *Bay State Gas Co. v. Rogers*, (1906) 147 Fed. 560; *Rogers v. Penobscot Min. Co.*, (C. C. A. 1907) 154 Fed. 616; *Farmers' Bank v. Wright*, (1908) 158 Fed. 841; *Kuchler v. Greene*, (1908) 163 Fed. 91; *O'Neil v. Wolcott Min. Co.*, (C. C. A. 1909) 174 Fed. 527; *Lawrence v. Southern Pac. Co.*, (1910) 180 Fed. 822; *Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co.*, (1910) 181 Fed. 974.

states, suit may be brought only in the district of the residence of either defendant or plaintiff. *Doscher v. U. S. Pipe Line Co.*, (1911) 185 Fed. 959. See also *John D. Park, etc., Co. v. Bruen*, (1904) 133 Fed. 806.

### Vol. IV, p. 557, sec. 1.

**Findings of fact.** — The rule is well settled in courts of admiralty that the decision of the trial court, which heard the witnesses on questions of fact, will not be disturbed by an appellate court, unless clearly against the weight of evidence. *Perriam v. Pacific Coast Co.*, (C. C. A. 1904) 133 Fed. 140; *Coastwise Transp. Co. v. Baltimore Steam Packet Co.*, (C. C. A. 1906) 148 Fed. 837; *Earn Line Steamship Co. v. Ennis*, (C. C. A. 1908) 165 Fed. 633; *Royal Exch. Assur. v. Graham, etc., Transp. Co.*, (C. C. A. 1908) 166 Fed. 32; *Reed v. Weule*, (C. C. A. 1910) 176 Fed. 660; *The Bailey Gatzert*, (C. C. A. 1910) 179 Fed. 44; *The J. G. Gilchrist*, (C. C. A. 1910) 183 Fed. 105.

The finding of a commissioner appointed in an admiralty cause, on a question of fact depending largely on the credit to be given to the various witnesses testifying before him, confirmed by the court, has every reasonable presumption in its favor; and an appellate court is not justified in setting aside or modifying the decree based thereon, unless there clearly appears to have been error or mistake in the finding or the conclusion drawn therefrom. *Cahill's Appeal*, (C. C.

A. 1903) 124 Fed. 63; *The North Star*, (C. C. A. 1907) 151 Fed. 168; *United Steamship Co. v. Haskins*, (C. C. A. 1910) 181 Fed. 962.

**Costs.** — The awarding or withholding of costs in admiralty is a matter in the discretion of the court, which is not subject to review where that is the sole question involved. *The Eva D. Rose*, (C. C. A. 1908) 166 Fed. 101.

**Appeals in admiralty to Circuit Court of Appeals.** — The ruling of a court of admiralty disallowing a claim filed against the proceeds of a vessel sold in a suit between other parties involves a separate issue, and is not reviewable except on an appeal by the claimant. *Henderson v. Kanawha Dock Co.*, (C. C. A. 1911) 185 Fed. 781, *citing The John and Winthrop*, (C. C. A. 1910) 182 Fed. 380.

Where the issues presented by a libel and cross-libel and the answers thereto in an admiralty cause are tried as a single controversy in the District Court, the effect is the same as if the two suits had been formally consolidated, and an appeal from the final decree brings up all questions. *The Colorado*, (C. C. A. 1910) 184 Fed. 609.

### Vol. IV, p. 560, sec. 911.

**Application of section.** — This section means no more than that when a writ or process issues from a federal court it must be signed by the clerk, and shall be authenticated in the manner therein set out. It is not an ordinance to the effect that no action or proceeding in a federal court shall be instituted except by the issue of process, signed by the clerk, duly sealed, etc. *Leas v. Merriman*, (1904) 132 Fed. 510.

All writs and processes issuing from a District Court when the office of its judge is

vacant shall be tested in the name of its clerk. *In re Urban, etc., Realty Title Co.*, (1904) 132 Fed. 140.

It has been for many years a settled practice in the federal court for this district, after writ and process has issued in obedience to this section, for the clerk to prepare the requisite number of copies thereof, attesting the same as true copies of the original writ and process, and to deliver them to the marshal or his deputy for service. The officer, having made service of such true and at-

within the state are required to follow by this section. *Fries-Breslin Co. v. Bergen*, (1909) 168 Fed. 360, *affirmed* (C. C. A.) 170 Fed. 76; *Baltimore, etc., R. Co. v. McCune*, (C. C. A. 1909) 174 Fed. 991; *Smith v. Jones*, (C. C. A. 1910) 181 Fed. 319.

**Manner of submitting cases to jury.**—This section does not require federal judges to conform to state regulations in the submission of cases and the control of the deliberations of juries; such proceedings being governed by the common law. *Liverpool, etc., Ins. Co. v. N. & M. Friedman Co.*, (C. C. A. 1904) 133 Fed. 713.

Nor does it apply to provisions requiring written instructions to be taken by the jury on retiring, or permitting papers read in evidence to be taken by them, or requiring written instructions, or forbidding the separation of the jury, or requiring exceptions to the charge to be made before the jury retires. *Knight v. Illinois Cent. R. Co.*, (C. C. A. 1910) 180 Fed. 368.

State statutes and constitutions forbidding judges, in instructing, to express an opinion on the facts do not bind federal courts. *Knight v. Illinois Cent. R. Co.*, (C. C. A. 1910) 180 Fed. 368.

**Verdicts.**—This section applies to the form and effect of verdicts. *Knight v. Illinois Cent. R. Co.*, (C. C. A. 1910) 180 Fed. 368.

**Motions for new trial.**—This section does not apply to motions for new trial. *Knight v. Illinois Cent. R. Co.*, (C. C. A. 1910) 180 Fed. 368.

**Judgments.**—This section applies to the mode of entering and recording judgments, including provisions for entering judgments against one or more defendants. *Knight v. Illinois Cent. R. Co.*, (C. C. A. 1910) 180 Fed. 368.

But it applies only to the Circuit and District Courts; it is not the practice of the federal appellate courts in actions at law to render judgment anew on affirmance, but to remand the cause with direction to the court below to proceed according to right and justice. *Egan v. Chicago G. W. R. Co.*, (1908) 163 Fed. 344.

Where the statutes of a state authorize a summary judgment against the sureties on an appeal or supersedeas bond, the Circuit and District Courts of the United States in that state may render such judgment. *Egan v. Chicago G. W. R. Co.*, (1908) 163 Fed. 344.

**Vacating or modifying judgments.**—In *Virginia, etc., Steel, etc., Co. v. Harris*, (C. C. A. 1907) 151 Fed. 428, it was held that the power conferred on judges by the local law to set aside a judgment after the term at which it was rendered, and within one year, when rendered against a party through his mistake, inadvertence, surprise, or excusable neglect, may be exercised by a federal court sitting in that state.

**Proceedings subsequent to judgment.**—This section applies to the forms and modes of procedure for procuring judgment, and not to subsequent proceedings. *Friedly v. Giddings*, (1902) 119 Fed. 438.

**Methods of review.**—The power and practice of the federal appellate courts are derived exclusively from the Constitution, the Acts of Congress, the common law, the ancient English statutes, and the rules and practice of the courts of the United States, and they are neither controlled nor affected by the statutes of the states or the practice of their courts. *Francisco v. Chicago, etc., R. Co.*, (C. C. A. 1906) 149 Fed. 354; *Boatmen's Bank v. Trower Bros. Co.*, (C. C. A. 1910) 181 Fed. 804 (citing the earlier cases).

This section has no application to the practice or proceedings of appellate courts or to matters relating to bills of exceptions, motions for new trials, or any other means adopted to secure a review of the judgments or decrees of the Circuit or District Courts. Its effect is limited to the practice and proceedings in the trial courts to secure their judgments. *Francisco v. Chicago, etc., R. Co.*, (C. C. A. 1906) 149 Fed. 354.

It has been held that this section is inapplicable to a subsequently created appellate court for a circuit comprising several states. *Shumaker v. Security L., etc., Co.*, (C. C. A. 1908) 159 Fed. 112.

**Exceptions and bill of exceptions.**—In the courts of the United States the proceedings preparatory to obtaining a review of their rulings, including the questions of when an exception need be taken and how motions and rulings, not in themselves part of the record, may be made such, are not regulated by state statutes, but by the statutes of the United States, and, if they be silent, by the common law and the practice prevailing in those courts. *Ghost v. U. S.*, (C. C. A. 1909) 168 Fed. 841.

This section does not apply to bills of exceptions and proceedings on review. *Knight v. Illinois Cent. R. Co.*, (C. C. A. 1910) 180 Fed. 368.

**Condemnation proceedings.**—A district attorney of the United States, authorized to institute and conduct proceedings to condemn land for a public building within a state, has the same power to bind the United States by an agreement to submit the matter of damages to arbitration, in accordance with a provision of a state statute applicable to such actions, as the attorney for an individual litigant would have. *Judson v. U. S.*, (C. C. A. 1903) 120 Fed. 637.

In condemnation proceedings under the Act of Aug. 1, 1888, ch. 728, 25 Stat. L. 357 [6 Fed. Stat. Annot. 700, 703], and the Act of Aug. 18, 1890, ch. 797, 26 Stat. L. 315, 316 [6 Fed. Stat. Annot. 704], it has been held that the provision that the proceedings shall be prosecuted in accordance with the laws of the state cannot be construed literally so as to oust the federal court of jurisdiction, where the state statute designates a special tribunal for such proceedings, but only requires a general conformity to the state practice as a whole. *U. S. v. Certain Land in New Castle*, (1908) 165 Fed. 783. See also *U. S. v. Honolulu Plantation Co.*, (C. C. A. 1903) 122 Fed. 581; *U. S. v. Sargent*, (C. C. A. 1908) 162 Fed. 81.

## Vol. IV, p. 577, sec. 915.

**Presumption of adoption of state statutes.** — Circuit Courts of the United States are not governed by any separate attachment law, but are required to administer the remedy in attachment provided in the laws of the state in which the courts are held. *Perez v. Fernandez*, (1906) 202 U. S. 80, 26 S. Ct. 561, 50 U. S. (L. ed.) 842.

The effect of this section is to make the state statutes in that regard, laws of the United States. *Files v. Davis*, (1902) 118 Fed. 465.

**Jurisdictional questions.** — The jurisdiction of a federal Circuit Court, as a federal court, is so involved as to sustain a direct writ of error from the federal Supreme Court under the Act of March 3, 1891, sec. 5, in a judgment dismissing the suit on the ground of the invalidity of the attachment and garnishment of the property of the nonresident defendant, and upon the lack of a general appearance by such defendant. *Davis v. Cleveland, etc., R. Co.*, (1910) 217 U. S. 157, 30 S. Ct. 463, 54 U. S. (L. ed.) 708.

Since common-law actions can only be brought in a federal court in the district in which the defendant is an inhabitant, or in

which he is found at the time of the serving of the process, unless he voluntarily appears, an action cannot be maintained by the United States against a nonresident in a federal court by attaching the defendant's property within the jurisdiction, without personal service of summons. *U. S. v. Brooke*, (1910) 184 Fed. 341.

**Motion to quash.** — A nonresident defendant over whom personal jurisdiction has not been obtained may appear specially in a suit in a federal Circuit Court for the sole purpose of moving to quash the service of writs of attachment and garnishment upon its property in the district, on the ground that such property was not subject to attachment or garnishment. *Davis v. Cleveland, etc., R. Co.*, (1910) 217 U. S. 157, 30 S. Ct. 463, 54 U. S. (L. ed.) 708.

**Attachments in equity.** — This section does not embrace remedies in equity by an independent suit which may have been given by the statutes of a state, but is limited by the phrase "in like causes" to remedies provided in actions at law wherein judgments were recovered. *Hudson v. Wood*, (1903) 119 Fed. 764.

## Vol. IV, p. 580, sec. 916.

**Common-law causes.** — Where the state law provided that "in a writ of fieri facias on a judgment or decree against one liable to the commonwealth, real estate might be levied on," the right to such levying being given only as against certain public officers, it was held that an execution from a federal court in Virginia may not be levied on real estate there though the judgment is in favor of the United States, since the phrase "in like causes" does not give the government the rights of the state, but, as applicable to Virginia, which is not a code state, means "common-law causes." *Clark v. Allen*, (1902) 117 Fed. 699.

**Only "judgments at law."** — This section does not embrace remedies in equity by independent suit which may have been given by the statutes of a state, but is limited by the phrase "in like causes," to remedies provided in actions at law wherein judgments were recovered. *Hudson v. Wood*, (1903) 119 Fed. 764.

**Enforcing judgment.** — This section empowers a Circuit Court to use a similar remedy to that provided by a state statute to enforce its judgments, but does not require it to follow the method prescribed by a state statute in serving a writ of scire facias to revive a judgment on a nonresident defendant if it deems such method insufficient. *Collin County Nat. Bank v. Hughes*, (C. C. A. 1907) 155 Fed. 389.

Where a judgment creditor is only entitled to an execution by leave of court, his right is only established when he obtains an order of court directing that execution issue. *General Electric Co. v. Hurd*, (1909) 171 Fed. 984.

**Supplementary proceedings.** — A United States court, proceeding under the laws of the state providing for proceedings supplementary to execution, as authorized by this section, is not affected by a provision of such laws that a witness cannot be compelled to attend in such proceedings at a place without the county of his residence or place of business; but such court may issue subpoenas for witnesses within its district or to compel the attendance of witnesses from other districts who live within one hundred miles, as provided by R. S. 876. *Meyer v. Consolidated Ice Co.*, (1908) 163 Fed. 400.

This section applies to the property and not to the person of the debtor. *Friedly v. Giddings*, (1902) 119 Fed. 438.

The remedy given to a judgment creditor by a state law, by the arrest and imprisonment of the defendant on a showing of fraudulent removal or concealment of his property, is one "to reach the property of a judgment debtor," within the meaning of this section, and is available in the federal courts. *Ex p. Crawford*, (C. C. A. 1907) 154 Fed. 769, affirming 154 Fed. 761, wherein it was said that a state statute authorizing arrest of a judgment debtor on certain grounds after the return of an execution unsatisfied is to be regarded as a writ, which, although not specifically provided for by Act of Congress, is capable of being adopted as necessary for the full and complete exercise of the jurisdiction of the federal courts, within the meaning of this section. It stands in fact much the same as a *capias ad satisfaciendum*, of which it may be considered as only another form. Of course, it goes into the federal law, if at all, with all its essential incidents, and the

method of procedure marked out with regard to it by the state statute has therefore to be substantially followed.

**Subsequently enacted state laws.**—This section adopted the remedies established by law in the several states at the time the section became a law, but not the subsequent state enactments regulating such remedies, they being left for adoption by rule as the federal court might deem advisable. *General Electric Co. v. Hurd*, (1909) 171 Fed. 984.

### Vol. IV, p. 583, sec. 917.

**Rules have force of law.**—The equity rules prescribed by the Supreme Court and the rules promulgated by the Circuit Courts (subject to alteration by the Supreme Court) have the force and effect of law, unless they are inconsistent with the statutes of the United States. *American Graphophone Co. v. National Phonograph Co.*, (1904) 127 Fed. 350; *Bryant Bros. Co. v. Robinson*, (C. C. A.

A United States court within the state of New York, which has not by general rule adopted the laws of the state providing for proceedings supplementary to execution since Jan. 1, 1878, when this section was enacted, has no power to entertain supplementary proceedings against a corporation judgment debtor, such proceedings not having been authorized by the state laws prior to 1878. *Meyer v. Consolidated Ice Co.*, (1908) 163 Fed. 400.

1906) 149 Fed. 321; *U. S. v. Barber Lumber Co.*, (1908) 169 Fed. 184.

**The admiralty jurisdiction of the court** is also a separate and distinct general jurisdiction, in which the practice and proceedings, under this section, are regulated by rules prescribed by the Supreme Court of the United States. *Bruce v. Murray*, (C. C. A. 1903) 123 Fed. 369.

### Vol. IV, p. 585, sec. 918.

**This section should be construed in connection with section 914**, requiring the practice and proceedings in Circuit Courts to conform, as near as may be, to the practice in the courts of record of the state, any rule of the court to the contrary notwithstanding. *Importers', etc., Nat. Bank v. Lyons*, (1905) 134 Fed. 510.

**Rule regulating special appearance.**—The provision of rule 22 of the Circuit Court of the Ninth Circuit that any party appearing specially shall state in the paper which he serves and files that the appearance is special, "and that if the purpose for which such

special appearance is made shall not be sanctioned or sustained by the court he will appear generally in the cause," and that if such statements be not made "the appearance shall be deemed and treated as a general appearance," is within the power of the court to prescribe, under this section, and valid. *Mahr v. Union Pac. R. Co.*, (1905) 140 Fed. 921.

**A rule requiring instructions to be presented to the court at the close of the evidence, and before argument, is within this section.** *Atchison, etc., R. Co. v. Hamble*, (C. C. A. 1910) 177 Fed. 644.

### Vol. IV, p. 586, sec. 919.

**A suit to recover a penalty for the alleged violation of section 3982 cannot be brought by a private prosecutor, but is maintainable**

only by and in the name of the United States. *Williams v. Wells Fargo, etc., Express*, (C. C. A. 1910) 177 Fed. 352.

### Vol. IV, p. 587, sec. 921.

**"Causes of a like nature," between the same parties, may be consolidated, it appearing reasonable, under this section.** *Frank v. Geiger*, (1903) 121 Fed. 126.

**Where separate actions are brought by separate plaintiffs against the same defendants, pending in the same court, for personal injuries sustained in the same accident, depending upon the same evidence, with the only difference in the extent of the injuries to the respective plaintiffs, the causes are properly consolidated for trial.** *Denver City Tramway Co. v. Norton*, (C. C. A. 1905) 141 Fed. 599.

**Where the plaintiff in each of two actions was injured in the same accident, and the same evidence, except as to the extent of the injuries, was determinative of both cases, it was a proper exercise of the trial court's discretion to consolidate the cases for trial over**

defendant's objection relating only to the disparity between the injuries of the two plaintiffs. *American Window Glass Co. v. Noe*, (C. C. A. 1908) 158 Fed. 777.

**A Circuit Court has power in its discretion to consolidate for trial separate actions brought against a railroad company to recover for the death of persons who were killed at the same time and in the same manner.** *Diggs v. Louisville, etc., R. Co.*, (C. C. A. 1907) 156 Fed. 564.

**Action to recover penalties.**—A federal Circuit Court may properly consolidate several actions brought by the United States against a carrier to recover the penalty prescribed by the Act of June 29, 1906, for violations of its requirement as to unloading live stock during transit. *Baltimore, etc., R. Co. v. U. S.*, (1911) 220 U. S. 94, 31 S. Ct. 368, 55 U. S. (L. ed.) 384.

**Cross-actions.** — A Circuit Court may in its discretion consolidate cross-actions between the same parties for breach of the same contracts. *American Trust, etc., Bank v. Ziegler Coal Co.*, (C. C. A. 1908) 165 Fed. 34.

Whether one judgment may be given for all or a separate judgment in each case will depend upon the special circumstances. If it is necessary to the due administration of the law and the protection of the rights of the parties that the integrity of the several causes shall be so far preserved as to secure the proper result in each case, to the end that the party aggrieved may not be embarrassed thereby in seeking relief against the judgment, or for any other sufficient reason, the

court will direct the proceedings accordingly. The statute is one for convenience in saving expense to the parties and the time of the court. *U. S. v. Baltimore, etc., R. Co.*, (C. C. A. 1908) 159 Fed. 35.

A court of admiralty may properly permit a large number of passengers to join in a single libel *in rem* against a vessel to recover damages alleged to have been sustained by them severally by reason of the failure to keep the vessel in a cleanly condition during a voyage, and to supply suitable accommodations and a sufficient quantity of wholesome food and provisions. *The Oregon*, (C. C. A. 1904) 133 Fed. 609.

## Vol. IV, p. 587, sec. 922.

**Waiver of irregularity in service.** — Where a United States marshal is the plaintiff in an action, and service of process is effected by his deputy, and no actual injury results and no intentional wrong is charged, if the defendant appears by attorney and files a special appearance to deny jurisdiction, and also files a motion to dismiss for irregular

service, and also a demurrer, on one day, and four days later, without having a decision on these defenses, files a general demurrer and a full answer to the merits, held that he has waived the irregularity of process. *Barnes v. Western Union Tel. Co.*, (1908) 129 Fed. 550.

## Vol. IV, p. 588, sec. 941.

**Sureties as parties to suit.** — Sureties on a stipulation in admiralty for the release of a libeled vessel do not become parties to the suit in such a sense as to require that they be joined in an appeal by the claimant from the decree entered therein, although such decree is joint in form against the claimant and the stipulators, unless some extraneous question has arisen in the suit involving their rights or obligations. *Perriam v. Pacific Coast Co.*, (C. C. A. 1904) 133 Fed. 141.

**Bond as substitute for property.** — A stipulation for value, given by the claimant for the release of a libeled vessel, pursuant to a rule of the court in admiralty, takes the place of the vessel itself for all purposes of the suit, and is available for the payment of all sums decreed in favor of the libellant against the vessel, including interest and costs, notwithstanding the fact that an additional stipulation for costs has been given, and the amount recoverable thereon, and for which execution may issue, includes interest on the agreed value of the vessel from the date of the stipulation, where it is so conditioned in accordance with the practice of the court. *The Mt. Desert*, (1911) 186 Fed. 395. See also *The Charles E. Falk*, (1907) 157 Fed. 782.

**Liability of sureties.** — This section has always been held to mean that the entry of judgment against the stipulators is a matter of course, and that the stipulators have ren-

dered themselves subject to such entry of judgment by the bare fact that they have so stipulated. *Perriam v. Pacific Coast Co.*, (C. C. A. 1904) 133 Fed. 144.

Under a stipulation given by a claimant in admiralty conditioned that, if the stipulators fail to pay the amount of any decree against them execution may issue against both claimant and his surety, both are principals and no demand is necessary upon the claimant in order to justify a demand on the surety. *The Mt. Desert*, (1911) 186 Fed. 396.

Where a stipulation for value, given by the claimant of a libeled vessel, was conditioned for the payment of the amount awarded by final decree of the trial court, "or by any appellate court if an appeal intervene, with interest," the waiving by libellant of further security on an appeal does not release the surety on the stipulation from the further payment of interest thereon, in accordance with its terms, or of the costs of the appellate court. *The Mt. Desert*, (1911) 186 Fed. 395.

**Fees and costs.** — Where the claimant of a libeled vessel has prevailed on the trial, and the libel is dismissed, he is entitled to tax as a part of his costs the premium paid by him to a surety company for a bond to obtain the release of the vessel, where it is reasonable in amount. *The John D. Dailey*, (1907) 158 Fed. 642.

## Vol. IV, p. 593, sec. 948.

**Discretion as to allowance.** — The granting or refusing leave to amend pleadings is ordinarily a matter of discretion, not reviewable

on appeal or error in the federal courts; but where it is shown that the court refused to exercise its discretion because of supposed

lack of authority, the ruling is reviewable for error. *Hernan v. American Bridge Co.*, (C. C. A. 1909) 167 Fed. 930.

**Misnomer.**—In *Bainum v. American Bridge Co.*, (1905) 141 Fed. 179, it appears that the plaintiff's statement, in an action for personal injury against a foreign corporation, alleged to be a corporation of New Jersey, specifically set out the facts, clearly identifying the defendant, the work in which it was engaged, and the time and place of the injury. There were in fact two corporations, closely connected and having the same name, except that one was "of New Jersey" and the other "of New York." Both had the same resident agent, on whom the process was served, and the same attorneys, who entered appearance for defendant and prepared the case for trial, when it was discovered that the New York corporation was in fact the one doing the work; and it was held that the court had power, under R. S. 948, 954, to permit the plaintiff to amend by substituting the name of the real defendant intended, and that such power would be exercised, especially where objection was not made until such time had elapsed as would bar a new action.

**Citizenship.**—Where, in a petition for removal, counsel through misinformation erroneously stated the citizenship of the plaintiff, the federal court may permit an amendment after removal accurately stating the fact so as to show that the court has jurisdiction. *Wilbur v. Red Jacket Consol. Coal, etc., Co.*, (1907) 153 Fed. 662.

**Mistake in designation of district.**—Where a declaration in an action in a federal court, a copy of which was served upon defendants with the summons, was properly entitled, in the district and division of the district in which defendants resided, but through mis-

take the summons required them to appear in another division of the district, it was held that such fact was not ground for abatement of the suit; but that the court had power in its discretion to permit an amendment of the summons, and its reservice in the amended form. *Caraway v. Kentucky Refining Co.*, (C. C. A. 1908) 163 Fed. 189.

**Correcting description of cause of action.**—The statutes extend the power of the court to allow an amendment which shall correct the description of the cause of action and of the parties at any stage of the case and in respect to any proceeding in it, whether in the process or pleadings, and that it should be exercised in every case where right and justice require it, and the refusal of it will prevent an injured party from obtaining redress, subject, however, to the proviso that the amendment shall work no injury to the other party. *Hernan v. American Bridge Co.*, (C. C. A. 1908) 167 Fed. 937.

**Amending date of return day.**—Where a writ of summons, dated July 16, 1908, and returnable "on the first Tuesday of October next," for want of opportunity was not served on the defendant until May 10, 1909, and through oversight the return day was not changed, the plaintiff is entitled, under the liberal amendment statutes of New Hampshire, to amend the same by inserting the appropriate return date of service. *Stone v. Speare*, (1910) 175 Fed. 584.

**Power to amend on removal.**—A federal court, into which a cause has been removed, has power to permit such amendments of process or pleadings as justice requires and as are permissible under the state statutes, provided they do not offend the federal statutes or decisions on the subject. *Stone v. Speare*, (1910) 175 Fed. 584.

## Vol. IV, p. 594, sec. 953.

**Necessity of signing bill of exceptions.**—The basis of an assignment of errors concerning matters transpiring in the course of a trial is a bill of exceptions signed by the trial judge. *Porter v. Buckley*, (C. C. A. 1906) 147 Fed. 141.

A bill of exceptions cannot be considered by an appellate court unless it was duly presented to and allowed by the trial judge during the term at which the trial was had, or within the time as extended by an order made during such term, or where there is a rule of court on the subject during the time so fixed, or an extension granted before its expiration. *Oxford, etc., R. Co. v. Union Bank*, (C. C. A. 1907) 153 Fed. 723.

A bill of exceptions not actually signed by the judge must be disregarded. *Knight v. Illinois Cent. R. Co.*, (C. C. A. 1910) 180 Fed. 369.

The clerk is without authority to certify up anything, except that made of record by the orders of the court. *Rupert v. U. S.*, (C. C. A. 1910) 181 Fed. 87.

**Signed at subsequent term.**—No bill of exceptions is sufficiently authenticated unless

signed by a judge who sat at the trial within the time required by law; and the omission or failure to sign the same cannot be cured by a certificate of the judge that it was allowed, settled, and signed within such time. *Oxford, etc., R. Co. v. Union Bank*, (C. C. A. 1907) 153 Fed. 723.

**Sealing of the bill of exceptions** is no longer necessary; but this does not render the other requisites any the less essential. *Metropolitan R. Co. v. District of Columbia*, (1904) 195 U. S. 322, 25 S. Ct. 28, 49 U. S. (L. ed.) 219.

**On the death of a federal judge**, before whom a criminal cause was tried, before a motion for new trial has been passed on, his successor has power, under this section, as amended in 1900 (Act June 5, 1900, 31 Stat. L. 270, ch. 717, sec. 1), to pass upon and overrule such motion where the evidence has been taken and preserved in stenographic notes, and, having such power, he has further power to proceed in the case and to render judgment on the verdict. *Meldrum v. U. S.*, (C. C. A. 1907) 151 Fed. 177.

**When new trial must be granted.**—Where the judge of a Circuit Court died, leaving a



pending motion for a new trial undecided, and there was no record from which his successor could fairly pass upon the motion and allow and sign a bill of exception, his only authority under the statute was to grant a new trial. *Penn Mut. L. Ins. Co. v. Ashe*, (C. C. A. 1906) 145 Fed. 593.

## Vol. IV, p. 596, sec. 954.

It is the duty of the court to exercise its discretion over amendments for the full protection of those who are absent from the record and beyond the jurisdiction of the court. *Frank v. Union Cent. L. Ins. Co.*, (1904) 130 Fed. 224.

**Effect of state statutes.**—The federal courts are not bound to follow the state courts in their construction of local statutes regulating the amendment of pleadings in suits at law. *Manitowoc Malting Co. v. Fuechtwanger*, (1909) 169 Fed. 983.

**Scope of section.**—This section is not confined to civil cases at law, but extends to and includes suits in equity. *Dancel v. United Shoe Machinery Co.*, (1903) 120 Fed. 839.

The power to amend must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or of the omission of some entry which should have been made during the progress of the case, or of the loss of some document originally filed therein. The difference between creating and amending a record is analogous to that between the construction and repair of a piece of personal property. The power to recreate a record, no evidence of which exists, has been the subject of much discussion in the courts, and the weight of authority is decidedly against the existence of such power. *Gagnon v. U. S.*, (1904) 193 U. S. 451, 24 S. Ct. 510, 48 U. S. (L. ed.) 745.

**Removed cases.**—A federal court, into which a cause has been removed, has power to permit such amendments of process or pleadings as justice requires and as are permissible under the state statutes, provided they do not offend the federal statutes or decisions on the subject. *Stone v. Speare*, (1910) 175 Fed. 584.

Where, in a petition for removal, counsel through misinformation erroneously stated the citizenship of the plaintiff, the federal court may permit an amendment after removal accurately stating the fact so as to show that the court has jurisdiction. *Wilbur v. Red Jacket Consol. Coal, etc., Co.*, (1907) 153 Fed. 662.

In *Kinney v. Columbia Sav., etc., Assoc.*, (1903) 191 U. S. 78, 24 S. Ct. 30, 48 U. S. (L. ed.) 103, it was said that a petition and bond for removal are in the nature of process; they constitute the process by which the case is transferred from the state to the federal court, and Congress has made ample provision for the amendment of process.

Leave to amend a petition for removal to a federal court for diverse citizenship so as to show the citizenship of the plaintiffs was, in the exercise of the general power of federal

But a party who has not presented to a succeeding judge a bill of exceptions containing a transcript of the evidence, as required by a rule of court, because of his failure to pay the reporter's fees, is not entitled to a new trial as of course. *Thorndyke v. Gunnison*, (C. C. A. 1909) 174 Fed. 137.

courts, under Rev. Stat. secs. 948, 954, to allow amendments of process, granted after the filing of the removal papers, but before any action taken in the federal court on the merits, where there was a general averment of diverse citizenship, and the citizenship of defendant had been clearly stated, and it appeared from the face of a trust deed, which was the subject-matter in controversy, that the plaintiffs were, at the time of its execution, residents of another state. *Kinney v. Columbia Sav., etc., Assoc.*, (1903) 191 U. S. 78, 24 S. Ct. 30, 48 U. S. (L. ed.) 103.

Where a complaint, in an action removed from a state court, was demurred to for want of facts, it cannot be dismissed because, when treated as a bill in equity, it does not contain the address, statement of citizenship, or proper prayer for relief, or because it was erroneously placed on the law docket; such objections being matters of form only. *Dancel v. United Shoe Machinery Co.*, (1903) 120 Fed. 839.

**Names of parties.**—In *Clemmens v. Washington Park Steamboat Co.*, (1909) 171 Fed. 168, it appears that a ferry company, which was a corporation of New Jersey, operated a line of excursion boats from Philadelphia under the assumed name of the "Washington Park Steamboat Company." A passenger to whom it sold a ticket under such name was injured, and brought suit against the steamboat company. The attorney for the ferry company, who was also a director, accepted service for the defendant, and appeared and defended the case on the merits; the trial resulting in a judgment for the plaintiff. Neither plaintiff nor the court was informed of the true facts until after an attempt to collect the judgment failed, and plaintiff moved to amend the record by substituting the name of the ferry company as defendant. It was held that such company, which was the real defendant, having in fact appeared and defended the suit, and there being no such person as the defendant named, the court had power to permit such amendment, under R. S. 948, 954, authorizing amendments to cure defects of form.

Where the petition misdescribed the defendant as a corporation of New York, instead of New Jersey, it was held that the New Jersey corporation was in fact the defendant, as the petition disclosed, and that, service having been properly made on its agent, the court had power under R. S. 948, 954, to permit plaintiff to amend his petition by correctly stating its place of incorporation. *Hernan v. American Bridge Co.*, (C. C. A. 1909) 167 Fed. 930. See also *Bainum v. American Bridge Co.*, (1905) 141 Fed. 180.

**Adding additional party plaintiff.**—Leave will not be granted to amend the writ, before the appearance of the defendant or the service of the writ and the filing of pleadings in the cause, by inserting the name of a third person as plaintiff suing for the use of the persons originally named as plaintiffs, where such third person is not before the court nor within the jurisdiction, and cannot be served with notice of the application, even though it is proposed to reserve to him the right to object to the order, such an order being, in form at least, an adjudication of the right to so use his name. *Frank v. Union Cent. L. Ins. Co.*, (1904) 180 Fed. 224.

**Declarations and complaints.**—Where a complaint contains any allegation of a ground of recovery, although only inferential, it is within the discretion of the court to permit the defect to be cured by amendment. *Great Northern R. Co. v. Herron*, (C. C. A. 1905) 136 Fed. 49.

Where the plaintiff's declaration, in an action against a corporation on a contract, purported to set out the contract *verbatim*, and recited that it was signed by the defendant's president and attested by its secretary and corporate seal; but, in copying the contract, there was nothing in the declaration to represent the seal, and when the contract was introduced in evidence it appeared that the corporate seal had been attached as recited in the contract, whereupon plaintiff was granted leave to amend the declaration to conform to the facts, it was held that such amendment was properly allowed in the furtherance of justice. *Mathieson Alkali Works v. Mathieson*, (C. C. A. 1906) 150 Fed. 241.

A plaintiff, suing as widow, to recover for her husband's wrongful death, may be permitted to amend her declaration to change the relation in which she sues from that of widow to that of administratrix. *Hall v. Louisville, etc., R. Co.*, (1907) 157 Fed. 464.

An amendment of plaintiff's petition, after verdict and judgment thereon, with no further proceedings taken, by inserting the words "and is a citizen of said state and of the United States of America," after the allegation therein that "plaintiff resides in El Paso, in El Paso county, state of Texas," may be allowed. *Mexican Cent. R. Co. v. Duthie*, (1903) 189 U. S. 76, 23 S. Ct. 610, 47 U. S. (L. ed.) 715.

The fact that an amendment of a complaint was allowed by consent, on application by the plaintiff, after he had sold the cause of action and before the substitution of the purchaser, does not invalidate such amendment. *Franklin v. Conrad-Stanford Co.*, (C. C. A. 1905) 137 Fed. 737.

A federal court may, in the exercise of judicial discretion, permit an amendment after trial, of the *ad damnum* clause of plaintiff's complaint, so as to raise the amount sued for to conform to the proof. *Manitowoc Malting Co. v. Fuechtwanger*, (1909) 109 Fed. 983.

An amendment to a pleading which sets forth no new cause of action relates back to the filing of the pleading amended, and the case stands as though the amendment had

been then filed. *Armstrong Cork Co. v. Merchants' Refrigerating Co.*, (C. C. A. 1910) 184 Fed. 199.

Where the variance between the pleading and the facts which the pleader seeks to prove is so slight that it is obvious that the opposing party could not have been misled by it in the preparation of his case for trial, it is the duty of the court to disregard it or to permit an amendment to conform the pleading to the proof offered. *Derham v. Donohue*, (C. C. A. 1907) 155 Fed. 385.

Where no objection was made to the declaration until the close of the evidence, and everything that defendant claimed should have been alleged was proved, and the jury found the facts in favor of the plaintiff, a judgment on the verdict will not be set aside for defects in the declaration. *Canadian Pac. R. Co. v. Elliott*, (C. C. A. 1905) 137 Fed. 904. See also *Chicago, etc., R. Co. v. Voelker*, (C. C. A. 1904) 129 Fed. 522.

Equity rule No. 29, relating to amendments, does not entitle the complainant as of right to amend his bill after a demurrer thereto has been sustained. *McKemy v. Supreme Lodge, etc.*, (C. C. A. 1910) 180 Fed. 961.

**Introducing new cause of action.**—Complainant in a suit in equity in a federal court will not be given leave to file a supplemental bill after final hearing and decision on the original bill and a prior supplemental bill, to set up facts to make a new and different case, all of which, so far as appears, were known to complainant months before the hearing and before the filing of the former supplemental bill, and some of them before the filing of the original bill. *Healey Ice Mach. Co. v. Green*, (1911) 184 Fed. 515.

The rule that the filing of a notice of appearance or of a general pleading, such as an answer, is equivalent to a general appearance for all purposes of the case, is limited in its application by the scope of the action in which such appearance or pleading is filed; and such an appearance does not authorize an amendment of plaintiff's pleading, so as to state a new or different cause of action upon which the defendant could not originally have been sued in that jurisdiction. *Western Wheeled Scraper Co. v. Gahagan*, (1907) 152 Fed. 648.

An amendment of a declaration changing the beneficiary of the action is in effect the bringing of a new suit. *Hall v. Louisville, etc., R. Co.*, (1907) 157 Fed. 464.

**On appeal.**—The granting of leave to amend pleadings is discretionary with the trial court, and its action is not reviewable except in case of gross abuse of discretion. *Lange v. Union Pac. R. Co.*, (C. C. A. 1903) 126 Fed. 338; *Rucker v. Bolles*, (C. C. A. 1904) 133 Fed. 858; *Stillwagon v. Baltimore, etc., R. Co.*, (C. C. A. 1908) 159 Fed. 97.

In an action of assumpsit, in which the declaration contained special counts upon a written contract, where the proof showed a breach of the contract by the plaintiff, but also a waiver of such breach by the defendant, which constituted in effect a modification of the contract by consent of parties, a judgment for plaintiff is not reversible be-

cause such waiver was not pleaded. *Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co.*, (C. C. A. 1906) 148 Fed. 159.

Where one of two defendants dies after the submission of a case to an appellate court, which subsequently affirms a decree in favor of the deceased, its failure to make a substitution for the deceased party is not a substantial error or defect, and it may be disregarded and corrected in a higher court on an

appeal from the judgment of affirmance. *Wilhite v. Skelton*, (C. C. A. 1906) 149 Fed. 67.

**Ground for reversal.**—It has been held that it was an abuse of discretion to allow an amendment during the trial, without imposing terms, by way of a continuance or otherwise, which would prevent the possibility of prejudice resulting to defendant. *Great Northern R. Co. v. Herron*, (C. C. A. 1905) 136 Fed. 49.

## Vol. IV, p. 601, sec. 955.

**Death of defendant.**—Where, after the sustaining of a demurrer to a bill to set aside a divorce decree, with leave to amend, complainant elected to stand by her bill, after which defendant died, it was held that it was improper, without revivor, for the court, on suggestion of defendant's alleged surviving wife, who had not previously been a party to the proceedings, to render judgment of dismissal *nunc pro tunc* as of the day following the expiration of the time allowed the complainant to amend, and, complainant's prayer for appeal having been allowed, to direct service of citation on defendant's administrator and such alleged surviving wife. *McNeil v. McNeil*, (C. C. A. 1909) 170 Fed. 289.

A judgment entered against a defendant, convicted under R. S. sec. 1782, which provides that any person violating the same shall be deemed guilty of a misdemeanor and shall be imprisoned and fined, is wholly penal, and the death of the defendant after judgment and while the case is pending in an appellate court on writ of error operates to abate the entire cause of action, and the fine is not collectible from the defendant's estate. *U. S. v. Dunne*, (C. C. A. 1909) 173 Fed. 254.

**Death of plaintiff.**—This section applies only to actions at law; nor is there any provision in the equity rules or practice for the compulsory revival of a suit in a Circuit Court at the instance of defendant after the death of the complainant. *Brown v. Fletcher*, (1904) 140 Fed. 639.

**Determination of survivor.**—This section does not itself provide what cause of action shall survive, but, in the absence of any other controlling statute, leaves the matter to the

common law. *Walsh v. New York, etc., R. Co.*, (1909) 173 Fed. 494.

The plaintiff's right of revivor, on the death of the defendant, is governed by the law of the state where the suit is brought and prosecuted. *Spaeth v. Sells*, (1909) 176 Fed. 797.

Thus the right of a plaintiff, in an action at law for the infringement of a patent, to a scire facias to revive the action against the executor of a deceased defendant, as provided for by this section, is subject to the limitation imposed by the state statute upon suits against executors, for the purpose of facilitating the settlement of estates. *Green v. Barrett*, (1903) 123 Fed. 349.

A suit in a federal court may be dismissed on motion for want of jurisdiction on the death of a defendant who is an indispensable party, where such fact plainly appears from the pleadings, and the executors of the decedent cannot be brought in; but if there is doubt on the question, and it appears that the suit may be separable, it should not be so dismissed, nor when there is a possibility of revival against the executors, until after the lapse of a reasonable time. *Lawrence v. Southern Pac. Co.*, (1910) 177 Fed. 547.

**Citizenship of representative.**—A suit cannot be instituted against executors in a federal court in a state other than the one in which they have taken out letters, where jurisdiction depends on diversity of citizenship, nor can a pending suit against the testator be revived against such executors unless ancillary letters are taken out in the state where the suit is pending. *Lawrence v. Southern Pac. Co.*, (1910) 177 Fed. 547.

## Vol. IV, p. 603, sec. 956.

A suggestion on the record, either by plaintiffs or defendants, that some of the plaintiffs are dead, constitutes a substantial compliance with this section. *Thomas v. Green County*, (C. C. A. 1908) 159 Fed. 339.

**Death of joint tortfeasor.**—Where a suit for infringement of a trademark was instituted against two defendants, such infringement constitutes a tort for which both were liable, so that on the death of one the suit did not abate as to the other. *Northwestern*

*Consol. Milling Co. v. Callam*, (1910) 177 Fed. 786.

**Action by joint owners of bonds.**—An action brought in a federal court by plaintiffs, as joint owners of bonds, does not abate by the death of one of the plaintiffs, but under this section the suit may proceed in the name of the survivors upon the suggestion of the death upon the record. *Thomas v. Green County*, (C. C. A. 1906) 146 Fed. 969.

## Vol. IV, p. 604, sec. 961.

A written stipulation is not essential to a waiver of a jury to assess damages on a bond after default under this section. *Brock v.*

*Fuller Lumber Co.*, (C. C. A. 1907) 153 Fed. 272, wherein it appears that plaintiff sued on a contractor's bond to secure performance

of a written contract. On the trial, defendants' attorney stated that defendants might be defaulted, but that he "would like to be heard on the question of damages," and immediately thereafter suggested that the case be sent to an auditor. This was agreed to, and, though a jury was then present, an auditor was appointed, and no request was made for a jury trial at any time during the term, nor until four months after default, and after defendants had learned that the

auditor's report was unfavorable, when they applied for an assessment of damages by a jury, as authorized by this section, and it was held that the finding of the Circuit Court that the request for a jury trial was too late should not be disturbed.

This section has been cited in *U. S. v. Dieckerhoff*, (1906) 202 U. S. 302, 26 S. Ct. 604, 50 U. S. (L. ed.) 1041; *U. S. v. Alcorn*, (1906) 145 Fed. 995; *U. S. v. Abeel*, (C. C. A. 1909) 174 Fed. 12.

### Vol. IV, p. 605, sec. 997.

**Assignment of error.**—This section does not require filing an assignment of errors before allowance of a writ of error or an appeal. This requirement rests upon rule 11 of the Circuit Court of Appeals, which is the same as Supreme Court rule 34. There are two reasons for this rule. One is that the judge to whom the application for the allowance or issue of a writ of error is presented may be informed what the alleged errors are upon which the petitioner relies, so that he may intelligently decide the question whether or not the writ should be issued. The other is that opposing counsel and the appellate court may be informed by a statement which becomes a part of the record what questions of law are presented for their consideration and determination. *Simpson v. Denver First Nat. Bank*, (C. C. A. 1904) 129 Fed. 257.

But this section does not necessitate the settlement of a bill of exceptions prior to the filing of the writ and the assignment of errors. *Old Nick Williams Co. v. U. S.*, (C. C. A. 1907) 152 Fed. 925.

And it has been held that the failure to file an assignment of errors is not jurisdictional, and may be waived. *Old Nick Williams Co. v. U. S.*, (1910) 215 U. S. 541, 30 S. Ct. 221, 54 U. S. (L. ed.) 318.

**Examination of transcript for "plain error."**

—The option reserved, under Supreme Court rules 21 and 35, of examining the transcript of record on writ of error or appeal, in order that the court may be advised as to whether there has occurred any "plain error" which obviously demands correction, will be exercised where the defendants in error have made no objection to the failure to assign error, under R. S. secs. 997 and 1012, but have submitted the case upon the specifications of error in the brief of the plaintiffs in error. *Columbia Heights Realty Co. v. Rudolph*, (1910) 217 U. S. 547, 30 S. Ct. 581, 54 U. S. (L. ed.) 877.

**Essential parts of record.**—This section makes an assignment of errors, a prayer for reversal, and a citation to the adverse party, essential parts of the record upon which a review of the rulings of a trial court may be invoked in the appellate courts of the United States. When an appeal is prayed and allowed in open court the prayer for reversal and the citation may be waived. But the assignment of errors is indispensable to the perfection of the appeal. *Webber v. Mihills*, (C. C. A. 1903) 124 Fed. 64; *Lockman v. Lang*, (C. C. A. 1903) 128 Fed. 279.

This section has been cited in *Briscoe v. Rudolph*, (1911) 221 U. S. 547, 31 S. Ct. 679, 55 U. S. (L. ed.) 848.

### Vol. IV, p. 609, sec. 998.

In proceedings in error in the federal courts, the citation signed by the judge of the court to which the writ is addressed, or any judge or justice of the appellate court, is the notice

required by this section. *Exploration Mercantile Co. v. Pacific Hardware, etc., Co.*, (C. C. A. 1910) 177 Fed. 825.

### Vol. IV, p. 610, sec. 999.

**Who may sign citation.**—A writ of error from the federal Supreme Court to the Supreme Court of the state of Nebraska sufficiently conforms to the requirements of this section where it was signed "John B. Barnes, presiding judge of the Supreme Court of Nebraska, in absence of Sedgwick, C. J., from this state," and the truth of this recital was not challenged. *Missouri Valley Land Co. v. Wiese*, (1908) 208 U. S. 234, 28 S. Ct. 294, 52 U. S. (L. ed.) 466; *Missouri Valley Land*

*Co. v. Wrich*, (1908) 208 U. S. 250, 28 S. Ct. 299, 52 U. S. (L. ed.) 473.

**One's remedy to review a state court judgment in the United States Supreme Court is not exhausted by a refusal of his application to a justice of the state court for a writ of error from the United States Supreme Court; but, on such refusal, an application must be made to a justice of the latter court before the remedy is exhausted.** *Ex p. Chadwick*, (1908) 159 Fed. 576.

### Vol. IV, p. 612, sec. 1000.

**Necessity of security.**—A Circuit Court of Appeals cannot, without statutory authority, permit the prosecution *in forma pauperis* of

a writ of error sued out of the court. *Bradford v. Southern R. Co.*, (1904) 195 U. S. 243, 25 S. Ct. 55, 49 U. S. (L. ed.) 178.

**Taking and approval of bond.**—The required bond may be approved by any judge or justice who is authorized to sign the citation and to allow the writ of error or appeal. It is not essential to its validity that it be approved by the justice or judge who allows the writ of error or appeal or signs the citation. *Brown v. Northwestern Mut. L. Ins. Co.*, (C. C. A. 1902) 119 Fed. 148.

**Prosecuting to effect.**—A party who, on appeal from a decree for the recovery of the possession of real property unless the balance of the purchase price should be paid before Jan. 1, 1899, secures an extension of the time for such payment until Nov. 1, 1899, has so prosecuted his appeal to effect, within the meaning of a supersedeas bond to secure the adverse party from loss in the use and possession of the premises, as to preclude any recovery on such bond for the use and occupation of the property between those dates. *Crane v. Buckley*, (1906) 203 U. S. 441, 27 S. Ct. 56, 51 U. S. (L. ed.) 260.

**What damages may include.**—There is no doubt that a supersedeas bond, conditioned according to the statute, for prosecuting an appeal with effect and answering all damages and costs, covers not merely compensation for the delay arising from the appeal, but also the amount of the decree appealed from, so far as the latter directs the payment of money by the appellant to the appellee. *American Surety Co. v. North Packing, etc.*, (C. C. A. 1910) 178 Fed. 810.

## Vol. IV, p. 615, sec. 1001.

**Suits by and against receivers of national banks.**—This section is applicable to an action brought by a receiver of a national bank. *Pepper v. Fidelity, etc., Co.*, (1903) 125 Fed. 822.

But, on motion therefor, defendants, sued by a nonresident receiver of a national bank, are entitled to require the plaintiff to give security for costs, where such security would

## Vol. IV, p. 616, sec. 1004.

**A writ of error sued out of the United States Circuit Court of Appeals to a United States District Court** should run in the name of the President and be attested by the Chief Justice of the Supreme Court and by the clerk of the Circuit Court. *Long v. Farmers' State Bank*, (C. C. A. 1906) 147 Fed. 360.

Under this section writs of error may be issued either by the clerk of the Supreme Court or the clerks of the Circuit Courts. By section 11 of the Court of Appeals Act all of the existing provisions of law regulating methods of review are made applicable to the Circuit Courts of Appeal. Under this, writs of error returnable to this court may be issued from the office of the clerk of the Circuit Court of Appeals or of the clerk of the Cir-

**Liability for costs.**—The surety on a bond given on appeal from a Circuit Court to the Circuit Court of Appeals, conditioned in effect as required by R. S. secs. 1000, 1012, and rule 13 of the Circuit Court of Appeals, that the appellant should prosecute his appeal to effect and to answer all costs if he should fail to make his plea good, is liable not only for the costs in the appellate court, but also for those in the court below. *Fidelity, etc., Co. v. Expanded Metal Co.*, (C. C. A. 1910) 183 Fed. 568.

**Bond in injunction cases.**—A supersedeas bond, given under this section and Supreme Court rule 29, does not suspend the operation of a prohibitory injunction granted by the decree appealed from, but, unless otherwise ordered by the trial judge in allowing the appeal, as authorized by equity rule 93, such injunction remains in full force pending the appeal, and its violation is punishable as a contempt. Hence damages sustained by the appellee by a violation of the injunction pending appeal are not the result of a supersedeas bond, and cannot be recovered in an action thereon. *Green Bay, etc., Canal Co. v. Norrie*, (1902) 118 Fed. 923.

**Judgment on bond.**—Where the statutes of a state authorize a summary judgment against the sureties on an appeal or supersedeas bond, the Circuit and District Courts of the United States in that state may render such judgment. *Egan v. Chicago G. W. R. Co.*, (1908) 163 Fed. 344.

be required by the laws of the state, under the conformity statute (R. S. sec. 914), unless the plaintiff by a certificate filed brings himself within the provisions of this section. *Schofield v. Palmer*, (1904) 134 Fed. 753.

Since a sovereign can be sued only by his own consent, he may prescribe the conditions on which he will be sued. *Treat v. Farmers' L. & T. Co.*, (C. C. A. 1911) 185 Fed. 760.

**Circuit Court in which the judgment was rendered.** *Northern Pac. R. Co. v. Amato*, (C. C. A. 1892) 49 Fed. 881. The writ runs in the name of the President and bears the teste of the Chief Justice. It is directed to the judges of the Circuit Court, and commands them to return, with the writ, into this court, a transcript of the record. Such a writ must be served, and it is so served when it is deposited with the clerk of the court in which the judgment was rendered. This deposit of the writ is its service, and the file mark, which it is the duty of the clerk to place thereon, is but evidence to show the facts of service and its date. *Kentucky Coal, etc., Co. v. Howes*, (C. C. A. 1907) 153 Fed. 163.

## Vol. IV, p. 617, sec. 1005.

**Amendment of error as to parties.**—Where an appeal was taken by two of three defendants, against whom a joint decree for a sum

of money was rendered, and the record fails to show that the third defendant, who made default in the court below, was in any manner

joined in the appeal, or notified to join, or severed for failure or refusal to join, the defect is not one of form only, which the Circuit Court of Appeals may permit the appellants to cure by amendment, under this section, but is fatal to jurisdiction of the appeal. *Copland v. Waldron*, (C. C. A. 1904) 133 Fed. 217.

The right to amend a writ of error and citation by adding omitted plaintiffs depends primarily upon whether the record shows enough to authorize the amendment under this section. If it appears from the record that the omission was accidental, the amendment should be allowed. *Thomas v. Green County*, (C. C. A. 1906) 146 Fed. 969. See also *Martin v. Burford*, (C. C. A. 1910) 178 Fed. 555.

The inclusion as plaintiffs in error of persons who were not parties to the action does

not vitiate the writ as to those who were parties, but is an error which may be corrected by dismissing the writ as to such persons, or by striking out their names. *Thomas v. Green County*, (C. C. A. 1906) 146 Fed. 969.

**Appeal instead of writ of error.**—In *Kerr v. U. S.*, (C. C. A. 1907) 159 Fed. 428, it was held that where a judgment on a *scire facias* on a forfeited recognizance was sought to be reviewed on appeal, instead of on a writ of error, the objection could not be waived by appearance nor cured by amendment.

**Defective attestation.**—That a writ of error was attested by the judge of the federal District Court, and by the District Court clerk, is a defect which is amendable under this section. *Long v. Farmers' State Bank*, (C. C. A. 1906) 147 Fed. 360.

## Vol. IV, p. 618, sec. 1007.

A *supersedeas* is a matter of right, and its allowance does not rest in the discretion of court or judge. It is the effect, as a matter of law, of a compliance by the appellant with the provisions of the Acts of Congress. The only function of the judge is to determine whether the security proffered for "damages and costs" is good and sufficient. *McCourt v. Singers-Bigger*, (C. C. A. 1906) 150 Fed. 102.

A writ of error and *supersedeas* bond suspends the execution of judgment until the case has been determined. *U. S. v. Dunne*, (C. C. A. 1909) 173 Fed. 256.

***Supersedeas in criminal case.***—While a writ of error to review a conviction for a non-capital crime, and a *supersedeas* to stay the execution of the sentence, is a matter of right, an appearance or bail is required to entitle the accused to go at large pending the writ of error. *Hardesty v. U. S.*, (C. C. A. 1911) 184 Fed. 269.

**When time begins to run.**—The judgment of a federal court is not final, so that the jurisdiction of the appellate court may be invoked, while the judgment is still under the control of the trial court through the pendency of a motion for a new trial. *Clarke v. Eureka County Bank*, (1904) 131 Fed. 145.

In an action at law, in which the judgment is reviewable only by writ of error, unless such writ is issued and served within sixty

days, a judge of an appellate court has no power to grant a *supersedeas*, and the allowance of an appeal by the trial court is without effect. *Robinson v. Furber*, (1911) 180 Fed. 918.

But under R. S. secs. 1007, 1012, a justice of the Circuit Court of Appeals may, on the application of appellant taking a second appeal after the dismissal of his first appeal, permit him to give a *supersedeas* bond after the expiration of the sixty days; the dismissal of the first appeal being due to the failure of the clerk of the trial court to send up the record in due season. *Sutherland v. Pearce*, (C. C. A. 1911) 186 Fed. 787.

**Damaged for violation of injunction.**—A *supersedeas* bond, given under this section and Supreme Court rule 29, does not suspend the operation of a prohibitory injunction granted by the decree appealed from, but, unless otherwise ordered by the trial judge in allowing the appeal, as authorized by equity rule 93, such injunction remains in full force pending the appeal, and its violation is punishable as a contempt. Hence damages sustained by the appellee by a violation of the injunction pending appeal are not the result of the *supersedeas* bond, and cannot be recovered in an action thereon. *Green Bay, etc., Canal Co. v. Norrie*, (1902) 118 Fed. 923.

## Vol. IV, p. 622, sec. 1008.

**Necessity of filing writ.**—A writ of error is not "brought" within the meaning of this section until the writ is actually filed or lodged with the clerk of the court which ren-

dered the judgment sought to be reviewed. *Kentucky Coal, etc., Co. v. Howes*, (C. C. A. 1907) 153 Fed. 163.

## Vol. IV, p. 624, sec. 1011.

**What may be reviewed.**—Decisions upon the admission and exclusion of evidence, upon questions of law, upon the question whether or not there is any substantial evidence to warrant the finding, and upon the question whether or not the finding supports the judg-

ment, are the only rulings at the trial that may be reviewed. *Barnsdall v. Waltemeyer*, (C. C. A. 1905) 142 Fed. 415.

Upon a writ of error only questions of law apparent on the record can be considered; there can be no inquiry whether there was

error in dealing with questions of fact. *Behn v. Campbell*, (1907) 205 U. S. 403, 27 S. Ct. 502, 51 U. S. (L. ed.) 857.

A judgment overruling a demurrer to a plea in abatement, without further order or judgment in the cause, is not subject to review under this section. *Cunningham v. Rodgers*, (C. C. A. 1909) 171 Fed. 835.

What is plea in abatement. — An answer in an action on a judgment in a federal court, setting up a parol agreement between the parties that in consideration of the defendant's consent to the taking of the judgment the plaintiff should take no steps for its enforcement until the termination of another

suit which is still pending, is in effect a plea in abatement under the Wisconsin practice, and under this section. *Marinette Sawmill Co. v. Scofield*, (C. C. A. 1909) 174 Fed. 502.

This section is applicable to the Circuit Court of Appeals. — *Paul v. Delaware, etc., R. Co.*, (1904) 130 Fed. 952.

This section has been cited in *U. S. Fidelity, etc., Co. v. Woodson County*, (C. C. A. 1906) 145 Fed. 150; *Mason City, etc., R. Co. v. Boynton*, (C. C. A. 1907) 158 Fed. 600; *Hill v. Walker*, (C. C. A. 1909) 167 Fed. 241; *Chicago G. W. R. Co. v. Minneapolis, etc., R. Co.* (C. C. A. 1910) 176 Fed. 237.

## Vol. IV, p. 624, sec. 1012.

Application of section. — This section does not have the effect of making a finding and statement of facts by a Circuit Court in an equity cause conclusive on the appellate court. *Hendryx v. Perkins*, (C. C. A. 1903) 123 Fed. 268.

In *Fidelity, etc., Co. v. Expanded Metal Co.*, (C. C. A. 1910) 183 Fed. 508, it was said: "It is obvious that section 1012 ap-

plies the same rules, regulations, and restrictions to appeals as section 1000 applies to writs of error."

This section has been cited in *Columbia Heights Realty Co. v. Rudolph*, (1910) 217 U. S. 547, 30 S. Ct. 581, 54 U. S. (L. ed.) 877; *Simpson v. Denver First Nat. Bank*, (C. C. A. 1904) 129 Fed. 258; *Sutherland v. Pearce*, (C. C. A. 1911) 186 Fed. 789.

## Vol. X, p. 199, sec. 1. [Act of Feb. 11, 1903.]

This section is not unconstitutional. — *U. S. v. New York, etc., R. Co.*, (1908) 165 Fed. 742.

This section does not authorize the sending up of the whole case, and therefore the court will not consider a case where no final judgment, order, or decree determinative of the merits is rendered. *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1909) 215 U. S. 216, 30 S. Ct. 86, 54 U. S. (L. ed.) 164.

Fairly construed, this section permits such cases to proceed in the usual way, except for

being expedited, until assigned for final hearing before three judges; and the provision that "in the event the judges sitting in such case shall be divided in opinion the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided," is effective only where, by reason of such division of opinion, a final decree cannot be entered, since, if entered, an appeal therefrom lies under section 2. *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, (1902) 166 Fed. 134.

## Supp. 1909, p. 291. [Act of April 14, 1906.]

This Act is re-enacted in amended form in Judicial Code, sec. 129, *ante*, title JUDICIARY, p. 195, of this Supplement.

Appeal direct to the Supreme Court, instead of the Circuit Court of Appeals, from a decree granting or denying an interlocutory injunction to restrain enforcement of a state statute on the ground of its unconstitutionality, see Judicial Code, sec. 266, *ante*, p. 242, of this Supplement.

Nature and purpose of Act. — In this Act the words "in any cause" were substituted in the place of the provision "in a cause in which an appeal from a final decree may be taken under the provisions of this Act to the Circuit Court of Appeals." See the original section and the amendment by the Act of June 6, 1900, 4 Fed. Stat. Annot. 422, 423, *note*. The purpose of Congress in substituting the words "in any cause" for the provision referred to was to confer upon the Circuit Court of Appeals jurisdiction to hear

appeals from interlocutory orders or decrees granting or continuing injunctions or appointing receivers where constitutional questions were involved. Without this provision there was no appeal from an order or decree of a District or Circuit Court, or judge thereof, granting or continuing an injunction or appointing a receiver, if a constitutional question was alleged in the bill of complaint. The only hearing in a case involving the construction or application of the Constitution of the United States was in the Supreme Court upon an appeal from final decree; and this delay for the entry of a final decree was deemed to be a matter of great hardship in such cases, hence the statute was amended. The court having jurisdiction on appeal from an interlocutory order to determine a constitutional question, it follows that the court has jurisdiction to determine whether the Circuit Court had or had not jurisdiction of the case by reason of the pres-

ence or absence of such constitutional question. *Louisville v. Cumberland Telephone, etc., Co.*, (1907) 155 Fed. 725, 728, 84 C. C. A. 151; *Seattle Electric Co. v. Seattle, etc., R. Co.*, (C. C. A. 1911) 185 Fed. 365.

In *Alabama R. Commission v. Central of Georgia R. Co.*, (C. C. A. 1909) 170 Fed. 225, reversing a decree for an interlocutory injunction enjoining the enforcement of certain railroad and passenger rates of the state, on the ground that they were confiscatory, the court said: "The litigation is likely to end sooner if no injunction is in force. Its dispatch is greatly dependent upon the conduct of the case by the complainants. They would not be inclined to press the case for speedy decision when they have once secured a preliminary injunction. As long as it stands, it is as good as any other, and experience shows that it often has practically the effect of a permanent injunction. Knowledge of this fact was probably one of the causes for the enactment of the statute allowing appeals from these interlocutory orders. . . . In these cases the preliminary injunctions have been in force for two years. If no injunction had been granted, it is probable that a final decree of the Circuit Court would have been reached in one-fourth of that time."

**Review of case on the merits.**—In *Alabama R. Commission v. Central of Georgia R. Co.*, (C. C. A. 1909) 170 Fed. 225, a case above cited and described in this note, the court said: "We think that on appeals from

orders annulling statutes which are *prima facie* valid, their invalidity depending on facts to be proved, it is the duty of the appellate court—and a responsibility which it cannot avoid—to examine the whole case on the law and the facts. We do not mean to say that the decision of the lower court is not entitled to great weight, or that as a practical question it may not sometimes be treated as conclusive. But where the usual result of an interlocutory injunction is to enjoin the operation of the law for a long period, and where the dissolution of the injunction is the only means of obtaining a practical test, which may at last be necessary, the ends of justice will be promoted by an examination of the merits by the appellate court. Cases, of course, may occur where the rates are apparently so flagrantly unjust, so in conflict with experience and common knowledge as to what is right, as to seem unfair and probably confiscatory on their face. In such instances, it may be that the sworn bill, with proper averments and with the affidavits of experts as to their opinions, would be sufficient to overcome the *prima facie* presumption that the rates established by legal authority are valid. But where the rates are not manifestly unfair, where it may be that in their practical enforcement they may not greatly lessen the income and may possibly increase it, it seems to us unreasonable that the law should be suspended on such procedure."

## Supp. 1909, p. 292. [Act of March 2, 1907.]

**Reason for enactment.**—In *U. S. v. Bitty*, (1908) 208 U. S. 393, 28 S. Ct. 396, 52 U. S. (L. ed.) 543, it was said: "If a court of original jurisdiction errs in quashing, setting aside, or dismissing an indictment for an alleged offense against the United States, upon the ground that the statute on which it is based is unconstitutional, or upon the ground that the statute does not embrace the case made by the indictment, there is no mode in which the error can be corrected and the provisions of the statute enforced, except the case be brought here by the United States for review. Hence, that there might be no unnecessary delay in the administration of the criminal law, and that the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced—the above Act of 1907 was passed."

**"Construction of the statute."**—A judgment holding insufficient on demurrer certain counts of an indictment charging wilful misapplication of the funds of a national bank, in violation of R. S. sec. 5209, 5 Fed. Stat. Annot. 145, because the facts alleged do not constitute a crime under that section, as it should be construed, is reviewable as "based upon the . . . construction of the statute." *U. S. v. Heinze*, (1910) 218 U. S. 532, 31 S. Ct. 98, 54 U. S. (L. ed.) 1139.

For the same reason a judgment is reviewable which quashed certain counts of an indictment for violation of the same statute

because they possessed the defects found in a prior indictment held not to charge a crime under the statute. *U. S. v. Heinze*, (1910) 218 U. S. 547, 31 S. Ct. 102, 54 U. S. (L. ed.) 1145.

The "construction of the statute" is involved, so as to sustain jurisdiction of a writ of error under this section, where an indictment against a national bank officer for making false reports to the Comptroller of the Currency was quashed because such officer was not an agent within the meaning of the federal statute defining the crime. *U. S. v. Corbett*, (1909) 215 U. S. 233, 30 S. Ct. 81, 54 U. S. (L. ed.) 173.

Interpretation is included in the term "construction," as used in this Act. *U. S. v. Biggs*, (1909) 211 U. S. 507, 29 S. Ct. 181, 53 U. S. (L. ed.) 305.

**Demurrer to indictment.**—The decision of a District Court sustaining a demurrer to an indictment for introducing liquor into the Indian country, is reviewable in the Supreme Court by a writ of error under this Act. *U. S. v. Sutton*, (1909) 215 U. S. 291, 30 S. Ct. 116, 54 U. S. (L. ed.) 200.

A judgment of a federal District Court sustaining a demurrer to an indictment upon two grounds, one of which involves the construction of the federal statute on which the indictment is founded, and the other the sufficiency of such indictment upon general principles of criminal law, is reviewable in the federal Supreme Court on a writ of error,



under this Act. *U. S. v. Stevenson*, (1909) 215 U. S. 190, 30 S. Ct. 35, 54 U. S. (L. ed.) 153.

But the various grounds of demurrer to an indictment cannot be considered on a writ of error sued out by the government in a criminal case, under this Act, to review a judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy; but the court has jurisdiction to review only the ruling of the court below on the sufficiency of such plea. *U. S. v. Mason*, (1909) 213 U. S. 115, 29 S. Ct. 480, 53 U. S. (L. ed.) 725.

**The sufficiency of an indictment upon general principles of criminal law is not open for review in the federal Supreme Court on a writ of error to a federal District Court under this Act.** *U. S. v. Stevenson*, (1909) 215 U. S. 190, 30 S. Ct. 35, 54 U. S. (L. ed.) 153.

A judgment of a federal Circuit Court holding insufficient on demurrer certain counts of an indictment charging wilful misapplication of the funds of a national bank, in violation of R. S. sec. 5209, because the facts alleged did not constitute a crime under that section, as it should be construed, is reviewable in the Supreme Court, under this Act, when based upon the construction of the statute upon which the indictment was founded. *U. S. v. Heinze*, (1910) 218 U. S. 532, 31 S. Ct. 98, 54 U. S. (L. ed.) 1139.

Jurisdiction of the federal Supreme Court of a writ of error sued out under this Act to review a judgment of a federal District Court quashing an indictment for a conspiracy illegally to acquire coal lands from the United States, because of the opinion that the federal statute did not prohibit the acts complained of, cannot be successfully challenged on the theory that the indictment, and not the statute, was construed. *U. S. v. Keitel*, (1908) 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230.

The United States may bring error under this Act to review a judgment of a federal

Circuit Court, quashing an indictment for violating the Immigration Act of March 3, 1903. *Taylor v. U. S.*, (1907) 207 U. S. 120, 28 S. Ct. 53, 52 U. S. (L. ed.) 130.

**Special plea in bar.**—The Supreme Court has jurisdiction to review a judgment purporting to dismiss an indictment upon the ground that the statute of limitations was a bar to the prosecution, although the plea filed and heard by consent and stipulation was denominated a plea in abatement. *U. S. v. Barber*, (1911) 219 U. S. 72, 31 S. Ct. 209, 55 U. S. (L. ed.) 99.

The decision of a federal Circuit Court sustaining a special plea in bar to an indictment is reviewable in the Supreme Court under this Act, although the decision may invoke the application, rather than the validity or construction, strictly speaking, of the statute upon which the indictment was founded. *U. S. v. Celestine*, (1909) 215 U. S. 278, 30 S. Ct. 93, 54 U. S. (L. ed.) 195.

On review of a judgment sustaining a plea in bar of the statute of limitations, to an indictment charging a continuing conspiracy, the court is not concerned with the technical sufficiency of redundancy of the indictment or even with any consideration of the nature of the overt acts alleged. *U. S. v. Barber*, (1911) 219 U. S. 72, 31 S. Ct. 209, 55 U. S. (L. ed.) 99, following *U. S. v. Kissel*, (1910) 218 U. S. 601, 31 S. Ct. 124, 54 U. S. (L. ed.) 1168.

**Construction of indictment.**—The action of the court below as to the mere construction of the indictment is not open to review on the writ of error authorized by the Act. *U. S. v. Biggs*, (1909) 211 U. S. 507, 29 S. Ct. 181, 53 U. S. (L. ed.) 305.

**Review by certiorari.**—Want of power in the federal Supreme Court, under the Act of March 3, 1891, sec. 6, to review by certiorari a judgment of the Circuit Court of Appeals, reversing a conviction below, cannot be helped out by this Act. *U. S. v. Dickinson*, (1909) 213 U. S. 92, 29 S. Ct. 485, 53 U. S. (L. ed.) 711.

## Supp. 1909, p. 294, sec. 714.

The Supreme Court of the District of Columbia is "a court of the United States" within the meaning of this section. *James*

*v. U. S.*, (1906) 202 U. S. 401, 26 S. Ct. 685, 50 U. S. (L. ed.) 1079.

## Supp. 1909, p. 294, sec. 3.

**Final judgment.**—A judgment overruling a demurrer to a plea in abatement is not a final judgment, and therefore is not reviewable under this section. *Cunningham v. Rodgers*, (C. C. A. 1909) 171 Fed. 835, dismissing an appeal, the court also saying: "There is the further objection to the appeal, that the action was at law, and the case could only have been brought to this court upon writ of error," citing *Toeg v. Suffert*, (C. C. A. 1909) 167 Fed. 125.

**Mode of review.**—This Act recognizes a distinction between cases at law and in equity and admiralty, and that a judgment from

such court erroneously brought to the Circuit Court of Appeals by appeal, instead of by writ of error, should not be reviewed, though the record contained all the essential elements of a record brought up by writ of error. *Price v. U. S.*, (C. C. A. 1909) 169 Fed. 791.

Thus it has been held that a judgment of the United States court for China, overruling a demurrer to a plea in abatement, was not a final judgment, and therefore not reviewable by the Circuit Court of Appeals under this Act. *Cunningham v. Rodgers*, (C. C. A. 1909) 171 Fed. 835.

# JURIES.

## Vol. IV, p. 737, sec. 800.

**Porto Rico.**—The competency of grand jurors summoned by the District Court of the United States for the district of Porto Rico after a valid local statute relating to the qualification of jurors went into effect must be tested by that statute, in view of the provision of the Act of April 12, 1900, 31 Stat. L. 85, ch. 191, sec. 14, 5 Fed. Stat. Annot. 773, that the statutory laws of the United States not locally inapplicable, except as otherwise provided, shall have the same force and effect in Porto Rico as in the United States, and of section 34, 5 Fed. Stat. Annot. 773, that, in addition to the ordinary jurisdiction of federal District Courts, the District Court of the United States for Porto Rico shall have jurisdiction "in all cases cognizant in the Circuit Courts of the United States, and shall proceed therein in the same manner as a Circuit Court," read in connection with section 800, which declares that jurors to serve in federal courts, in each state respectively, shall have the same qualifications as jurors of the highest court of law in that state at the time when such jurors are summoned. *Crowley v. U. S.*, (1904) 194 U. S. 466, 24 S. Ct. 731, 48 U. S. (L. ed.) 1075.

**Necessity for designating as grand or petit jurors.**—Under this section providing that jurors in the federal courts shall be drawn or selected in accordance with the practice in the state courts as nearly as practicable, and section 810, 4 Fed. Stat. Annot. 744, providing when grand jurors shall be summoned in such courts, construed together, a venire of

jurors may be drawn and summoned for a term without designating them as grand or petit jurors, and at the term a grand jury may be selected therefrom, where such is the state practice. *U. S. v. Breese*, (1909) 172 Fed. 765.

The conditional or qualified right of challenge on behalf of the federal government in a criminal case, which has the effect of setting aside a juror until the panel is exhausted, without assigning any cause, still exists in those states where such practice obtains, notwithstanding the enactment of the Acts of March 3, 1865, 13 Stat. L. 500, ch. 86, and R. S. sec. 819, 4 Fed. Stat. Annot. 745, giving peremptory challenges to the government, if such practice has, conformably to section 800, been adopted by a court rule in the federal courts. *Sawyer v. U. S.*, (1906) 202 U. S. 150, 26 S. Ct. 575, 50 U. S. (L. ed.) 972.

**Objection to personal qualifications—how taken.**—An objection to the personal qualifications of grand jurors may be taken by plea in abatement, filed after the return of the indictment, but prior to arraignment, and as soon as the facts on which the objection was based were ascertained. *Crowley v. U. S.*, (1904) 194 U. S. 466, 24 S. Ct. 731, 48 U. S. (L. ed.) 1075.

This section was cited in *Crawford v. U. S.*, (1909) 212 U. S. 183, 29 S. Ct. 260, 53 U. S. (L. ed.) 465; *Virginia v. Felts*, (1904) 133 Fed. 85; *U. S. v. Mitchell*, (1905) 136 Fed. 896; *Shaw v. U. S.*, (C. C. A. 1910) 180 Fed. 348.

## Vol. IV, p. 741, sec. 802.

**Act constitutional.**—To the same effect as the original note and citing the cases there set out, *Spencer v. U. S.*, (1909) 169 Fed. 562, 95 C. C. A. 60.

This section was not repealed by Act of June 30, 1879, ch. 52, 21 Stat. L. 43, 4 Fed. Stat. Annot. 749, relating to the same subject. *U. S. v. Merchants, etc., Transp. Co.*, (1911) 187 Fed. 355.

**"Jurors."**—The word "jurors," as used in this section, declaring that jurors shall be returned from such parts of the district from time to time as the court shall direct, etc., embraces both grand and petit jurors. *Spencer v. U. S.*, (1909) 169 Fed. 562, 95 C. C. A. 60.

**Drawing from part of district.**—While a federal court is given discretion by this section to direct the selection of jurors from any part of the district instead of the district at large, such power should only be ex-

ercised when there is some reason for it. Thus in a criminal prosecution against a corporation in the district including Chicago, which contains two-thirds of the population of the district, where the case involved in a large way questions of the transportation of commerce, a panel of jurors drawn almost entirely from without the city and composed largely of farmers was set aside, as not best calculated to return a fair and intelligent verdict, and a panel was drawn from the entire district. *U. S. v. Standard Oil Co.*, (1909) 170 Fed. 988.

Where, prior to the return of certain indictments, the district judge appointed a jury commissioner, and directed such commissioner, with the clerk, to place in the box as eligible for jury service the names of 550 persons residing in the eastern division of the district, directing the number to be drawn from each county, it was held that such order

was not objectionable as substituting the discretion of the judge for that of the commissioner, nor because the representation provided in the order was not in accordance with

the population of such counties. *U. S. v. Merchants', etc., Transp. Co.*, (1911) 187 Fed. 355.

### Vol. IV, p. 743, sec. 808.

**Waiver of objections.**—Objections to competency of grand jury, not made until thirty-five days after service of process, are waived, where the court is open every day, except holidays, during such period. *U. S. v. Louisville, etc., R. Co.*, (1910) 177 Fed. 780.

The objection that the grand jury which returned an indictment was not selected as required by statute can be availed of only by a motion to quash, or by a plea, and is waived by going to trial on the merits. In any event, if matter of record and ground of error, the right to make the objection is lost by the failure to assign it on the prosecution of a writ of error. *McInerney v. U. S.*, (C. C. A. 1906) 147 Fed. 183.

**Ex post facto law.**—The Arkansas statute (Mansf. Dig. Ark., sec. 3991, Ind. Ter. Annot. Stat. 1899, sec. 2671), which applied to Indian Territory before the statehood of Okla-

homa, required a grand jury to be composed of only sixteen men, and while this section provides that a grand jury shall consist of not less than sixteen nor more than twenty-three persons, it was held that so far as this section permitted a grand jury of more than sixteen persons to act upon a charge of crime committed before statehood, it was violative of Const. U. S., art. 1, sec. 9, providing that no *ex post facto* law shall be passed, and, as to such a charge, a jury of more than sixteen men was not a legally constituted grand jury. *U. S. v. London*, (1909) 176 Fed. 976.

**Applies to Circuit and District Courts only.**

—To the same effect as the original note, see *U. S. v. Haskell*, (1909) 169 Fed. 449.

For another case citing this section, see *Lowdon v. U. S.*, (1906) 149 Fed. 673, 79 C. C. A. 361.

### Vol. IV, p. 744, sec. 810.

**Purpose of Act.**—To the same effect as the original note, see *U. S. v. Breese*, (1909) 172 Fed. 765.

**Presence of judge.**—A judge ordering a grand jury need not be present when the order is executed. *Ex p. Harlan*, (1909) 180 Fed. 119, *affirmed* (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101.

**Effect of order.**—The making of an order for the drawing and attendance of a grand jury is the exercise of a judicial power, which pertains to both judge and court, and the order does not conclude public or private

rights in any way, being nothing more than a mere administrative regulation of internal affairs relating to the organization of the court. *Ex p. Harlan*, (1909) 180 Fed. 119, *affirmed* (1910) 218 U. S. 442, 31 S. Ct. 44, 54 U. S. (L. ed.) 1101.

For another case citing this section, see *U. S. v. Louisville, etc., R. Co.*, (1910) 177 Fed. 780.

**Necessity for designating as grand or petit jurors.**—See under this title, vol. 4, p. 737, sec. 800.

### Vol. IV, p. 744, sec. 811.

For a case citing this section, see *Jones v. U. S.*, (1908) 162 Fed. 417, 89 C. C. A. 307.

### Vol. IV, p. 744, sec. 812.

For a case citing this section, see *Atwell v. U. S.*, (1908) 162 Fed. 97, 89 C. C. A. 97, 15 Ann. Cas. 253.

### Vol. IV, p. 745, sec. 819.

**Ex post facto law.**—The provision of this section which limits the number of peremptory challenges of a defendant charged with a misdemeanor in a federal court to three is not invalid as an *ex post facto* law as applied to a defendant charged with an offense committed in Oklahoma territory, but indicted and tried after the admission of the state, because under the law of the territory he was entitled to a larger number. *Hallock v. U. S.*, (C. C. A. 1911) 185 Fed. 417.

**Trial of several indictments together.**—That a number of indictments against the same defendant under section 5480, R. S.,

for using the mails to defraud, are by order of the court tried together to the same jury, does not affect the right under section 819 to three peremptory challenges for each indictment. *Betts v. U. S.*, (1904) 132 Fed. 228, 65 C. C. A. 452. *Compare Krause v. U. S.*, (1906) 147 Fed. 442, 78 C. C. A. 642.

**Consolidation of actions.**—Where separate actions by the same plaintiff are consolidated for trial by order of the court, either on its own motion or on motion of counsel for the plaintiff, in order to avoid waste of time and unnecessary expense, but the causes of action are such that separate verdicts are

required, plaintiff and defendants are each entitled to the same number of challenges to jurors as they would be if the cases had been tried separately. *Butler v. Evening Post Pub. Co.*, (C. C. A. 1906) 148 Fed. 821.

**Territorial courts.**—On the trial in a territorial District Court of an indictment charging an offense against the laws of the United States questions relating to the right of the defendants to be tried separately and

to challenge jurors peremptorily are to be determined by the laws of the territory. *Cochran v. U. S.*, (C. C. A. 1906) 147 Fed. 206.

**Cases in which section applies.**—This section in so far as it relates to challenges in capital and other felony cases clearly applies only in cases in which the United States is the prosecutor. *Virginia v. Felts*, (1904) 133 Fed. 85.

## Vol. IV, p. 749, sec. 2.

**Prior service.**—R. S. sec. 812, 4 Fed. Stat. Annot. 744, which provides that "no person shall be summoned as a juror in any Circuit or District Court more than once in two years, and it shall be sufficient cause of challenge to any juror called to be sworn in any case that he has been summoned and attended said court as a juror at any term of said court held within two years prior to the time of such challenge," as modified by this Act, by reducing the time to one year, prescribes the rule of procedure in the federal courts to the exclusion of any state statute or rule, and under such provisions it is not ground of challenge to a juror that he has served as a juror within one year unless it was in the same court. *Morris v. U. S.*, (1908) 161 Fed. 672, 88 C. C. A. 532, *reversed* on other grounds in (1909) 168 Fed. 682, 94 C. C. A. 168.

Neither is prior service a ground for disqualification of a juror unless such service

was in the capacity of a petit juror. *Boyer-town Nat. Bank v. Schufelt*, (1906) 145 Fed. 509, 76 C. C. A. 187.

**Appointment of jury commissioner by district judge.**—This Act provides that all jurors for the federal courts shall be publicly drawn from a box in which names shall have been placed by the clerk of the court and a commissioner to be appointed by the judge thereof. R. S. sec. 609, 4 Fed. Stat. Annot. 243, declares that Circuit Courts shall be held by the circuit justices, or by the circuit judge of the circuit, or by the district judge of the district, sitting alone, or by any two of such judges together. It has been held that since a district judge sitting in a Circuit Court has all the powers of a circuit judge, a district judge presiding in the Circuit Court had jurisdiction to appoint a commissioner to select jurors from which a grand jury was to be drawn for such Circuit Court. *U. S. v. Miller*, (1911) 187 Fed. 369.

## Vol. IV, p. 754, sec. 5. [Iowa — residence of jurors.]

**Residence of jurors from central division.**—This Act does not require that jurors drawn for service in the circuit division of the Southern District of Iowa should be citizens

residing in that division, it being sufficient that they reside in the district. *Spencer v. U. S.*, (1909) 169 Fed. 562, 95 C. C. A. 60.

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# JUSTICE, DEPARTMENT OF.

## Vol. IV, p. 763, sec. 346.

For a case citing this section, see *In re Beavers*, (1904) 131 Fed. 366.

## Vol. IV, p. 763, sec. 347.

**Appointment of special assistants to a district attorney.**—The fact that the commission of a special assistant to a district attorney appointed under the authority given by R. S. sec. 363, 4 Fed. Stat. Annot. 70, is signed by the solicitor-general in the department of justice as "acting attorney-gen-

eral" does not affect the validity of the appointment; the solicitor-general being empowered by section 347 to exercise the duties of the office of the attorney-general in case of his absence, which will be presumed in support of the regularity of the appointment. *U. S. v. Twining*, (1904) 132 Fed. 129.

## Vol. IV, p. 766, sec. 356.

**On question of law only.**—The question as to whether or not a citizen of Porto Rico, legally a resident of New York, is eligible

for appointment in the Marine Hospital service under a departmental regulation which requires the applicant to be a citizen of the

United States, or, if of foreign birth, to furnish proof of American citizenship, does not involve any question of law within the meaning of this section, and is not, therefore, one properly calling for an opinion of the attorney-general. The requirement not being demanded by law, its interpretation may properly be left to the department or bureau responsible for its existence and execution. (1904) 25 Op. Atty.-Gen. 183.

A finding of facts cannot be made by the attorney-general. (1908) 26 Op. Atty.-Gen. 604; (1908) 27 Op. Atty.-Gen. 49.

A statement of the facts in the nature of an agreed case in an action at law should be embodied in the request for an opinion. (1902) 24 Op. Atty.-Gen. 59; (1902) 24 Op. Atty.-Gen. 102; (1907) 26 Op. Atty.-Gen. 378; (1908) 26 Op. Atty.-Gen. 609.

Must be on matter actually pending.—(1902) 24 Op. Atty.-Gen. 59; (1902) 24 Op. Atty.-Gen. 118; (1903) 24 Op. Atty.-Gen. 556; (1904) 25 Op. Atty.-Gen. 179; (1908) 26 Op. Atty.-Gen. 609; (1908) 27 Op. Atty.-Gen. 37; (1908) 27 Op. Atty.-Gen. 49.

Question of law must be specifically formulated.—It has been the invariable rule of the department of justice to decline to give an opinion upon any question of law unless it is "specifically formulated." (1902) 24 Op. Atty.-Gen. 59; (1907) 26 Op. Atty.-Gen. 378; (1908) 26 Op. Atty.-Gen. 609.

Questions not arising in department making inquiry.—In (1906) 25 Op. Atty.-Gen. 584, the attorney-general declined to express an opinion upon the question propounded by the Secretary of the Interior as to whether the preliminary draft of title LXVIII., "Railway and Telegraph Companies," submitted to him by the commission to revise and codify the laws of the United States, correctly embodies the provisions of existing law upon the subject, for the reason that the inquiry did not present a question of law arising in the administration of his department.

Questions of propriety involving executive discretion.—The attorney-general will not express an opinion upon the propriety of the exercise by the head of a department of his official discretion. (1902) 24 Op. Atty.-Gen. 118; (1905) 25 Op. Atty.-Gen. 94; (1905) 25 Op. Atty.-Gen. 524; (1907) 26 Op. Atty.-Gen. 421; (1908) 26 Op. Atty.-Gen. 578.

Jurisdiction of attorney-general and comptroller of treasury.—The attorney-general will not express an opinion upon a question involving payment of money which has been decided by the comptroller of the treasury, whose decision, under section 8 of the Act of July 31, 1894, ch. 2, 28 Stat. L. 208, 7 Fed. Stat. Annot. 384, is conclusive in law. (1904) 25 Op. Atty.-Gen. 185.

The comptroller of the treasury, rather than the attorney-general, should pass upon the question of the power of refund and payment out of the treasury of duty overpaid on an importation of merchandise. (1902) 24 Op. Atty.-Gen. 553. See also (1902) 24 Op. Atty.-Gen. 85; (1906) 25 Op. Atty.-Gen. 614; (1907) 26 Op. Atty.-Gen. 431.

Exception.—The authority conferred upon

the comptroller of the treasury by section 8 of the Act of July 31, 1894, 28 Stat. L. 208, 7 Fed. Stat. Annot. 384, to decide questions involving payments to be made from the treasury is complete; but that Act does not establish a rule which is universal and without exception. Congress did not, by that enactment, intend to shorten the reach of sections 354 and 356, R. S., or to repeal *pro tanto* those sections. Where a question is presented to the attorney-general in accordance with law for decision, and he is of opinion that the nature of the question is general and important in other respects than disbursement, and therefore conceives that it is proper for him to deliver his opinion, it is final and authoritative under the law, and should be so treated by the accounting officers of the treasury, even though the question involves a payment to be made from the treasury. When the comptroller of the treasury waives his right to determine a matter involving disbursements within the scope of his authority under the law, and requests or suggests a ruling by the attorney-general, the attorney-general's opinion should be controlling upon the accounting officers of the treasury, and should be followed by them unless contrary to some authoritative judicial decision. (1904) 25 Op. Atty.-Gen. 301, followed (1906) 26 Op. Atty.-Gen. 81. See also (1908) 26 Op. Atty.-Gen. 609.

Judicial questions.—The attorney-general cannot properly pass upon the question whether the courts in this country have authority to execute letters rogatory issued out of the German patent office, as that is a matter for judicial and not for executive determination. (1902) 24 Op. Atty.-Gen. 69.

In (1903) 25 Op. Atty.-Gen. 97, the attorney-general declined to express an opinion as to the liability of the postmaster at Baltimore, Md., for a sum of money paid by him to a former clerk in the Baltimore post-office, and for which no service was performed, for the reason that the question was essentially a judicial one, amounting to an inquiry whether in regular legal proceedings a court and jury would hold that officer liable.

In (1905) 25 Op. Atty.-Gen. 369, the attorney-general declined to express an opinion upon the question whether a wilful refusal to give true answers to inquiries concerning statistics which, by section 6 of the Permanent Census Act of March 6, 1902, 1 Fed. Stat. Annot. 737, 32 Stat. L. 52, the Department of Commerce and Labor is authorized to collect, would subject a person to the penalties prescribed by section 22 of the Act of March 3, 1899, 1 Fed. Stat. Annot. 747, 30 Stat. L. 1020, for the reason that the question is pre-eminently one for judicial and not executive determination.

Matters belonging to department of justice.—In (1905) 25 Op. Atty.-Gen. 543, the attorney-general declined to express an opinion upon the question whether proceedings by court-martial would bar proceedings in the civil courts for an assault or other crime involved in the offense of hazing, for the reason that it would be of no assistance to

those officers in the proper discharge of their duties, and should such action be taken, the matter would peculiarly be one for the consideration of his department. See also (1902) 24 Op. Atty.-Gen. 59; (1908) 26 Op. Atty.-Gen. 631.

Questions once definitely answered. — A question once definitely answered by a former attorney-general and left at rest for a long term of years should be reconsidered only in a very exceptional case. (1902) 24 Op. Atty.-Gen. 53.

## Vol. IV, p. 770, sec. 362.

For a case citing this section, see *In re Beavers*, (1904) 131 Fed. 366.

# KIDNAPPING.

## Vol. IV, p. 774, sec. 5526.

**Constitutionality.** — This section was authorized by the provisions of U. S. Const., 13th Amendment, forbidding slavery or involuntary servitude within the United States or any place subject to their jurisdiction, and granting to Congress the power to enforce the prohibition by appropriate legislation. *Clyatt v. U. S.*, (1905) 197 U. S. 207, 25 S. Ct. 429, 49 U. S. (L. ed.) 726.

**Scope of statute.** — The holding of another in a state of peonage, whether sanctioned or not by municipal or state law, is included in the prohibition against peonage in any state or territory of the United States contained in this section. *Clyatt v. U. S.*, (1905) 197 U. S. 207, 25 S. Ct. 429, 49 U. S. (L. ed.) 726.

**Peonage defined.** — In *Clyatt v. U. S.*, (1905) 197 U. S. 207, 25 S. Ct. 429, 49 U. S. (L. ed.) 726, Brewer, J., in defining peonage, said: "Peonage may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. . . . Peonage is sometimes classified as voluntary or involuntary; but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service — involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject, like any other contractor, to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service."

For other cases defining peonage, see *Peonage Cases*, (1905) 136 Fed. 707; *In re Peonage Charge*, (1905) 138 Fed. 686; *U. S. v. Clement*, (1909) 171 Fed. 974.

**Element of offense.** — In order to constitute the crime of holding another person in

peonage, it is not necessary that the defendant should have acted corruptly. The fact that persons were induced to work for another in payment of debts through fear of prosecution if they refused did not render the master guilty of peonage, unless such fear was caused by threats of prosecution made by him at the time. *U. S. v. Clement*, (1909) 171 Fed. 974.

**State laws punishing breach of labor contract.** — A state statute which makes criminal the procurement of money upon a fraudulent contract to perform service and the fraudulent abandonment of the contract after having so procured the money is not a violation of R. S. secs. 1990, 5526, prohibiting involuntary service of labor. *Young v. State*, (1908) 4 Ga. App. 827, 62 S. E. 558.

In *Bailey v. Alabama*, (1911) 219 U. S. 219, 31 S. Ct. 145, 55 U. S. (L. ed.) 191, it was held that so far as the refusal without just cause to perform the labor called for in a written contract of employment under which the employee has obtained money which was not refunded, or property which was not paid for, is made *prima facie* evidence of an intent to defraud by Ala. Code 1896, sec. 4730, as amended by Gen. Acts 1903, p. 345, and Gen. Acts 1907, p. 636, and therefore punishable as a criminal offense, such legislation offends against the prohibition of the 13th Amendment to the Federal Constitution against involuntary servitude, except as punishment for crime, and against the provisions forbidding peonage, found in R. S. secs. 1990 and 5526, enacted to secure the enforcement of such amendment — especially since, under the local practice, the accused may not, for the purpose of rebutting the statutory presumption, testify as to his uncommunicated motives, purposes, or intentions. *Compare Townsend v. State*, (1905) 124 Ga. 69, 52 S. E. 293.

**To work out a debt or contract.** — If a person desiring to have a servant returned to him to work out a debt causes such servant to be arrested on a warrant procured by the master, and after incarceration the master procures the servant's release on his promise to return to his master's employment to continue to work out a debt, the master is guilty

of peonage, prohibited by this section, provided the servant was charged with the crime for the procuring his arrest and incarceration, and to enable the master to extort from the servant a promise to return and work out the debt. *In re Peonage Charge*, (1905) 138 Fed. 686.

Inducing a person to labor in payment of debts by threats of prosecution may constitute intimidation and amount to peonage, if by reason of the different character of the

parties such threats overcome the will of the servant so that the service is involuntary. *U. S. v. Clement*, (1909) 171 Fed. 974.

**Evidence.**—Evidence of a prior condition of peonage, to which the persons so held were returned by the act of defendant, is essential to support a conviction under an indictment charging the defendant with returning certain designated persons to a condition of peonage. *Clyatt v. U. S.*, (1906) 197 U. S. 207, 25 S. Ct. 429, 40 U. S. (L. ed.) 726.

## LABOR.

### Vol. IV, p. 779, sec. 1.

**Constitutionality.**—The prohibition, under penalty of fine or imprisonment, except in case of extraordinary emergency, against requiring or permitting laborers or mechanics employed upon any of the public works of the United States or of the District of Columbia to work more than eight hours each day is not repugnant to the Federal Constitution. *Ellis v. U. S.*, (1907) 206 U. S. 246, 27 S. Ct. 600, 51 U. S. (L. ed.) 1047. See also (1905) 25 Op. Atty.-Gen. 441.

**Extraordinary emergency.**—The exception in this section of cases of extraordinary emergency was designed to excuse overtime work which must be rendered to avert some sudden unusual emergency, unexpectedly arising and calling for prompt action. (1907) 26 Op. Atty.-Gen. 278.

The building of levees on the banks of the Mississippi river in the Eastern District of Louisiana presents at all times an extraordinary emergency, exempted from operation of the eight-hour law. *U. S. v. Garbish*, (1910) 180 Fed. 502.

A delay, not entirely unexpected, in obtaining the timber required for the construction of a pier at the Boston navy yard, was held not to create an extraordinary emergency within the meaning of the exception in this Act. *Ellis v. U. S.*, (1907) 206 U. S. 246, 27 S. Ct. 600, 51 U. S. (L. ed.) 1047.

In *U. S. v. Sheridan-Kirk Contract Co.*, (1906) 149 Fed. 810, it was held that an "extraordinary emergency" in connection with the building of a dam across the Ohio river could not be construed as a continuing emergency, which would suspend the eight-hour law during the entire life of the contract, nor an emergency growing out of the scarcity of labor, nor could it be made to include, not only the time of the happening of a flood, but also the time required to repair the injuries resulting therefrom; but that it is such an unforeseen, sudden, or unexpected emergency as requires immediate action or remedy, and when the emergency passes the privilege ceases.

**Intent.**—A contractor for a public work of the United States, who intentionally permits laborers employed thereon to work more than eight hours a day, under the mistaken as-

sumption that an extraordinary emergency exists, intentionally violates the provisions of this Act. *Ellis v. U. S.*, (1907) 206 U. S. 246, 27 S. Ct. 600, 51 U. S. (L. ed.) 1047.

**Laborers and mechanics.**—*Masters, mates, engineers, firemen, crane men, deck hands, and scow men* employed on tugs, dredges, and scows used in dredging a harbor channel are not laborers or mechanics within the meaning of this Act. *Ellis v. U. S.*, (1907) 206 U. S. 246, 27 S. Ct. 600, 51 U. S. (L. ed.) 1047.

In *Breakwater Co. v. U. S.*, (C. C. A. 1910) 183 Fed. 112, it appeared that the defendant was a contractor engaged in constructing for the United States jetties near Cape May harbor, extending from the shore into the open sea. The jetties were built up with stone, thrown overboard from barges, which were towed across Delaware bay, anchored, and as needed towed to the jetties and warped along while being discharged. As crews of such barges defendant employed engineers, boatmen, and hookmen, selected for their seafaring experience, who operated the barges and also discharged their cargoes. The work done and the time required to do it depended on tide, wind, and weather, which ordinarily required variable hours of service on the part of the men. The court followed *Ellis v. U. S.*, *supra*, and held that such men were seamen, with the rights of such, including the right to a lien on the vessel for their wages, and could not be classed as laborers or mechanics, within the meaning of this Act.

**Watchman.**—In (1908) 26 Op. Atty.-Gen. 623, it was held that a watchman "whose duty is to watch the entrance of one of the public buildings occupied by the War Department, executing instructions with regard to admitting persons into the building and permitting public property to be taken out of the building, reporting to his chief any violation of law, disturbance of the peace, etc., that may be brought to his attention, or to guard the building and property therein during the night," was not a laborer or mechanic within the meaning of the eight-hour law.

In (1908) 26 Op. Atty.-Gen. 622, it was held that a watchman employed at Corregidor Island, Philippine Islands, whose duties

were "to supervise all arrivals and to see that no one lands on the island without authority, to investigate such matters as the absence from work of native employees, and to make reports of those matters," was not a laborer or mechanic within the meaning of the eight-hour law.

See also (1908) 26 Op. Atty.-Gen. 604.

*Blacksmiths and their helpers, firemen, and pumpmen* employed in the Reclamation Service are either mechanics or laborers within the meaning of the eight-hour law. (1906) 26 Op. Atty.-Gen. 64.

*Person caring for office, lawns, etc.*—A laborer "whose duty is to perform manual labor in the removal of furniture and office fixtures, cutting grass, washing floors and windows, and general office cleaning," is not a laborer within the meaning of the eight-hour law; such services being more those of a domestic servant than those of a laborer in the usual meaning of the term. (1908) 26 Op. Atty.-Gen. 623.

*A hostler* "whose duty is to feed, drive, and care for horses, and to clean carriages, harness, and stables," is rather a domestic servant than a laborer. (1908) 26 Op. Atty.-Gen. 623.

*A messenger* "whose duty is to sweep floors and do general office cleaning, attend to fires, and carry messages," is not a laborer or mechanic within the meaning of the eight-hour law. (1908) 26 Op. Atty.-Gen. 623. See also (1908) 26 Op. Atty.-Gen. 604.

*Method of payment not material.*—The words "laborers and mechanics," as used in the eight-hour law, apply to all persons who may fairly come within the description of laborers and mechanics, whether they are paid by the year, by the month, or by the day. (1905) 25 Op. Atty.-Gen. 465.

*Jetty work.*—In (1907) 26 Op. Atty.-Gen. 278, it was held that this Act applied to the jetty work at the mouth of the Columbia river, which was being conducted directly by the government, and that those employed upon that work who came fairly within the meaning of the words "laborers and mechanics" should be restricted to eight hours of effective labor in any one calendar day, irrespective of enforced idleness on other days, except in case of a sudden emergency requiring prompt action.

*Skilled workmen.*—The eight-hour law includes skilled as well as unskilled workmen; and the employment of persons for a longer period than eight hours in any one day "when a dam is being raised or lowered" and the service is one "requiring skill and training" which "cannot safely be intrusted to inexperienced men," is not an employment in case of an "extraordinary emergency," and is a violation of that statute. (1908) 26 Op. Atty.-Gen. 605.

*Panama canal.*—This Act applies to the employment of laborers and mechanics in the construction of the Panama canal. It does not apply to the office force of the Isthmian Canal Commission stationed on the Isthmus of Panama, or to any of the employees of the government who are not within the ordinary meaning of the words "laborers and mechanics." (1905) 25 Op. Atty.-Gen. 441.

*Employees of Panama railroad.*—This Act does not apply to laborers and mechanics in the employ of the Panama Railroad and Steamship Line, such persons being employed by the corporation and not by the United States. (1905) 25 Op. Atty.-Gen. 465.

*Labor outside regular hours.*—Persons employed as lock tenders, lock helpers, lockmen, and in similar employments at the locks of the various canals owned and operated by the government may be called upon to perform service at any hour of the day, and such requirement is legal and proper under the eight-hour law so long as the total service rendered does not exceed eight hours per day. (1908) 26 Op. Atty.-Gen. 605.

*Reclamation Act.*—There is no conflict between the declaration in section 4 of the Reclamation Act of June 17, 1902, 32 Stat. L. 388, 7 Fed. Stat. Annot. 1099, that eight hours shall constitute a day's work upon the public works therein specified, and the saving clause in section 1 of this Act which allows more than eight hours' work in one calendar day "in case of extraordinary emergency." (1906) 26 Op. Atty.-Gen. 64.

*"Public works."*—Dredging a channel in Boston harbor is not a public work of the United States, within the meaning of this Act. *Ellis v. U. S.*, (1907) 206 U. S. 246, 27 S. Ct. 600, 51 U. S. (L. ed.) 1047. *Compare* (1906) 26 Op. Atty.-Gen. 30.

*Irrigation works for the reclamation of arid and semi-arid lands* (Act of June 17, 1902, 32 Stat. L. 388, 7 Fed. Stat. Annot. 1098) perfectly and comprehensively fill the idea of "public works of the United States." (1906) 26 Op. Atty.-Gen. 64.

*Eight hours' effective labor.*—This law means eight hours of effective labor. (1906) 26 Op. Atty.-Gen. 64.

*Contractors furnishing supplies to quartermaster.*—This Act does not apply to contractors furnishing the Quartermaster's Department with supplies. (1906) 26 Op. Atty.-Gen. 36.

*Construction of naval vessels under contract.*—This Act does not apply to vessels under construction for the navy by contract with builders at private establishments. Materials for such vessels, such as armor, guns, and other articles obtained under special contracts, are *a fortiori* not within the statute. (1906) 26 Op. Atty.-Gen. 30.

## Vol. IV, p. 780, sec. 2.

*Jurisdiction.*—In a prosecution of government contractors for "unlawfully, intentionally, and knowingly requiring or permitting

a laborer or mechanic, employed on public work," to wit, a dam across the Ohio river, to work more than eight hours in a single



calendar day, contrary to the provisions of this Act, the offense was not the working overtime by the laborer or mechanic, but was on the part of the contractor in requiring and permitting such overtime work to be done; and hence, where the work was directed, required, or permitted from the Ohio side of the river, the federal court for the Southern District of Ohio had jurisdiction over the offense, notwithstanding some or all of the work may have been performed south of the line which divides the states of Ohio and Kentucky. *U. S. v. Sheridan-Kirk Contract Co.*, (1906) 149 Fed. 809.

**Indictment.**—The time of the commission of an offense under this Act as laid in the indictment does not confine the proof within the limits of that period, but proof that the offense was committed on or about the dates fixed in the indictment, if confined to dates prior to the finding of the grand jury, is competent to establish the charge. *U. S. v. Sheridan-Kirk Contract Co.*, (1906) 149 Fed. 809.

**Information.**—This Act makes it a separate offense in the case of each laborer or mechanic so required to work more than eight hours, and a criminal information against a contractor for violation of such provision must set out the names of, or otherwise

identify, the persons so alleged to have been unlawfully employed, that the accused may meet the charge intelligently, and be able to plead a conviction or acquittal in bar of any subsequent prosecution. *U. S. v. Breakwater Co.*, (1909) 174 Fed. 78, *reversed* on other grounds (C. C. A. 1910) 183 Fed. 112.

**Burden of proof.**—The rule which places the burden of proof upon the party who, under the circumstances of the case, is best able to make the proof, requires, in a prosecution for violation of the eight-hour law, that the burden of showing the alleged offense was justified by an extraordinary emergency shall be upon the one interposing such a defense, who from the necessities of the case is possessed of special knowledge with reference thereto. *U. S. v. Sheridan-Kirk Contract Co.*, (1906) 149 Fed. 810.

**Defenses.**—Where a defendant has been notified by government engineers that he can no longer rely on the construction of the eight-hour law given by that department during the years immediately following the passage of the law, he is not entitled to introduce such construction as a defense. *U. S. v. Sheridan-Kirk Contract Co.*, (1906) 149 Fed. 810.

## Vol. IV, p. 784, sec. 1.

State laws regulating number of employees in crews.—See *Pittsburgh, etc., R. Co. v. State*, (1909) 172 Ind. 147, 87 N. E. 1034.

## Vol. IV, p. 784, sec. 3.

**Construction of statute.**—An arbitration of differences between an interstate carrier and its employees, under this Act, is essentially a common-law arbitration, and rests solely on the written agreement of arbitration entered into by the parties, which limits and determines not only the rights of the parties thereto but also the extent of the powers of the arbitrators, and it is to be construed in accordance with the rules governing the construction of contracts, rather than those applicable to pleadings. *In re Southern Pac. Co.*, (1907) 155 Fed. 1001.

**Scope of question submitted.**—An agreement for arbitration between a railroad company and the Order of Railway Telegraphers provided for the submission, among others, of the question "whether members of the Order of Railroad Telegraphers in the employ of the employer shall legislate for train dispatchers respecting rates of pay and hours of service or otherwise." It was held that such question was not limited to an inquiry as to whether the train dispatchers in the service of the employer had authorized the order or its committee to represent them in the arbitration proceedings, which was merely a matter of agency, but that it covered the broader question as to whether they should be represented generally in their negotiations and dealings with the employer in respect to rates

of pay and hours of service by the body of its employees who were members of the order, or should be separately represented, and that the board of arbitration properly admitted evidence offered by the employer to show the nature of their duties, and that their relation to the employer and to its service to the public was different from that of ordinary telegraphers. *In re Southern Pac. Co.*, (1907) 155 Fed. 1001.

An agreement for arbitration between a railroad company and the Order of Railroad Telegraphers, whose members employed by the company were working under a schedule agreed to between the parties fixing rates of pay and hours of service, which submitted as one of the questions to be arbitrated "the question of eliminating from the operation of the schedule certain important agencies where the duties of soliciting traffic are paramount," was not ambiguous in respect to such question, which was clearly limited by terms to "agencies where the duties of soliciting traffic are paramount," and could not be broadened by construction to authorize the board of arbitrators to consider and determine whether the schedule shall apply generally to "station agents whose regular duties do not include telegraphic work and whose annual earnings . . . equal or exceed" a certain sum. *In re Southern Pac. Co.*, (1907) 155 Fed. 1001.

**Vol. IV, p. 786, sec. 4.**

**Entry of judgment.**—In an arbitration proceeding to settle differences between an interstate carrier and its employees, judgment on the award cannot be entered by the court

until after the appeal has been determined, or until after the time for taking an appeal has expired. *In re Southern Pac. Co.*, (1907) 155 Fed. 1002.

**Vol. IV, p. 786, sec. 6.**

**Construction of agreement.**—A written contract *inter partes*, as an agreement for arbitration stating the questions to be submitted and determined, must primarily be interpreted by its language taken in its ordinary and accepted meaning, and if that language is plain and unambiguous in itself, there is no room for construction, but it will

be held to mean precisely what its terms imply. It is only when the language is susceptible of more than one construction that the intent or understanding of the parties may be inquired into, or that evidence of the surrounding circumstances may be resorted to. *In re Southern Pac. Co.*, (1907) 155 Fed. 1001.

**Vol. IV, p. 787, sec. 10.**

**Constitutionality.**—Personal liberty as well as the right of property are invaded without due process of law, in violation of U. S. Const., Fifth Amendment, by the provisions of section 10, making it a criminal offense against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of his membership in a labor organization. There is no such connection between interstate commerce and membership

in a labor organization as to authorize Congress to make it a crime against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of such membership on his part. *Adair v. U. S.*, (1908) 208 U. S. 161, 28 S. Ct. 283, 52 U. S. (L. ed.) 436, reversing 152 Fed. 737. See also *U. S. v. Scott*, (1906) 148 Fed. 431; *Order of Railroad Telegraphers v. Louisville, etc., R. Co.*, (1906) 148 Fed. 437.

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## LARCENY (INCLUDING ROBBERY).

**Vol. IV, p. 790, sec. 5456.**

**Blank checks.**—In *Keller v. U. S.*, (C. C. A. 1909) 168 Fed. 697, it was held that six blank checks, with stubs attached, each of the value of one cent, the personal property of the United States, constituted "property" the subject of larceny, under this section.

**Indictment.**—This section does not make the value of the property stolen an element of the offense or a factor in determining its grade or punishment, and therefore it is not necessary that an indictment thereunder shall allege the value. *Brown v. U. S.*, (1906) 146 Fed. 975, 77 C. C. A. 173.

**Vol. IV, p. 790, sec. 1.**

**Clerk of federal court.**—The duty of a clerk of a federal District Court to pay over to the United States the surplus fees and emoluments of his office, which his half-yearly return or the audit thereof shows to exist over and above the compensation and allowances authorized by law to be retained by him, is not governed by the federal statutes relating to the embezzlement of "public money" or "money or property of the United States," but such fees and emoluments are received by the clerk, not as money or property belonging to the United States, but as the amount allowed to him for his compensation and office expenses under the statutes defining his rights and duties, and with respect to the amount payable when the return is

made, the clerk is not a trustee, but a debtor. *U. S. v. Mason*, (1910) 218 U. S. 517, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133.

**Indictment.**—An indictment under the Act charging a defendant with the embezzlement of money of the United States is bad where it does not allege that he was a clerk or employee of the government, or that the money came lawfully into his possession by virtue of some employment. *U. S. v. Allen*, (1906) 150 Fed. 152.

An indictment which charges a defendant with stealing money "belonging to" the United States sufficiently avers the ownership of the property stolen. *Dimmick v. U. S.*, (1905) 135 Fed. 257; 70 C. C. A. 141.

## LEGAL TENDER.

Vol. IV, p. 794, sec. 3587.

**Five-cent pieces.**—Under this section and section 3515, 2 Fed. Stat. Annot. 121, providing that minor coins shall consist of five-cent pieces, three-cent pieces, and one-cent pieces, five-cent pieces are legal tender, so that proof that a defendant stole eighty-five cents in United States five-cent pieces was sufficient to sustain an indictment charging the theft of eighty-five cents lawful current money of the United States of America. *Black v. State*, (1904) 4 Tex. Crim. 107, 79 S. W. 311.

**Payment of street car fare.**—The refusal of a conductor, under the rule of the company, to accept five one-cent pieces for fare

except in exchange for a five-cent piece to be inserted in the automatic collector by the passenger is not a violation of this section providing that the minor coins of the United States shall be a legal tender at their nominal value for any amount not exceeding twenty-five cents in one payment, under which five separate pieces are legal tender for a debt of five cents, so as to render the rule unreasonable; such refusal not amounting to a refusal to accept the five coins in payment of the fare within the meaning of the statute. *Martin v. Rhode Island Co.*, (R. I. 1911) 78 Atl. 549.

## LIMITATION OF VESSEL OWNERS' LIABILITY.

Vol. IV, p. 837, sec. 4281.

**Reasonableness of stipulation.**—A condition in bills of lading issued by a steamship company, limiting its liability in case of loss to a specified sum per package unless the value of the goods shall be expressed therein, is not an agreed valuation of the goods, and is invalid to relieve the company from liability for the full loss in case of their loss or injury through negligence, but a limitation to the invoice or declared value is reasonable and enforceable. *U. S. Lace Curtain Mills v. Oceanic Steam Nav. Co.*, (1906) 145 Fed. 701.

**Value of baggage.**—A provision printed in a steamship ticket for the carriage of six passengers, limiting the liability of the carrier for loss or damage to baggage to \$100, not read by nor called to the attention of the passengers, is unreasonable and void. *Weinberger v. Compagnie Generale Transatlantique*, (1908) 146 Fed. 516.

**Articles included as passenger's baggage.**—The provisions of this section respecting the liability of vessels "as carriers" do not apply to articles carried by a passenger as baggage. *La Bourgogne*, (C. C. A. 1906) 144 Fed. 781, *affirmed* (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

**Hand baggage.**—A steamship company issued a passage ticket limiting its liability for loss of the personal effects of passengers to \$100, unless the value of the same, in excess of that sum, be declared before the issue of the contract or delivery of the effects to

the ship and payment of freight at current rates thereon. Hand baggage was delivered to the company's baggage master at his direction, and on his statement that it would be sent to the passenger's room, but it was never delivered. It was held that the loss, if unexplained, established a *prima facie* case of negligence for which the company was liable, notwithstanding the failure of the passenger at the time of delivery to declare the value thereof or pay excess freight thereon; such requirement not applying to hand baggage. *Holmes v. North German Lloyd Steamship Co.*, (1906) 184 N. Y. 280, 77 N. E. 21.

**Jewelry worn by passenger.**—The provision of section 4281 that if any shipper of jewelry, etc., contained in any parcel or package or trunk shall take the same as freight or baggage on any vessel without giving written notice of its character and value, and having the same entered on the bill of lading, the shipowner shall not be liable as carrier, is intended to apply where such goods are received from a shipper by a carrier for transportation in the usual course of business, and does not relieve a shipowner from liability for jewelry worn and carried on board by a woman passenger with the intention of placing it in the custody of the purser, as permitted by the rules of the ship, but which was stolen by an employee of the ship before she had the opportunity to do so. *The Minnetonka*, (C. C. A. 1906) 146 Fed. 509, *affirming* (1904) 132 Fed. 52.

## Vol. IV, p. 838, sec. 4282.

**Any vessel.**—As to what vessels are within the statute, see *infra*, section 4289.

**Fire during deviation.**—The owner of a vessel which has deviated from her voyage by his order is not relieved from liability for loss of cargo by fire during such deviation by R. S. sec. 4282, which exempts him from liability for fire unless "caused by the design or neglect of such owner." *The Indrapura*, (1909) 171 Fed. 930.

**Agreement to insure cargo.**—A contract between carrier and shipper that the carrier

should insure the cargo, operates to restore the carrier's common-law liability for loss by fire, abrogated by this section. *Southern Cotton Oil Co. v. Merchants', etc., Transp. Co.*, (1910) 179 Fed. 133.

**General average.**—This section does not exempt the vessel from general average contribution. *The Wm. J. Quillan*, (1909) 168 Fed. 407; *The Wm. J. Quillan*, (1910) 175 Fed. 207, *reversed* on other grounds (C. C. A.) 180 Fed. 681.

## Vol. IV, p. 839, sec. 4283.

**Valuation of vessel.**—See *infra*, this note, *Measure of owner's liability*; and *infra*, this title, section 4285.

**Jurisdiction of District Courts in admiralty**—*Of claims against vessel.*—A court of admiralty in which proceedings are instituted by a vessel owner for limitation of liability has exclusive jurisdiction to settle in such proceedings all claims arising out of the matters on which they are based, and an order made therein restraining all persons having claims from prosecuting suits thereon elsewhere is a bar to a subsequent suit on a claim in another court, although brought by an administrator who had not at that time been appointed. *Seese v. Monongahela River Consol. Coal, etc., Co.*, (1907) 155 Fed. 507.

**Reducing claim below appraised value of vessel.**—Where a District Court has acquired jurisdiction of a proceeding for limitation of liability for a claim for damages on which the owner has been sued in another district, the claimant cannot defeat such jurisdiction by appearing specially and offering or attempting to reduce the amount of his claim below the appraised value of the vessel and her pending freight. *The John K. Gilkinson*, (1907) 150 Fed. 454.

Where a District Court has obtained jurisdiction of a proceeding for limitation of liability on a claim for which the owner has been sued, the claimant cannot defeat such jurisdiction after the vessel has been appraised by reducing his claim below the appraisal. *The John K. Gilkinson*, (1907) 156 Fed. 868.

**Prior litigation in state court.**—Prior litigation in a state court of the question of the liability of a vessel owner growing out of a collision will not deprive the owner of the right to institute proceedings in an admiralty court for a limitation of his liability, however far the prior litigation may have proceeded; and on the institution of such proceedings all matters relating to the petitioner's liability are brought within the jurisdiction of the court of admiralty, which is required by admiralty rule 54, on motion of the petitioner, to make an order restraining the further prosecution of all or any suit or suits against the petitioner in respect of any claim, and has no power to refuse or limit such order. *The City of Boston*, (1906) 159 Fed. 257.

**Action for death by wrongful act as one of limited liability.**—Whether an action in a state court against the owner of a vessel for wrongful death is one of limited liability, under R. S. secs. 4283, 4284 *et seq.*, is a question of admiralty and maritime jurisdiction, which must be determined by the federal courts. *The Lotta*, (1907) 150 Fed. 219.

**In which district.**—Under admiralty rule 57, 9 S. Ct. iii., where the owner of a vessel has been sued on a claim for damages against which he is entitled to a limitation of his liability under the statute, but the vessel has not been libeled, a proceeding for limitation of liability may be brought either in the District Court of the district in which the owner has been sued or in that of the district in which the vessel may be, and an allegation in the petition that the vessel is within the district gives the court jurisdiction. *The John K. Gilkinson*, (1907) 150 Fed. 454.

A tug which, in pursuit of her business, was frequently within the Southern District of New York, and was there in a regular way at the time of the filing of a petition for limitation of liability by her owner, was within the district for the purpose of giving the court jurisdiction, under admiralty rule 57, although the domicile of the owner was elsewhere. *The John K. Gilkinson*, (1907) 156 Fed. 868.

**Administering state law.**—A claim for damages by reason of the death of a person in collision, filed in a proceeding in admiralty for limitation of liability by the administratrix of the deceased, but based on a state statute which gives the right of recovery to the widow, is sufficient to authorize a recovery, where it discloses that the claimant is also the widow of the deceased, and an amendment making the claim in that capacity may properly be allowed. *The Saginaw*, (1905) 139 Fed. 906.

**Proceeding in state court.**—A shipowner, by defending and appealing an action in a state court to recover damages for injury to a passenger, does not waive his right to petition a court of admiralty for limitation of liability. *In re Starin*, (1903) 124 Fed. 101.

"While there can be no doubt that an answer in a state court proceeding often suffices to give an opportunity to present the defense of the limitation of liability provided by the United States statutes, yet it is manifestly

useless where anything in the nature of affirmative relief is necessary. If a person, when confronted with a claim, desires to bring all matters connected with his vessel to a definite determination; he must proceed affirmatively, and the only manner in which he can do so is by resorting to a District Court of the United States." *The Hoffmans*, (1909) 171 Fed. 455, 458.

That the Pennsylvania law forbids a carrier to limit its liability for negligence, while the federal laws limit the liability of the owner of a vessel in the operation of which a person is injured to the amount or value of the interest of the owner in the vessel and freight, does not deprive the state courts of jurisdiction of an injury action against a ferry company, but the company may make its defense of limited liability and have a special finding as to the value of the vessel. *Amos v. Delaware River Ferry Co.*, (1910) 228 Pa. St. 362, 77 Atl. 12.

**Stipulation as to proceeding in state court.**—A stipulation providing for a proceeding in a state court does not preclude the shipowner from proceeding in a federal court for limitation of liability, unless the stipulation so provides in unmistakable language. *The Hoffmans*, (1909) 171 Fed. 455.

**Effect of judgment in state court.**—An action at law was brought in a state court by a passenger against the owner of a vessel to recover damages resulting from a collision. After trial and a verdict in favor of plaintiff, and more than two years after the collision, the defendant instituted proceedings for limitation of liability in a court of admiralty, in which the plaintiff was enjoined from further prosecuting her suit in the state court. On appeal by her from an order denying a motion to dissolve the injunction, the Circuit Court of Appeals reversed such order, holding that under the facts, and by analogy to the practice in courts of equity and bankruptcy, the claimant should be permitted to prosecute her action to judgment for the purpose of liquidating her claim, "subject to the directions subsequently to be given by the District Court with reference to her sharing with other claimants as to any judgment which she may obtain." She subsequently recovered judgment in the state court for the amount of the verdict. It was held that, while the District Court was not absolutely bound by such judgment, it should be accepted as determining the amount of plaintiff's claim, unless the court was satisfied that it was excessive. *The City of Boston*, (1909) 182 Fed. 174.

**When only one claim.**—For a full discussion of the right to maintain a proceeding for limitation of liability when there is but one claim, and an extensive review of the authorities, see *The Hoffmans*, (1909) 171 Fed. 455.

The provision of the statute limiting a vessel owner's liability for damage done without his privity or knowledge to the value of his interest in the vessel and in her freight then pending, and Supreme Court admiralty rules 54 to 57, prescribing procedure to ascertain the value of such interest, etc., relate

to a claim or claims growing out of a particular act for which it is sought to hold the owner liable; and in the proceeding to limit the owner's liability, it is these claims only that are pertinent in the first instance, the ultimate disposition of the fund produced by the owner's interest being a matter for subsequent determination; and admiralty may refuse to exercise its jurisdiction to limit liability, where there is and can be only a single claim against a single owner, and when the appraised value of the vessel exceeds many times the sum already adjudged to be due claimant. *Delaware River Ferry Co. v. Amos*, (1910) 179 Fed. 758.

**Contesting liability of vessel.**—Where a petition in admiralty to limit the liability of a vessel and cargo for collision, as authorized by admiralty rules 54-57, failed to state the facts and circumstances by reason of which exemption from liability was claimed, as required by rule 56, the petition was sufficient to entitle petitioner to contest the question of fault on the part of its vessel. *The Sacramento*, (1904) 131 Fed. 373.

A petition for limitation of liability must allege the facts necessary to entitle the petitioner, under the statute, to the relief sought, and a damage claimant contesting the right must take issue by answer, which must be full and explicit and distinct to each separate article and separate allegation, as required by admiralty rule 27. The proof required in support of the petition that any liability incurred was without the privity or knowledge of the petitioner does not reach the subsequent issue of liability of the vessel for individual claims sought to be proved under rule 55, the right to contest which is reserved to the petitioner by rule 56, which issue should be presented by appropriate pleadings conforming to the general practice in admiralty, the claimant being required to allege and prove a cause of action as in an original suit. *In re Davidson Steamship Co.*, (1904) 133 Fed. 411.

**Issues on petition and answer.**—In a proceeding for limitation of liability the petition and answer on the one hand and the individual claims for damages on the other present distinct issues, which are to be separately adjudicated in the order named. *In re Davidson Steamship Co.*, (1904) 133 Fed. 411.

**Suits on claims against owners stayed.**—"It is now well settled that proceedings in a United States District Court, under admiralty rule 54 of the Supreme Court, secs. 4283-4285 R. S., Act Cong. June 26, 1884, ch. 121, 23 Stat. L. 53, and sec. 4289 R. S. as amended by Act June 19, 1886, ch. 421, sec. 4, 24 Stat. L. 80, to limit the liability of shipowners for loss or damage to personal goods, supersede all other actions or suits for the same damages in the state or national courts upon all matters properly presented therein, and in the nature of the case, where the jurisdiction of the District Court has attached, it is exclusive. *Black v. Southern Pac. R. Co.*, (1889) 39 Fed. 565; *Oregon R., etc., Co. v. Balfour*, (1898) 90 Fed. 295, 298, 33 C. C. A. 57, and authorities there cited;

Butler v. Boston, etc., Steamship Co., (1889) 130 U. S. 527, 9 S. Ct. 612, 32 U. S. (L. ed.) 1017." Dowdell v. U. S. District Ct., (C. C. A. 1905) 139 Fed. 444, 445.

**Enjoining actions on claims.** — "A court of admiralty, in which is pending a proceeding for the limitation of the liability of a shipowner, may enjoin the prosecution of suits in state courts against the shipowners. *In re Whitelaw*, (1896) 71 Fed. 733, and authorities there cited; *The Tolchester*, (1890) 42 Fed. 180, 185. And in proceedings of this character, which have been designated as 'equity proceedings in admiralty,' to prevent a multiplicity of suits, it has frequently been decided that the powers of an admiralty court are as extensive, and its remedies are as effective, as are those of a court of chancery when its jurisdiction is invoked in an equitable proceeding, and that all persons having claims, whether *in rem* or *in personam*, against a ship or its owners, can have their rights determined therein. This principle was clearly recognized by this court in *In re Pacific Mail Steamship Co.*, (1904) 130 U. S. 76, *supra*; *In re Meyer*, (1896) 74 Fed. 897; *The Annie Faxton*, (1896) 75 Fed. 312, 320, 21 C. C. A. 366." Dowdell v. U. S. District Ct., (C. C. A. 1905) 139 Fed. 444, 445.

Where there was only a single claimant against a vessel for death alleged to have resulted from negligence, and an action therefor has been brought against the owner in the state court, he is entitled to set up his limited liability as a defense in such court; and the fact that the extent of his liability has been determined in an *ex parte* proceeding in a federal court does not authorize an injunction restraining the claimant from the prosecution of his action in the state court to recover the amount of such limited liability. *The Lotta*, (1907) 150 Fed. 219.

**Effect of restraining order.** — A court of admiralty in which proceedings are instituted by a vessel owner for limitation of liability has exclusive jurisdiction to settle in such proceedings all claims arising out of the matters on which they are based, and an order made therein restraining all persons having claims from prosecuting suits thereon elsewhere is a bar to a subsequent suit on a claim in another court, although brought by an administrator who had not at that time been appointed. *Seese v. Monongahela River Consol. Coal, etc., Co.*, (1907) 155 Fed. 507.

**Interrogatories annexed to answer.** — Interrogatories annexed to an answer in a proceeding for limitation of liability, which are directed solely to the discovery of assets of the petitioner, are immaterial to the issues, and subject to exception. *In re Knickerbocker Steamboat Co.*, (1905) 136 Fed. 958.

**Necessary parties.** — On appointment of a commissioner to take proofs on a damage claim filed in a proceeding for limitation of liability by the owner of one of two vessels in collision, after an authoritative determination by the Circuit Court of Appeals that both vessels were in fault, the owner of the other vessel, if not a party, should be brought in by notice, being liable to contribution if

the claim is established and enforced. *The City of Boston*, (1909) 182 Fed. 171.

**Time for filing claims.** — In a proceeding in admiralty for a limitation of liability, the court has discretionary power to permit the filing of a claim for damages after the expiration of the time fixed in the monition, in a proper case, and such permission will be granted where the claim was forwarded by mail to the clerk on the last day of such time and received before any action was or could have been taken respecting such claims. *The City of Boston*, (1906) 159 Fed. 257.

**Reopening proceeding after final decree.** — Where proceedings in a court of admiralty by a shipowner, for limitation of liability, have been terminated, so far as the parties before the court are concerned, by a final decree, the court has no power to reopen the proceedings for the purpose of allowing other claimants, who have not appeared therein, to come into the case and prove their claims. If for any reason the decree is not binding on such claimants, their remedy is by an independent suit. *Dowdell v. U. S. District Ct.*, (C. C. A. 1905) 139 Fed. 444.

**Consolidation of proceedings.** — In *The City of Boston*, (1909) 182 Fed. 171, a motion to consolidate proceedings to limit the liability of each of two colliding vessels was denied. The court said: "Both these petitions, it is true, grow out of the same collision. The petitioner in this case is a damage claimant in the other. The total damage from the collision is now to be borne, one-half each, by the owners of the two vessels. Notwithstanding these facts, I am not clear that consolidation of the two cases should be ordered. No precedent for such consolidation of two petitions of this kind is found. I am not convinced that the advantages to be gained would outweigh the possible disadvantages. It seems to me that the rights of the parties can be secured as well by continuing the distinction between the two proceedings, and that no loss of time will necessarily be involved."

**Waiver of statutory limitation.** — The right to petition for limitation of liability is not waived by a provision in a bill of lading that the transportation shall be subject to certain specified conditions. *The Hoffmans*, (1909) 171 Fed. 455.

**Pleading limitation of liability.** — A petition for limitation of liability held sufficient to give the court jurisdiction as against a special plea. *In re Eastern Dredging Co.*, (1905) 138 Fed. 942.

**Answer to petition — specification of fault of vessel.** — In a proceeding by the owner of a vessel for limitation of liability, where the petition alleges generally freedom from fault on the part of claimant, he must allege and offer evidence to prove the same; and it is not sufficient merely to deny such allegation of the petition, but the answer should specify in what the fault consisted. *In re Starin*, (1909) 173 Fed. 721.

Claimants who pleaded as a defense to a petition for limitation of liability the negligence of petitioner, because of the unseaworthiness of the vessel, but failed to comply

with an order requiring them to specify the particulars, will not be permitted to give testimony as to such defense under a general denial, to controvert petitioner's *prima facie* case. *The John H. Starin*, (1909) 175 Fed. 527.

**"Privty or knowledge."**—A steamship company, which establishes rules and regulations requiring the masters of its vessels to maintain only the moderate speed required by the international rules in case of fog, and has not knowingly tolerated or encouraged the violation of such rules or neglected their enforcement, and which has exercised due care in securing officers of experience and ability, is not debarred from the right to a limitation of liability for damages caused by a collision for which its vessel was in fault by reason of maintaining excessive speed in a fog, on the ground that the collision occurred with its privty or knowledge. *La Bourgogne*, (C. C. A. 1907) 139 Fed. 433, *affirmed* (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

An owner who, after a general inspection, purchases a vessel from a shipbuilder of recognized standing and reputation, who equips her with machinery, means, and appliances which are suitable and sufficient, if properly used, may limit his liability for injuries to a stevedore, occasioned by the negligent use of such appliances by his employees. *The Harry Hudson Smith*, (C. C. A. 1905) 142 Fed. 724, *affirming* 136 Fed. 271.

The owner of a vessel whose cargo was injured by fire while the vessel was in dry dock by the owner's order under circumstances constituting a deviation cannot claim exemption from liability on the ground that the loss was without his "privty or knowledge." *The Indrapura*, (1909) 171 Fed. 929.

**When the owner is a corporation.**—In a suit by a corporation for limitation of liability as owner of a vessel for a loss due to unseaworthiness, the privty of libellant with its condition is measured by that of its managing officers. *Oregon Round Lumber Co. v. Portland, etc., Steamship Co.*, (1908) 162 Fed. 912.

Where a judgment was recovered in a state court against a corporation for the death of a person killed on a derrick scow owned by the defendant, by the breaking of a part of the derrick, the court finding that the part was obviously defective on inspection, but that no inspection or repair was made, that the derrick was being used at the time in the raising of a sunken vessel under the personal direction of the defendant's president, who was on board, and that the defendant was chargeable with negligence causing or contributing to the death, the corporation cannot maintain a petition for limitation of liability against such judgment on the ground that the injury was occasioned without its privty or knowledge, through the fault or negligence of the master of the scow. *The Capt. Jack*, (1909) 169 Fed. 455.

**Mere negligence.**—Mere negligence, of itself, does not necessarily establish the existence on the part of the owner of a vessel of "privty or knowledge," so as to preclude the

shipowners from limiting their liability. *Deslions v. La Compagnie Générale Transatlantique*, (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

**Negligence of agent.**—A shipowner, who has provided a suitable person as his agent to inspect or provide for the proper equipment of the vessel, is not deprived of the benefit of the statute limiting liability by proof of negligence of such agent in failing to provide such equipment or to maintain it in good condition of which the owner had no knowledge or notice. *The Tommy*, (C. C. A. 1907) 151 Fed. 570.

**Failure to furnish equipment.**—The owner of a barge is not entitled to a limitation of liability for the death of an employee engaged in discharging a cargo of rails, which resulted from the fact that the vessel lacked the necessary equipment for handling the rails and the master borrowed and used a set of tongs which were worn and unfit for use, although warned of their defective condition; it not appearing that such owner had delegated power to any competent person to provide the vessel with proper equipment to render her seaworthy for the service in which she was engaged. *The Tommy*, (1905) 142 Fed. 1034, *affirmed* (C. C. A. 1907) 151 Fed. 570.

**Failure to have survey made.**—A barge leased by libellant corporation to one of the respondents to be used in coaling a vessel in port, while being unloaded alongside the vessel capsized, and the cargo was lost and one person drowned. The immediate cause of the capsizing was the unusual quantity of water in the hold, which had come in during the latter part of the time she was being loaded. The evidence tended to show that she was loaded and was being unloaded in the usual and proper manner. She was an old vessel, and had been twice extensively overhauled and repaired, the last time some five years before. The superintendent and the manager of the libellant had both been through the hold only a few days previously, but without lights; and it did not appear that they made more than a casual examination, nor had she been surveyed by any one having skill, and there was evidence that some of her interior timbers were broken. It was held that the sinking was attributable to her unseaworthiness, which was not without the privty of libellant, and that it was not entitled to a limitation of liability. *Oregon Round Lumber Co. v. Portland, etc., Steamship Co.*, (1908) 162 Fed. 912. See also *Braker v. F. W. Jarvis Co.*, (1908) 166 Fed. 987.

**Negligence of watchman in permitting vessel to go adrift.**—Where the precautions taken by the petitioner to secure and care for the vessel were sufficient, and it appeared that none of its managing officers had knowledge of her going adrift or of the negligence of the watchman, it was not chargeable with privty or knowledge which precluded it from limiting its liability. *In re Eastern Dredging Co.*, (1906) 159 Fed. 541.

**Vessel going adrift in storm of unusual violence.**—A steamer owned by petitioners was placed by them on the beach, where she

had been for several weeks, and had been partially broken up and her machinery removed, when during a storm and high tide at night she floated, broke from her moorings, and drifted across the bay. She did not float at ordinary high tide, and lay in a hollow, with a bank between her and the sea. She was made fast by five hawsers, three of which parted, and the others slipped from their fastenings. A watchman was on board. The storm and height of the tide were extraordinary, and exceeded any that had been known for several years, and many other vessels dragged their anchors or broke from their moorings. The direction of the wind at high water was such as to force the vessel off shore, but in most storms occurring at that time of year the wind blows on shore. The court held (1) that there was no absence of reasonable care or skill on the part of petitioners, which would charge them with privity or knowledge, such as to prevent them from limiting their liability; and (2) that the breaking away of the steamer was due to inevitable accident or *vis major*, and she could not be held liable for injuries to other vessels into which she may have drifted. *The C. H. Northam*, (1909) 181 Fed. 986.

**Hearing and determination of question.** — In a proceeding by the owner of a vessel for limitation of liability on account of a collision, where an answer is filed by the owner of the other vessel setting up a claim for damages, the question of the knowledge or privity of the petitioner, though jurisdictional, and the question of liability for the collision, where both are put in issue by the pleadings and are to be determined largely upon the same evidence, may properly be heard at the same time as a matter of convenience, and the court is not required to hear and dispose of the jurisdictional question separately. *In re Eastern Dredging Co.*, (1906) 159 Fed. 541.

**Unseaworthiness of vessel — Proper equipment in general.** — "The right of a shipowner to limit its liability is dependent upon his want of complicity in the acts causing the disaster, and the burden of proof rests upon him to show affirmatively that he has properly officered and equipped the vessel for the contemplated service." *McGill v. Michigan Steamship Co.*, (C. C. A. 1906) 144 Fed. 788, 795, reversing (1904) 133 Fed. 577. *Certiorari denied* (1906) 203 U. S. 593, 27 S. Ct. 782, 51 U. S. (L. ed.) 332.

**Failure to comply with inspection laws.** — "It is well settled that the owner of a vessel is not entitled to limit his liability arising from the unseaworthiness of a vessel. If the libellant was ignorant of the condition of the vessel, it was because of a negligent examination, as in *The Republic*, (1894) 61 Fed. 109." *Braker v. F. W. Jarvis Co.*, (1908) 166 Fed. 987, 988.

**Failure of owner's agent to ascertain condition.** — A contention on the part of the respondent company that its liability should be limited to the value of the boats, not sustained because the responsible agent of the company neglected to avail himself of an opportunity to ascertain the condition of the

boats. *Sanbern v. Wright, etc.*, *Lighterage Co.*, (1909) 171 Fed. 449, affirmed (1910) 179 Fed. 1021.

**Loss of vessel at sea by striking submerged obstruction.** — Evidence considered, and held to entitle the owner of the Danish steamship *Norge* to a limitation of liability on account of her loss at sea while on a voyage from Copenhagen to New York, through striking a derelict or unknown obstruction under the surface of the water to the southward of Rockall Rock, by which she was so injured that she sank in twenty minutes, and a number of persons lost their lives; it being shown that she was seaworthy and properly manned and equipped, that she was on an approved route with a lookout properly stationed, and that there was no fault or negligence in her management. Claims made by representatives of persons who lost their lives by the disaster also dismissed. *The Norge*, (1907) 156 Fed. 845.

**Cases of personal injury and death.** — This section applies to cases of personal injury and death as well as to cases of loss of or injury to property. *The Southside*, (1907) 155 Fed. 364.

**Passenger falling on gangplank.** — Conflicting evidence considered, and held insufficient to sustain the burden resting upon a passenger to prove, in a proceeding for limitation of liability, that the injury for which she claimed damages, and which resulted from her falling while passing over the gangplank of petitioner's barge, was due to the wet and unfit condition of such gangplank. *In re Starin*, (1906) 151 Fed. 274.

**Loss arising from a collision — Both vessels having same ownership.** — Where, after collision, the corporation owning both boats filed a petition to limit its liability with reference to the boat lost only, and did not offer to surrender the colliding boat, an interlocutory decree that the owner of the boat lost was entitled to limit its liability to the appraised value of such boat with its freight pending was no bar to libellant's subsequent action against the owner for damages for the death of a passenger in such collision, in which it was held that both boats were at fault, though libellant had appeared and presented a claim for such damages in the limitation proceeding. *Hall v. North Pac. Coast R. Co.*, (1904) 134 Fed. 309.

**Measure of owner's liability.** — See *infra*, section 4285.

In a proceeding for limitation of liability arising out of an accident which occurred more than two years before the proceeding, in appraising the value of the vessel at the time of the accident, deductions from her present value on account of additions made since the accident should also be made at their present value, and not at their cost. *The Captain Jack*, (1908) 162 Fed. 808.

**Hoisting apparatus as part of vessel.** — A traveling steam hoist or derrick, mounted on a fuel scow specially designed to be used with such a hoist, and from which, although removable, it had been removed but once in fourteen years, is a part of the vessel, within the meaning of the limitation of liability



statute. *The Buffalo*, (C. C. A. 1907) 154 Fed. 815, *affirming* (1906) 148 Fed. 331.

*Tug and scow used together.*—Where a contractor for raising a sunken vessel employed in the work an outfit which it owned, consisting of a scow on which was mounted a derrick, and a tug to supply motive power, in order to maintain a petition for limitation of liability for the killing of a person by the breaking of a part of the derrick during the work the contractor was required to surrender the entire outfit, including the tug. *The Capt. Jack*, (1909) 160 Fed. 455.

*Dismantled ship.*—Where a vessel, at the time of the commission of injuries for which her owners seek limitation of liability, had been so far dismantled as to have no market value as a vessel, for the purpose of fixing the amount of the stipulation to be given by petitioners, the net value of the materials in her after she is broken up may properly be taken; but in such computation the value of a dummy engine placed on board for use in removing her machinery, and which was no part of her equipment, should be excluded. *The C. H. Northam*, (1909) 181 Fed. 985.

*"Freight then pending."*—By the terms "freight pending" and "freight for the voyage," as used in this section, is meant the earnings of the voyage, whether for the carriage of passengers or merchandise, and where passage or freight money is prepaid under contracts by which it becomes the absolute property of the shipowner whether the voyage is completed or not, it must be regarded as earned, although the vessel is lost, and must be surrendered by the owner to entitle him to a limitation of liability under the statute for claims growing out of such loss. *La Bourgogne*, (C. C. A. 1905) 139 Fed. 433, *affirmed* (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

*"Pending" freight* is limited to that due to or to be earned by the particular vessel through whose fault the loss occurred, and the fact that goods when lost or injured were being transported under through bills of lading on different vessels of the same owner does not require a surrender of the freight earned by a different vessel in the course of such shipment. *Ralli v. New York, etc., Steamship Co.*, (C. C. A. 1907) 154 Fed. 286.

*Vessel sunk before completion of loading.*—Where a lighter sank at a pier while being loaded, injuring a large part of her cargo, the fact that the uninjured cargo was then transferred by her owner to another vessel, and that such lighter did not deliver any part of it, does not relieve the owner in proceedings for limitation of his liability from the necessity of surrendering as "pending freight" the freight which she would have

earned if she had carried the cargo. *Ralli v. New York, etc., Steamship Co.*, (C. C. A. 1907) 154 Fed. 286.

*Earnings in wrecking service.*—Where, at the time of an injury which gave rise to proceedings for limitation of liability, the vessel surrendered was employed in raising a sunken vessel under a contract by which the petitioner received a stated sum for the service, such sum may properly be considered as "freight pending" within the meaning of the statute, which must also be surrendered, and no deduction can be made therefrom on account of other vessels or appliances also used in the service, but which the petitioner did not surrender. *The Captain Jack*, (1908) 162 Fed. 808.

*Interest and costs.*—Where a damage claimant, in proceedings by a vessel owner for limitation of liability on account of a collision, had instituted an action in a state court, and obtained a verdict therein before the commencement of the limitation proceedings, on which she was subsequently permitted to take judgment, and which was accepted by the court of admiralty as a liquidation of her claim, she was also entitled to interest on the amount of the verdict from the time of its rendition. *The City of Boston*, (1909) 182 Fed. 174.

*Scope of proceeding—claims provable.*—In a proceeding by a vessel owner for limitation of liability growing out of the sinking of the vessel in a collision, although she is exonerated from fault for the collision, a claim for injury to a passenger resulting from the alleged negligence of the vessel after the collision is within the scope of the proceedings and may be proved therein. *The City of Boston*, (1907) 159 Fed. 261.

*Effect of decision—adjudication as to fault in collision case.*—Where the question of fault for a collision between two vessels was determined in a proceeding by the owner of one of the vessels for a limitation of liability, in which proceeding all damage claimants were cited to appear and had the opportunity to be heard, the decision on such question is conclusive on such a claimant although he did not appear. *The City of Boston*, (1907) 159 Fed. 261.

*Appeals.*—A decree in admiralty in proceedings for limitation of liability adjudging the rights of the parties and referring the cause to a commissioner to take testimony on claims for damages is reviewable on an appeal taken after the entry of a final decree on the commissioner's report, although the time for taking an appeal from the first decree had expired, such decree being in its nature interlocutory. *La Bourgogne*, (C. C. A. 1905) 139 Fed. 433, *affirmed* (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

## Vol. IV, p. 849, sec. 4284.

This section was not repealed by the Hepburn Act (Act Feb. 4, 1887, ch. 104, 24 Stat. L. 379, 3 Fed. Stat. Annot. 809). *The Hoffmans*, (1909) 171 Fed. 455.

*"Appropriate proceedings."*—In construing the phrase "appropriate proceedings," as

used in this section, Seaman, J., said: "With no precedents interpreting the rules as to the practice upon such issue [liability of the vessel], I am of opinion that they [the provisions of the statute] intend the appropriate judicial hearing of the contro-

versy over liability, with the issues presented upon distinct allegations of fact for and against the claim; that claimant must state, as the fundamental requisite of apportionment and recovery for damages arising out of the collision, a *prima facie* case of liability on the part of the petitioner's vessel, such liability being expressly reserved for contest; and that the petitioner becomes respondent in respect of such issue, and may either answer the claimant's allegations by counter statement of facts, consistent with the petition, or have the averments of the petition thereupon adopted for the purpose of the issue. Unless the rules intend that the fact of collision, followed by the petition to limit liability, creates a presumption of liability which the petitioner must overcome, the contention is untenable that the claimant may rest its claim upon specification of damages sustained and averment that the injuries occurred without fault on its part. Such departure from the general doctrine cannot be upheld under my understanding of the letter or spirit of the rules." *In re Davidson Steamship Co.*, (1904) 133 Fed. 411, 413.

"**Freight for the voyage.**"—In proceedings by a French steamship company for limitation of liability for claims arising out of the sinking of one of its ships while on a voyage from New York to Havre, the "freight for the voyage" which the petitioner is required by the statute to surrender cannot be construed to include any part of an annual subsidy paid to the company by the French government, in consideration for which the company agreed to build and maintain a weekly

steamship service between Havre and New York, the vessels to be built in France and to be of a character, size, speed, and equipment specified, and subject to the use of the government in case of war or other extraordinary political circumstances, and to transport gratuitously all mails and specie for the use of the state. In such case it is impossible to determine what part of subsidy is to be considered as compensation to any single vessel for transportation of the mails on a single trip. *La Bourgogne*, (C. C. A. 1905) 139 Fed. 433, *affirmed* (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

"**Voyage**" defined.—The earnings of the voyage which a shipowner is required by the statute to surrender in order to obtain a limitation of liability for losses occurring on such voyage are those only of the particular voyage which exposed the passengers or property to risk; and where a steamship was engaged in making regular trips across the Atlantic from Havre to New York and return, discharging her passengers and cargo at each terminal port, each of the trips between such ports constitutes a voyage, within the meaning of the statute, and in proceedings for limitation of liability for claims arising out of the sinking of the ship in collision while on her way from New York to Havre the owner is not required to surrender the earnings of the preceding trip from Havre to New York. *La Bourgogne*, (C. C. A. 1905) 139 Fed. 433, *affirming* (1902) 117 Fed. 264, *affirmed* (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

## Vol. IV, p. 850, sec. 4285.

See *supra*, p. 1466, under section 4283, *Measure of owner's liability*.

This section was not repealed by the Hepburn Act (Act Feb. 4, 1887, ch. 104, 24 Stat. L. 379, 3 Fed. Stat. Annot. 809). The Hoffmans, (1909) 171 Fed. 455.

**Injury by mutual fault of vessels owned by defendant.**—The purpose of proceedings for limitation of liability for a collision is to exempt the petitioner from all personal liability on account of the collision, on whatever ground it may rest; and where the petition is for the limitation of liability as owner of a vessel sunk, but it is found on the hearing, on appropriate allegations in the answer, that petitioner was also owner of the other vessel concerned, and that both were in fault for the collision, it is a condition precedent to the granting of the relief sought that both vessels and their pending freight be surrendered. *The San Rafael*, (C. C. A. 1905) 141 Fed. 270, *reversing* (1904) 134 Fed. 749, *certiorari denied* (1906) 200 U. S. 619, 26 S. Ct. 756, 50 U. S. (L. ed.) 623.

## Vol. IV, p. 851, sec. 4286.

This section was not repealed by the Hepburn Act (Act Feb. 4, 1887, ch. 104, 24 Stat. L. 379, 3 Fed. Stat. Annot. 809). The Hoffmans, (1909) 171 Fed. 455.

**Option to surrender vessel or to pay appraised value.**—This section and section 4283 clearly give the owner of any vessel the right to personal exemption from liability for any damage occasioned by such vessel without his privity or knowledge by transferring her and her pending freight to a trustee to be appointed by a court of admiralty, and although admiralty rule 54, prescribing the procedure under said sections, permits him at his option to retain the vessel by having her appraised and paying her appraised value and pending freight into court or giving a stipulation therefor, he still has the right before an appraisal made on his petition has been accepted, or any order has been made thereon, to dismiss that part of his petition, and, instead, to ask for the appointment of a trustee to whom he may transfer the vessel and her freight. *Ohio Transp. Co. v. Davidson Steamship Co.*, (C. C. A. 1906) 148 Fed. 185, *certiorari denied* 203 U. S. 593, 27 S. Ct. 782, 51 U. S. (L. ed.) 334.

**Control of vessel.**—Where a charter-party transfers to the charterer the entire command, possession, and control of the vessel, the charterer is owner for the service stipu-

lated for; but where a charter-party is merely an agreement for the use of the vessel, the general owner at the same time retaining command, possession, and control over her navigation, the charterer is a contractor for

the specific service, and the responsibilities of the owner are not changed. *Grimberg v. Columbia Packers' Assoc.*, (1905) 47 Ore. 257, 83 Pac. 194.

### Vol. IV, p. 851, sec. 4287.

This section was not repealed by the Hepburn Act (Act Feb. 4, 1887, ch. 104, 24 Stat. L. 379, 3 Fed. Stat. Annot. 809). *The Hoffmans*, (1909) 171 Fed. 455.

### Vol. IV, p. 852, sec. 4289.

This section was not repealed by the Hepburn Act (Act Feb. 4, 1887, ch. 104, 24 Stat. L. 379, 3 Fed. Stat. Annot. 809). *The Hoffmans*, (1909) 171 Fed. 455.

**Ferry boats.**—A New York corporation operating a ferry for the carriage of passengers across the East river between Manhattan and Brooklyn held entitled to a limitation of its liability for the death of a passenger to the value of the boat on which he was such passenger and its freight. *The Southside*, (1907) 155 Fed. 364.

**Mud scows.**—A scow 110 feet long, employed in carrying mud in Boston harbor and adjacent waters, or other waters subject to the jurisdiction of admiralty courts, is a "vessel" for the purposes of admiralty jurisdiction and the maritime law, and her

owner may maintain proceedings for limitation of liability on account of collision. *In re Eastern Dredging Co.*, (1905) 138 Fed. 942.

**Ship taken ashore to be dismantled.**—A steamer, which had been taken on shore by her owners for the purpose of being dismantled, and from which the masts and engines had been removed, so long as the dismantling process had not proceeded so far as to render her wholly incapable of being navigated as a tow or otherwise, continued to be a "vessel" within the meaning of this section, and her owners could maintain proceedings for a limitation of liability for damage done by her, where she floated and went adrift in a storm without their knowledge. *The C. H. Northam*, (1909) 181 Fed. 983.

### Vol. IV, p. 852, sec. 18.

**Direct personal contracts.**—This section is to be construed in connection with the Limited Liability Act of 1851 (R. S. sec. 4283, 4 Fed. Stat. Annot. 839), and does not apply to personal contracts, so as to exempt a part owner from full liability for supplies purchased by his authority, or with his knowledge and consent. *Rudolf v. Brown*, (1905) 137 Fed. 106; *Great Lakes Towing Co. v. Mill Transp. Co.*, (C. C. A. 1907) 155 Fed. 11; *O. S. Richardson Fueling Co. v. Seymour*, (1908) 235 Ill. 319, 85 N. E. 496.

*In Great Lakes Towing Co. v. Mill Transp. Co.*, (C. C. A. 1907) 155 Fed. 11, a towing company entered into a contract with the managing agent of petitioner, which was the

owner of certain vessels on the Great Lakes, by which it agreed to perform all towing and wrecking service required by such vessels during the season at certain stated prices. One of petitioner's vessels having stranded, the towing company was called on pursuant to said contract, and sent a tug with wrecking apparatus to the assistance of such vessel, where it spent several days in pumping and attempting to get her afloat, but unsuccessfully, and she was lost. It was held that the petitioner was not entitled to a limitation of liability for the services so rendered by the towing company under its contract, to the value of the salvage recovered from the wreck.

### Vol. IV, p. 854, sec. 1.

**Construction in favor of validity of exemption.**—Exemptions contained in bills of lading are never construed to cover the negligence or default of the carrier unless that is expressly stipulated for. *The Toronto*, (C. C. A. 1909) 174 Fed. 634, *affirming* (1908) 168 Fed. 386.

**Vessels plying between domestic ports.**—This section applies to any shipment "from ports of the United States," whether to a foreign or domestic port, and is broad enough to render void a clause of a bill of lading by which the shipper waives any lien upon the vessel for any breach thereof, where it is attempted to set up such clause as a defense to a libel *in rem* to recover for loss or dam-

age to cargo arising from negligence of the carrier. *The Tampico*, (1907) 161 Fed. 689.

**Private carriers.**—Under a contract between a lighterage company and a manufacturer, by which the company agreed to transport property of the manufacturer in New York harbor and vicinity, and for such purposes furnished it the full capacity of lighters or barges when such transportation was required, as between the parties the company was a private and not a public carrier, and a provision of the contract, by which in consideration of the making of a lower rate the shipper agreed to exempt the carrier from liability for loss or injury to cargoes from

negligence, is not within the statute, but is valid and enforceable. *The Maine*, (1903) 161 Fed. 401.

**Exemption authorized by foreign law.**—A provision in a contract of affreightment exempting a carrier by sea from liability for loss of or damage to cargo "occasioned by negligence, default, or error of judgment of the pilot, master, or mariners," may be enforced in a court of the United States where the contract was made in a country by whose laws such stipulation was legal and no part of it was to be performed in the United States, and where it related to the transportation of property on a foreign vessel on a voyage which did not include a port of the United States. *The Fri*, (C. C. A. 1907) 154 Fed. 333, *reversing* (1905) 140 Fed. 123, *certiorari denied* (1908) 210 U. S. 431, 28 S. Ct. 761, 52 U. S. (L. ed.) 1135.

**Limitation of value of package.**—It is competent for a steamship company as a carrier of goods to limit its liability in case of loss, even as against its own negligence, by a provision in the bills of lading that it is "not accountable for any sum exceeding \$100 per package for goods of whatever description, . . . unless the value of such be herein expressed and freight as may be agreed paid thereon," where such valuation is the basis on which freight is charged and was fully known to the shipper. *Hohl v. Norddeutscher Lloyd*, (C. C. A. 1910) 175 Fed. 544.

**Negligence in stowage.**—Where stevedores, in loading a cargo of licorice root under the direction and control of the master, broke open a large number of the bales and stowed the root in unusual places, where it received injury, it was held that a notation, placed on the bill of lading at the insistence of the master, stating that the ship was not responsible for broken or cut bales, was void as the insertion in the bill of lading of a clause relieving the ship from liability for damages "arising from negligence, fault, or failure in proper loading stowage," within the meaning of the Act. *Bethel v. Mellor, etc., Co.*, (1904) 131 Fed. 129.

Where, during the unloading of a barge in the usual manner, which caused an uneven keel for a few hours, she sprang a leak, and the remaining cargo was damaged by water, such damage was not caused by fault or error in the management of the vessel, but from negligence, fault, or failure in proper loading for which the vessel is liable. *Donaldson v. J. W. Perry Co.*, (C. C. A. 1905) 138 Fed. 643.

During the voyage of a steamship across the Atlantic burlap bags containing walnuts, stowed with other cargo in the hold, which was without partitions, were torn, apparently by wooden cases containing other cargo which were thrown around by the pitching of the vessel, and the walnuts were lost or damaged. The voyage was rough, but no more so than should reasonably have been anticipated at the season. It was held that the loss was not due to perils of the sea, within the exceptions in the bills of lading, but to negligent stowage, for which the vessel was liable; due care requiring that the bags should have

been kept separate from the other cargo which was likely to injure them. *The Trignac*, (1909) 169 Fed. 682.

A steamship held liable for damage to a cargo of olives shipped in casks, on the ground of negligent stowage, on evidence showing that cargo of such weight was stowed on top of the casks as to flatten the staves of some, causing the brine to leak out, and consequent damage to the olives. *The Soyo Maru*, (C. C. A. 1910) 178 Fed. 921.

A ship is responsible for proper stowage of her cargo, although the charter-party gave a representative of the charterer the right to select the stevedores for loading, which fact did not deprive the master of his authority to control the manner of stowage, nor affect the warranty of seaworthiness, which includes proper stowage. *Knorr v. Pacific Creosoting Co.*, (1910) 181 Fed. 856.

**Excessive leakage of oil.**—The mere fact that a large quantity of cocoanut oil had leaked from the casks during the voyage does not show improper stowage. *The Oceana*, (1909) 171 Fed. 172; *The Neidenfels*, (1909) 174 Fed. 293.

**Employment of charterer's stevedores.**—A provision of a charter-party that the master shall employ the charterer's stevedores at ports of loading, and discharge and pay them stated compensation, "the stevedores to be wholly under the direction and control of the master," does not affect the liability of the ship or owners for improper stowage. *Bethel v. Mellor, etc., Co.*, (1904) 131 Fed. 129.

**Hasty and inconsiderate unloading.**—Damage to cargo from the sinking of a ship after arriving in port, due to hurried and imprudent unloading, which brought the centre of gravity of the ship too high for safety, does not result from "faults or errors in navigation or in the management of said vessel," but arises from "negligence, fault, or failure in proper loading, storage, custody, care, or proper delivery" of merchandise. *The Germanic*, (1905) 196 U. S. 589, 25 S. Ct. 317, 49 U. S. (L. ed.) 610, *affirming* (C. C. A. 1903) 124 Fed. 1.

**Cargo stowed without dunnage.**—A vessel is liable for damage to a cargo of coffee resulting from its having been by the master's orders stowed on the bottom of a hold without dunnage, and from a leaky water tank. *Dowgate Steamship Co. v. Arbuckle*, (1907) 158 Fed. 179.

**Proper care of cargo.**—The action of the master of a vessel in permitting whale oil, which leaked from barrels, to remain in the bilges, with the object of saving it at the end of the voyage, did not pertain to the "management of the vessel;" but injury to other cargo from such oil arose from "failure in proper care of the cargo." *The Persiana*, (C. C. A. 1911) 185 Fed. 396, *reversing* (1907) 156 Fed. 1019.

**Loss by thieves.**—An exemption in a bill of lading of liability for loss of cargo by theft does not relieve the vessel, where there was negligence on her part which contributed to or facilitated the theft. *The Ghazee*, (C. C. A. 1909) 172 Fed. 368. See also *The Seneca*, (1908) 163 Fed. 591.

**Grounding of vessel while loading.**—A provision of a contract for the carriage of a cargo of flour on a barge by which the shipper assumed the risks of carriage did not relieve the barge owner from liability for a loss of flour by reason of its negligence or that of its agent in failing to properly care for the barge while being loaded. *Stockton Milling Co. v. California Nav., etc., Co.*, (1908) 165 Fed. 356.

**Shortage in weight.**—A ship is relieved from liability for a shortage in weight of a shipment of vegetable fibre in bales under a bill of lading containing the clause, "Not responsible for weight, nor quality, nor for loose bales," where it shows that all the bales shipped were delivered. *The La Kroma*, (1905) 138 Fed. 936.

**Evidence.**—In an action to recover for damage to cargo from leakage of the vessel, evidence that directions as to the manner of

loading were given the agents of the vessel by libellant, which directions were not followed, was competent. *Donaldson v. J. W. Perry Co.*, (C. C. A. 1905) 138 Fed. 643.

**Stipulation limiting time for making claim.**—A stipulation in a bill of lading for goods carried by ship, that all claims for damages against the steamship company or its stockholders must be presented within thirty days, applies to a libel against the ship itself, as well as to claims in *personam* against the owners, and such stipulation is not unreasonable as applied to a loss which was known to the consignors more than three weeks before the expiration of the stipulated time, since the enforcement of the stipulation in such a case would not work a manifest injustice. *The Queen of the Pacific*, (1901) 180 U. S. 49, 21 S. Ct. 278, 45 U. S. (L. ed.) 419, *reversing* (C. C. A. 1899) 94 Fed. 180. See also *The Niceto*, (1905) 134 Fed. 655.

## Vol. IV, p. 856, sec. 2.

**Does the Act apply to passengers and baggage?**—A notice or memorandum printed on the back of a steamship ticket purporting to limit the liability of the carrier for loss of baggage, not referred to in the body of the ticket nor called to the attention of the purchaser, is simply a notice, and forms no part of the contract. *La Bourgogne*, (C. C. A. 1906) 144 Fed. 781, *affirmed* (1908) 210 U. S. 95, 28 S. Ct. 864, 52 U. S. (L. ed.) 973.

**Application to charter-party.**—The provision of this section relates to contracts between carrier and shipper, and does not ap-

ply to a charter-party by which a ship is demised. *Golar Steamship Co. v. Tweedie Trading Co.*, (1906) 146 Fed. 563.

**Leakage of sea water through valve.**—A ship cannot by bill of lading exempt herself from liability for damage to cargo from sea water, as a peril of the seas, where such water entered because of the obstruction of a valve, due to the failure to exercise due diligence in the equipment of the ship at the beginning of the voyage. *The Brilliant*, (1905) 138 Fed. 743, *affirmed* (C. C. A. 1908) 159 Fed. 1022.

## Vol. IV, p. 857, sec. 3.

### IN GENERAL.

**The purpose of the Act is, according to the interpretation given to it by the Supreme Court, to enable the owner to stipulate in contravention of the implied warranty, providing he has used due diligence, proper care, and reasonable foresight to make his vessel in all respects seaworthy and fit for the voyage undertaken.** *The Indrapura*, (1910) 178 Fed. 593.

**Prospective operation.**—Stipulations in a bill of lading exempting the vessel from liability for loss or injury to cargo are to be construed as operating prospectively, and not as relieving her from liability for unseaworthiness at the beginning of the voyage, unless so expressed in clear and explicit language. *The Indrapura*, (1910) 178 Fed. 591.

**Foreign vessels.**—The third section of the Harter Act (27 Stat. L. 445), which is expressly applicable to "any vessel transporting merchandise or property to or from any port of the United States," includes a foreign vessel carrying cargo from a foreign to an American port. *The Chattahoochee*, (1899) 173 U. S. 540, 19 S. Ct. 491, 43 U. S. (L. ed.) 801, *affirming* (C. C. A. 1896) 74 Fed. 899, (1905) 196 U. S. 589, 25 S. Ct. 317, 49 U. S. (L. ed.) 610, *affirming* (C. C. A. 1903) 124 Fed. 1,

**Loss of goods in loading—delivery to vessel in open sea.**—Where, in loading a cargo of mahogany logs, the ship was obliged to lie three miles off shore in the open sea, the logs being delivered in rafts, which were made fast to the ship, and bills of lading then given for the same, the vessel is not liable for logs which broke away from the rafts and were lost before they were loaded, when reasonable diligence was exercised in the loading, and the loss arose either from unusual weather conditions, making a case of perils of the sea within the exceptions in the bills of lading, or because they were insufficiently secured in the rafts through the negligence of the shipper. *Munson Steamship Line v. Steiger*, (C. C. A. 1905) 136 Fed. 772.

**Collision.**—In a case of collision by mutual fault, resulting in the total loss of one vessel and her cargo, the provision of the statute which exempts the owner of a seaworthy vessel from responsibility for loss of or damage to cargo occurring through faults or errors of navigation or management, does not prevent the other vessel, which alone is sued by the cargo owners for the full amount of their loss, from recouping one-half the amount awarded from the half damages awarded to the owners of the lost vessel,

The Chattahoochee, (1899) 173 U. S. 540, 19 S. Ct. 491, 43 U. S. (L. ed.) 801, *affirming* (C. C. A. 1896) 74 Fed. 899.

**Personal injuries.**—The liability of a ship for personal injuries to passengers and members of the crew is not within the provision of the Act. The Hamilton, (1907) 207 U. S. 398, 28 S. Ct. 133, 52 U. S. (L. ed.) 264.

**Reduction in freight.**—Where a cargo owner is allowed as damages against the vessel for loss of cargo its full value at the port of delivery, he is not entitled to a reduction in freight on account of the loss. Carolina Portland Cement Co. v. Anderson, (C. C. A. 1911) 186 Fed. 145.

**"Inherent defect, quality, or vice of thing carried."**—See *infra*, p. 1474, *Injury Due to Stopping for Repairs*. A canal boat brought a cargo of hay from Quebec to New York, where it arrived in good condition. It was loaded by the consignor, and was to be unloaded by libelants, who had become owners of the bills of lading. On arriving in New York the boat and cargo were seized by libelants under process from the state court in a suit against the consignor, and held on demurrage for some thirty days, when the suit was dismissed, and the cargo was unloaded. During such time the weather was damp, and the hay in the hold became musty. The vessel was seaworthy, having no more leakage than was usual in that class of boats, and it was held that the injury arose from an "inherent defect, quality, or vice of the thing carried." The M. C. Currie, (1904) 132 Fed. 125.

**Damage to a cargo of sugar shipped in bags from a Cuban port to New York held to have been due to the sweating of the cargo and ship, for which the vessel was not liable, and not to any lack of care in stowing.** The Niceto, (1905) 134 Fed. 655.

A loss through leakage of wood oil shipped from China to New York in ordinary barrels held not to have been due to improper stowage but to the insufficiency of the packages, for which the carrier was not liable under the terms of the bill of lading, it being shown that such oil has a tendency to shrink the barrels and cause leakage unless they are specially prepared. The Claverburn, (1906) 147 Fed. 850.

**"Dangers of the sea."**—If the jettison of cargo or damage thereto is rendered necessary by or is due to any fault or breach of contract on the part of the owner or master of the vessel, the loss must be attributed to that cause, rather than to the sea peril, although that may enter into the case. Corsar v. J. D. Spreckels, etc., Co., (C. C. A. 1905) 141 Fed. 260.

**Damage to cargo caused by sea water which entered through a hatch during a voyage across the Atlantic by a new steamer held not due to the unseaworthiness of the vessel or any defect in the hatch covers, but to perils of the sea, for which the vessel and owners were not liable under the bill of lading; it being shown that the tarpaulin hatch covers were new and sufficient and properly secured, but that the one above libelant's goods was injured by a cut through the breaking loose of a derrick at night during a very**

severe storm. Gough v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft, (1907) 158 Fed. 174.

A shipowner is not exonerated from liability for a failure to deliver cargo on the ground that it was lost through perils of the sea, where it was stowed on the deck, and there is no proof that the place or manner of stowage was sanctioned by general usage, or that they did not contribute to the loss. The Gualala, (C. C. A. 1910) 178 Fed. 402.

The fact alone that damage to cargo was caused by sea water, without any evidence as to how the water entered the ship, is not sufficient to relieve the vessel from liability on the ground that the damage resulted from sea perils within an exception in the bill of lading, nor is it sufficient to show, in addition, that the ship encountered stormy weather on the voyage, which was no worse than should have been anticipated. The Medea, (C. C. A. 1910) 179 Fed. 781, *reversing* (1909) 173 Fed. 498.

**Straining due to unusually heavy seas.**—Where it is shown that a wooden vessel was seaworthy at the inception of her voyage, that the cargo was properly stowed and protected, that she was properly provided with pumps and the same were properly worked, that her hatches were properly secured, and that she encountered on her voyage heavy seas of unusual violence adequate to strain her seams and cause her to take in an unusual quantity of water, damage to her cargo therefrom, which it is not shown could have been avoided by the exercise of ordinary skill and care, is within the exception of "dangers of the sea" in the bill of lading, for which she is not liable. Cook v. Southeastern Lime, etc., Co., (1906) 146 Fed. 101.

**Rolling and pitching of vessel.**—A quantity of arsenic was stowed in the same hold with olive oil, but where the slant of the deck was downward from the arsenic toward the oil, and with a dunnage of about four inches. It was shown that the method of stowing the arsenic was usual, and that there was apparently no danger to it under ordinary circumstances. It was also shown that the voyage across the Atlantic was very rough, and that the vessel rolled and pitched to an unusual extent, and when she arrived at New York some of the arsenic was found to have been injured from leakage of the oil. It was held that under such evidence the damage must be attributed to perils of the sea, for which the vessel was not liable. The Langfond, (1906) 143 Fed. 150.

**Liability for deviation.**—Deviation is a term of art, belonging in the main to the law of marine insurance and to be interpreted by that law; but the rule as to deviation is applicable to a shipper as well as to an insurer, and any deviation from the course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding from one voyage terminus to the other will cast subsequent loss of or injury to either ship or cargo on the shipowner, without any reference to the question whether it had any bearing on the particular

loss complained of. *The Citta Di Messina*, (1909) 169 Fed. 472.

Delay of a vessel, even on the route prescribed by a policy or bill of lading, may amount to deviation. *The Citta Di Messina*, (1909) 169 Fed. 472.

**General average.**—Although the Act relieves a shipowner from liability for the negligence of his servants in the navigation and management of the vessel, it does not, either expressly or by implication, render valid a contract which entitles him to share in a general average made necessary by such negligence, and a stipulation therefor in a bill of lading is void. *New York, etc., Mail Steamship Co. v. Ansonia Clock Co.*, (1905) 139 Fed. 894.

Where the owner of a vessel has conformed to the provisions of the Act by exercising due diligence to make his vessel seaworthy and properly manned, equipped, and supplied, although she was stranded through a fault in navigation, he is entitled to have expenditures made by him for salvage of the vessel and cargo taken into a general average adjustment in a suit brought by cargo owners to enforce a general average contribution from the vessel on account of cargo jettisoned for his protection against liability, although not

entitled to an affirmative decree for the recovery of any balance due him on such adjustment. *The Jason*, (C. C. A. 1910) 178 Fed. 414, *affirming* (1908) 162 Fed. 56.

This section is not to be construed so broadly as to entitle a vessel owner to collect a general average contribution from the cargo owners on account of expenditures incurred for the salvage of vessel and cargo after stranding through faults and negligence in navigation, and a provision in the bills of lading giving it such right is invalid. *The Jason*, (C. C. A. 1910) 178 Fed. 414, *affirming* (1908) 162 Fed. 56.

**Costs.**—In a proceeding for limitation of liability, where there is an appraisal, and a stipulation for value given, the petitioner is entitled to a single docket fee, and may deduct from the fund the expenses of administration, but this may not include the cost of procuring the stipulation, nor the expense of giving the same, nor of the appraisal; each person claiming damages, and recovering the same, is entitled to a separate proctor's fee, payable herein by the stipulators for costs, and not out of the fund. *In re Excelsior Coal Co.*, (1905) 136 Fed. 271, *affirmed* (C. C. A.) 142 Fed. 724.

### PROPERLY MANNED AND EQUIPPED.

**Failure to maintain watch at night on vessel at pier.**—Where the owner of a vessel, while in her home port, permitted all of her crew to leave for the night, except the fireman, cook, and a deck hand, and permitted them to sleep without maintaining a proper watch, and the fires to be banked so that no

steam was available to work the pumps in case of an emergency, he was guilty of negligence, rendering the vessel liable for loss of cargo by the sinking of the vessel from injuries caused by an ice jam. *The Valentina*, (1904) 131 Fed. 352.

### SEAWORTHY VESSEL.

**In general.**—Due diligence to make a vessel in all respects seaworthy within the meaning of this section is not required merely on the part of the owner himself, nor in respect to construction only, but it is also required on the part of those to whom the owner has intrusted the duty, and in respect to inspection, maintenance, and repair, as well as construction. *The Ninfa*, (1907) 156 Fed. 512.

**Private carrier.**—The obligation to furnish a seaworthy vessel is not affected by the fact that the owner is a private carrier. *Braker v. F. W. Jarvis Co.*, (1908) 166 Fed. 987.

**Voyage charter.**—There is no difference between a time charter and a voyage charter in respect to the liability of the vessel to the charterer for unseaworthiness. *Dene Shipping Co. v. Tweedie Trading Co.*, (C. C. A. 1905) 143 Fed. 854, *certiorari denied* (1906) 202 U. S. 622, 26 S. Ct. 767, 50 U. S. (L. ed.) 1175.

**Fitting vessel for particular cargo.**—Asphalt is "lawful cargo," under a charter which includes the West Indies; and it is the duty of the owner, in order to render the vessel seaworthy, to fit her for the proper

carriage of such cargo by lining, where her construction is such as to require it. *Dene Shipping Co. v. Tweedie Trading Co.*, (C. C. A. 1905) 143 Fed. 854, *certiorari denied* (1906) 202 U. S. 622, 26 S. Ct. 767, 50 U. S. (L. ed.) 1175.

**Liability for unseaworthiness.**—This section, as construed by the Supreme Court, does not exempt the vessel or owner from liability for the consequences of unseaworthiness, even though due diligence was exercised to make her seaworthy. *The Ninfa*, (1907) 156 Fed. 512.

**Seaworthiness defined.**—The term "seaworthy," as now construed, has relation to the article carried and the different compartments of the ship and their particular use, as well as to the navigability of the vessel. *The Indrapura*, (1910) 178 Fed. 591.

**Implied warranty of seaworthiness.**—In every contract for the carriage of goods by sea, in the absence of agreement otherwise, there is an absolute implied warranty by the carrier that the ship is seaworthy at the time of the beginning of her voyage, and reasonably fit to encounter the ordinary perils that may be expected, and her liability for loss or

injury to cargo from a breach of such warranty is not affected by the statute. *The Indrapura*, (1910) 178 Fed. 591.

**Losses before commencement of voyage.**—The Act applies to the vessel only after the voyage has commenced, and cannot be invoked by an owner to relieve him from liability for cargo lost while the vessel was loading, through the negligence of those in charge in permitting her to settle on the bottom and list until deck cargo fell overboard. *Steamship Wellesley Co. v. Hooper*, (C. C. A. 1911) 195 Fed. 733.

**Injury due to stopping for repairs.**—Injury to a cargo of oats shipped from Chicago to Buffalo from becoming wet and heated between the time it was loaded and the time of delivery (which was over a month) owing to the vessel being delayed for repairs after loading, was held, under the evidence, to have been due to her having been unseaworthy and not in good condition for the carriage of such cargo when the voyage was begun, owing to her defective decks and the careless handling of the pump during her detention, by reason of which water leaked through into the hold. *The Gordon Campbell*, (1905) 141 Fed. 435.

**Failure to inspect vessel.**—One to whom a decree in admiralty directs the payment of a fund is presumptively a party to the suit, or in court as a claimant of the fund, and evidence is required to rebut such presumption, where a denial of the fact is made a basis for impeaching the decree. *The Indrani*, (C. C. A. 1910) 177 Fed. 914.

**Defective pipe from engine room to trimming tank.**—The placing of the filling pipe extending from the engine room of a steamer to a trimming tank in the forepeak upon the floor of the intermediate hold, boxed in, and extending through the collision bulkhead, held not a faulty construction which rendered the vessel unseaworthy as to cargo carried in such hold, where the evidence showed that many contemporary vessels were so constructed and rated A1 by Lloyds. But the omission to fit such pipe with a valve or stopcock within the forepeak, or where it passed from the hold, to prevent the flooding of the hold in case of a break in the pipe, rendered her unseaworthy as to such cargo and liable for its injury from the flooding of the hold in consequence of the breaking of the pipe through some fault of construction. *The Indrapura*, (1910) 178 Fed. 591.

**Failure to protect valves in ballast tank.**—Failure to protect a valve in the pipe by which water could be run into a ballast tank, also usable for cargo, so that a stick got into the valve, in consequence of which water leaked through the valve into the tank and damaged cargo stored therein, was a failure to exercise due diligence in equipment to make the ship seaworthy at the beginning of the voyage, and which rendered her liable for the damage. *The Brilliant*, (1905) 138 Fed. 743, *affirmed* (C. C. A. 1908) 159 Fed. 1022.

**Sudden leaks and defective pumps.**—Proof that a vessel within a few hours after leaving port, and before encountering any peril of the

sea, sprang a leak from defective butts in her bottom, and that, in addition, her steam pump was not in good working order, and broke down when put in use, raises a presumption that she was unseaworthy at the beginning of the voyage, which is not rebutted by evidence merely of previous diligence, and, in the absence of a stipulation therefor in the bill of lading, the owner is not exempted from liability for damage to cargo caused by such leakage. *Carolina Portland Cement Co. v. Anderson*, (C. C. A. 1911) 186 Fed. 145.

**Sudden leak while loading.**—Where a barge, being on uneven keel for a few hours, due to unloading in the usual manner, sprang a leak and the remaining cargo was damaged by water, such damage was not caused by fault or error in the management of the vessel, but from negligence, fault, or failure in proper loading within section 1, for which the vessel was liable. *Donaldson v. J. W. Perry Co.*, (C. C. A. 1905) 138 Fed. 643.

**Defective feed pipe.**—A cargo of grain carried by a steamer from a Lake Superior port to Buffalo was found on arrival to have been damaged by water escaping from a crack in the main feed pipe running through the cargo space between the boiler and engine. Such construction was not unusual, and the vessel had an A1 rating, but had been built for eleven years, during which time the pipe had not been renewed, and had not been thoroughly inspected for more than a year, being covered with asbestos and inclosed in a box, which had not been removed in that time. Rough weather was encountered on the voyage, but not worse than was to be expected at the season. It was held that the evidence was not sufficient to sustain the burden of proof resting on the vessel to show that the damage resulted from a danger of navigation within the exception of the bill of lading, rather than from a defect in the pipe which rendered her unseaworthy at the beginning of the voyage. *The Rappahannock*, (C. C. A. 1911) 184 Fed. 291, *reversing* (1909) 173 Fed. 829.

**Insufficient coal for voyage as unseaworthiness.**—*British, etc., Marine Ins. Co. v. Kilgour Steamship Co.*, (1910) 184 Fed. 174.

**Beginning voyage with port negligently left open.**—If a ship starts on a voyage with a port negligently left open, causing damage to cargo, her owners are liable for failing to provide a ship seaworthy at the beginning of the voyage, and are not protected by this section 3, on the ground that the fault was one in navigation or the management of the vessel, although proper appliances for closing the ports were furnished; and this rule is especially applicable where the ports were so located as to be submerged when the vessel was fully loaded. *The Tenedos*, (1905) 137 Fed. 443, *affirmed* (C. C. A. 1907) 151 Fed. 1022.

**Overloading causing unseaworthiness.**—A barge which sank at a dock, after loading a cargo of bricks, held liable for the damage to the cargo on the ground of unseaworthiness due to overloading. *The G. B. Boren*, (1904) 132 Fed. 887.



**Weakness from long use.**—A barge held liable in damages for dumping a large part of her cargo of copper ore which she was discharging from a steamship, and for injury to the ship, on the ground of unseaworthiness, due to weakness from long use in the same business, which caused her to careen after she had taken on her load, although the weather was calm and the water smooth. *The Willie*, (1904) 134 Fed. 759.

**Inability to carry load without straining and causing leakage.**—Damage to a cargo of hay from water held, under the evidence, to have been due to leakage, owing to the inability of the vessel to carry the cargo for which she was chartered without straining, which rendered her unseaworthy. *The William Power*, (1904) 131 Fed. 136.

**Unexplained sinking of vessel.**—The sinking of a vessel while being properly handled, without undue stress of weather or other known external cause, was presumptively due to unseaworthiness. *Oregon Round Lumber Co. v. Portland, etc., Steamship Co.*, (1908) 162 Fed. 912; *Sanbern v. Wright, etc., Light-erage Co.*, (1909) 171 Fed. 449, *affirmed* (C. C. A. 1910) 179 Fed. 1021.

**Manner of stowing cargo.**—The requirement of seaworthiness at the beginning of a voyage includes not only seaworthiness in hull and equipment, but also in the stowage of the cargo. *Corsar v. J. D. Spreckels, etc., Co.*, (C. C. A. 1905) 141 Fed. 260; *The*

*Medea*, (C. C. A. 1910) 179 Fed. 781, *reversing* (1909) 173 Fed. 498.

A ship is not seaworthy when from her improper loading she is rendered unfit to encounter the ordinary perils of navigation which could reasonably have been anticipated on the projected voyage. *Steamship Wellesley Co. v. Hooper*, (C. C. A. 1911) 185 Fed. 733.

A ship is responsible for the proper stowage of her cargo, although the charter-party gives the charterer the option of appointing the stevedores, to be paid by the owners, where it also provides that they shall be under the direction of the master and the owners responsible for all risks of loading and stowage. *Corsar v. J. D. Spreckels, etc., Co.*, (C. C. A. 1905) 141 Fed. 260.

**Liquid and dry cargoes.**—On a libel for damage to a shipment of green goatskins, evidence held to justify a finding that the injury was caused by brine leaking from citron barrels negligently stowed near the skins. *Lazarus v. Barber*, (C. C. A. 1905) 136 Fed. 534.

**Effect on appeal of findings below.**—The concurrent findings of the two lower courts that a vessel was inspected at the beginning of the voyage, and found to be seaworthy and fit to carry the cargo which she had undertaken to transport, will ordinarily not be disturbed by the federal Supreme Court on appeal. *The Wilderoft*, (1908) 201 U. S. 378, 26 S. Ct. 467, 50 U. S. (L. ed.) 794.

## NAVIGATION OR MANAGEMENT OF THE SHIP.

**Exemption applicable only after voyage has commenced.**—This section applies to a vessel only after the voyage has commenced, and cannot be invoked by an owner to relieve him from liability for loss of cargo through the careening and sinking of a vessel at the pier before she was fully loaded, due to the negligence of a watchman in failing to adjust her lines to permit her to drop with the tide. *Ralli v. New York, etc., Steamship Co.*, (C. C. A. 1907) 154 Fed. 286.

**Leaving port in disregard of storm signals.**—The navigation and management of a vessel includes the determination of the time and manner of leaving port, which is the prerogative of the master; and under said section, where a vessel was seaworthy and in all respects properly manned, equipped, and supplied, the owners are not liable for a loss or damage to cargo due to a peril of the seas, even though the exposure to such peril was through the fault of the master in failing to ascertain or heed the warnings of the weather bureau before starting on the voyage. *Hanson v. Haywood Bros., etc., Co.*, (C. C. A. 1907) 152 Fed. 401.

**Changing course on account of stress of weather—failure to put into port for repairs.**—A ship bound from Antwerp to San Francisco with a cargo of cement encountered such rough weather in attempting to round Cape Horn and was subjected to such strain that her deck seams opened and a part of the cargo was damaged by water. She finally abandoned the attempt and completed the

voyage by way of the Cape of Good Hope and Australia. At the time of her change of course she was 370 miles distant from Port Stanley, where she could have been repaired; but she did not put in for repairs, and before she reached Australia the cargo received further damage by reason of the open seams. Held that the change of course and also the determination of the master to proceed without putting in for repairs were matters pertaining to the "navigation and management of the vessel," and not to the custody, care, or proper delivery of the cargo, and that, assuming the vessel to have been in all respects seaworthy, and properly manned, equipped, and supplied at the beginning of the voyage, she was exempted by the Act from liability for the damage caused or contributed to by the failure to repair. *Corsar v. J. D. Spreckels, etc., Co.*, (C. C. A. 1905) 141 Fed. 260.

**Sea valve left open during voyage.**—Damage to a cargo of molasses, through its dilution by sea water while being pumped out at the port of destination, held to have been due to a sea valve connecting with one of the pumps having been left partially open, which was a fault in the management of the vessel, it being affirmatively shown that the valve was in good condition and that it was properly closed when the cargo was loaded and at the commencement of the voyage. *Sun Co. v. Healy*, (C. C. A. 1908) 163 Fed. 48.

**Allowing leaking oil to remain in bilges.**—The action of the master of a vessel in permitting whale oil, which leaked from bar-

rels, to remain in the bilges, with the object of saving it at the end of the voyage, did not pertain to the "management of the vessel." *The Persiana*, (C. C. A. 1911) 185 Fed. 306, *reversing* (1907) 156 Fed. 1019.

**Failure of master to protect cargo.**—The owner of a scow chartered by the day, with a man in charge, is liable to the charterer for loss of her cargo of stone by her careening while she lay in an exposed position at the end of a pier where she was left by a tug, through the neglect of her master to haul her into the slip, where she would have been protected, which he could have done without difficulty. *Rodgers v. Bouker Contracting Co.*, (1904) 134 Fed. 702.

**Injury to cargo while unloading.**—Damage to cargo from the sinking of a ship after arriving in port, due to hurried and imprudent unloading, which brought the centre of gravity of the ship too high for safety, does not result from "faults or errors in naviga-

tion or in the management of said vessel." *The Germanic*, (1905) 196 U. S. 589, 25 S. Ct. 317, 49 U. S. (L. ed.) 810, *affirming* (C. C. A. 1903) 124 Fed. 1.

**Acts for benefit of ship.**—Tipping a vessel by the head while discharging cargo, for the purpose of examining her propeller, and having nothing to do with the discharge of the cargo, was an act of management of the ship. *The Indrani*, (C. C. A. 1910) 177 Fed. 914.

**Failure to close ventilators, etc., in rough weather.**—"If there was any negligence in the management of the ship on the voyage in failing to cover the ventilators, or remove them and stop the tubes in rough weather, or in failing to keep the scuppers clear, the owner is exempted from liability by the Harter Act (Act Feb. 13, 1893, ch. 105, 27 Stat. L. 445), having used due diligence to make the ship seaworthy at the outset of the voyage." *The Hudson*, (1909) 172 Fed. 1005, 1007, 1008.

## BURDEN OF PROOF.

**Seaworthy vessel.**—The burden of proving that a vessel was seaworthy at the time of beginning the voyage, or that due diligence had been used to make her so, rests upon the shipowner claiming the benefit of the exemption against errors of management or navigation, whether or not there is any evidence to the contrary. *The Wildcroft*, (1906) 201 U. S. 378, 26 S. Ct. 467, 50 U. S. (L. ed.) 794; *Bradley v. Lehigh Valley R. Co.*, (C. C. A. 1907) 153 Fed. 350, *affirming* (1906) 145 Fed. 589; *The Ninfa*, (1907) 156 Fed. 512.

Where disaster overtakes a vessel at the beginning of her voyage, without stress of weather or other adequate cause appearing, the presumption is that she was unseaworthy when the voyage commenced, and the burden rests on the owner, to avoid liability for cargo lost or injured, to overcome such presumption by showing affirmatively that the ship was seaworthy. *Steamship Wellesley Co. v. Hooper*, (C. C. A. 1911) 185 Fed. 733.

"The burden was clearly upon the defendant to prove that it had exercised 'due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied' at the time of the commencement of the voyage." *Levy v. Gibson Line of Steamers*, (1908) 130 Ga. 581, 61 S. E. 484, 485.

**Cause of damage in general.**—Where the evidence shows that a ship received goods on board in good condition, and delivered them damaged, it has the burden of proving that the damage was due to a risk excepted in the bill of lading, although, if it is manifestly so, as from breakage or decay, which are excepted generally, the ship need not show the cause of the breakage or decay, but the cargo owner can only recover by proof of negligence. *The Patria*, (C. C. A. 1904) 132 Fed. 971, *affirming* (1903) 125 Fed. 425.

A ship has the burden of explaining the cause of damage to cargo shown to have been received in good condition, to relieve itself

from liability for such damage. *The La Kroma*, (1905) 138 Fed. 936.

A decree dismissing a libel to recover for damage to cargo affirmed where the evidence left it uncertain whether the damage was caused by sea water or by sweat and heat, and the bill of lading exempted the vessel from liability for injury caused by perils of the sea or from sweat or decay. *The Folmina*, (C. C. A. 1907) 153 Fed. 364.

**Loading of vessel.**—"The established rule is that where the evidence shows that the damage was occasioned by one of the causes for which the vessel was exempted from liability, in the absence of some fault, such as negligent stowage, the burden is upon the libellant to show that it might have been prevented by reasonable skill and diligence on the part of those employed by the vessel." *Lazarus v. Barber*, (C. C. A. 1905) 136 Fed. 534, 536.

**Dangers of navigation.**—The burden rests upon a lake carrier who, having agreed to deliver in good condition, "the dangers of navigation excepted," delivers cargo water-damaged, to show that the damage was caused by a danger of navigation. *The Rappahannock*, (C. C. A. 1911) 184 Fed. 291, *reversing* (1909) 173 Fed. 829.

**Damage by sea water.**—A carrier by water is charged with the burden of proving that damage to a cargo from sea water was occasioned by the perils of the sea within an exception in the bill of lading against dangers and accidents of the seas. *The Folmina*, (1909) 212 U. S. 354, 29 S. Ct. 363, 53 U. S. (L. ed.) 546. On certificate from the Circuit Court of Appeals, (1907) 153 Fed. 364.

**Damage from excepted risk.**—A vessel owner who receives goods in good condition, as evidenced by the bill of lading, and delivers them damaged, has the burden of proof to establish that the damage arose from an excepted risk. *The Presque Isle*, (1905) 140 Fed. 202.

**Vol. IV, p. 863, sec. 5.**

**Violation as indictable offense.**—The provisions of this section make it a criminal statute; and one violating either of such provisions is subject to indictment and prosecution therefor. *U. S. v. Cobb*, (1906) 163 Fed. 791.

**Indictment—authority to sign bill of lading in defendant's name.**—An indictment for issuing a bill of lading containing provisions

in violation of the Act, which avers that such bill was issued by defendant, and sets out a copy of such bill, from which it appears that defendant's name was signed thereto "per" another, need not allege that the bill of lading was so signed by defendant's authority, which is a matter of proof. *U. S. v. Cobb*, (1906) 163 Fed. 791.

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## LIMITATIONS.

**Vol. IV, p. 865, sec. 1047.**

For a construction of this section, see under the title **FINES, PENALTIES, AND FORFEITURES**, vol. 3, p. 100.

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## LOTTERIES.

**Vol. IV, p. 869, sec. 1.**

The three necessary elements of a "lottery" are the furnishing of a consideration, the offering of a prize, and the distribution of the prize by chance rather than entirely upon a basis of merit. *Brooklyn Daily Eagle v. Voorhies*, (1910) 181 Fed. 580.

**Prize coupons in food packages.**—In *U. S. v. Jefferson*, (1905) 134 Fed. 299, it appeared that the defendant, to induce the sale

of a cereal called "Mother's Oats," placed in each package a coupon on which one of the letters which spelled the word "Mother's" was printed, and offered premiums to persons holding coupons which would spell the word "Mother's," the letter "o" being placed on only one coupon in five hundred. It was held that such scheme was a lottery, within this Act.

**Vol. IV, p. 871, sec. 4.**

**Constitutionality.**—To the same effect as the original note, see *Public Clearing House v. Coyne*, (1904) 194 U. S. 505, 24 S. Ct. 789,

48 U. S. (L. ed.) 1097; *Missouri Drug Co. v. Wyman*, (1904) 129 Fed. 623.

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## MEDALS.

**Vol. X, p. 222, sec. 1.**

**Retention of old medals.**—It is optional with the holder of a medal whether he shall surrender his old medal for the new. (1905) 25 Op. Atty.-Gen. 529.

It is not within the authority of the Secretary of War, in replacing the medals issued to officers and privates for gallantry in action, to allow a particular grantee, who is en-

titled to a new medal, to receive it and at the same time retain the old medal in his possession. (1905) 25 Op. Atty.-Gen. 529.

The word "replace," as used in this section, implies the loss, destruction, or surrender of the old medal. (1905) 25 Op. Atty.-Gen. 529.

# MINERAL LANDS, MINES, AND MINING.

## Vol. V, p. 4, sec. 2318.

**Fraudulent purchase as agricultural land.** — Of similar effect to the original note, see *Murray v. White*, (1911) 42 Mont. 423, 113 Pac. 754.

**Lands valuable for minerals.** — It is not enough to render lands valuable for minerals that there is some trace of minerals, but there must be minerals in such quantities as to justify the expenditure of effort to extract them; but it is not necessary that minerals of sufficient amount and value to allow im-

mediate profitable working be shown to exist in the land, and it is enough if the vein or deposit has a present or prospective commercial value. *Madison v. Octave Oil Co.*, (1908) 154 Cal. 768, 99 Pac. 176.

**Sufficiency of evidence to prove lands were mineral lands.** — See *Madison v. Octave Oil Co.*, (1908) 154 Cal. 768, 99 Pac. 176.

This section was cited in *Montello Salt Co. v. Utah*, (1911) 221 U. S. 452, 31 S. Ct. 706, 55 U. S. (L. ed.) 810.

## Vol. V, p. 4, sec. 2319.

**Rights of aliens.** — To the same effect as the original note, see *Shea v. Nilima*, (1904) 133 Fed. 209, 66 C. C. A. 263; *Holdt v. Hazard*, (1909) 10 Cal. App. 440, 102 Pac. 540.

**Gypsum is a mineral, and lands containing it are mineral lands, within the federal statutes.** *Madison v. Octave Oil Co.*, (1908) 154 Cal. 768, 99 Pac. 176.

**Location of lode claim after patent for placer claim.** — Under this and the following sections providing for the disposition of lode or vein mining claims and placer deposits, a vein known to exist within the boundaries of a placer claim at the date of an application for a patent, and not included in the ap-

plication, may be located by an adverse claimant after the issuance of the patent. *Mutchmor v. McCarty*, (1906) 149 Cal. 603, 87 Pac. 85.

**Necessity for appropriation of surface ground belonging to United States.** — In order to make a valid mining location under this section, providing that all mineral deposits in mineral lands belonging to the United States, and the lands containing the same, shall be open to entry, etc., surface ground, including the vein or lode, must be appropriated, and such surface must be the property of the United States. *Traphagen v. Kirk*, (1904) 30 Mont. 562, 77 Pac. 58.

## Vol. V, p. 8, sec. 2320.

**Vein or lode — Definition.** — The definition of a vein must be considered with reference to the formations and characteristics of the particular district in which the vein is located. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

The words "vein," "lode," and "ledge" are used as synonymous terms. *Noyes v. Clifford*, (1908) 37 Mont. 138, 94 Pac. 843.

**Mineralization.** — In the absence of defined walls and of mineralization appreciably greater than that contained in the general mass of the mountain, broken, strained, and fissured material, or crushed and brecciated matter, characteristic of the district, cannot be held to constitute a vein or lode, under the statute. In such case the limits of fracturing do not constitute the limits of the vein, and even if there be found an occasional vugg or fragment of ore, yet, where it is disconnected from any ore body, and so intermingled with the surrounding country rock that it cannot be regarded as continuous, it does not mark the line of the vein or lode,

within the meaning of the law. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

Where a vein, located in sedimentary beds of rock, is formed by replacement, and the mineralization ceases within a short distance of the ore body or ore channel, the limits of the deposition of ore are the limits of the vein; and this is so whether the vein be considered laterally or with reference to the apex. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

**Boundaries ill-defined.** — Where the boundaries of what is claimed to be a vein are not well, or not at all, defined, either at the surface or at depth, the value of the material must be so in excess of the country rock as to differentiate it from such rock; else the material cannot be held to constitute a vein. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

**Sedimentary rock.** — The mere fact that sedimentary rock is broken, crushed, seamed, stained, and fissured does neither constitute

such material a vein nor an apex of a vein, where no hanging wall nor foot wall appears, where the mineralization of such crushed material is not appreciably greater than that existing generally throughout the sedimentary area, and where the same kind of crushed and brecciated material exists elsewhere and generally within that area. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

*Values of filling.* — What values the filling or material of a fissure should contain to constitute it a vein, within the meaning of the Act of Congress, must necessarily depend upon the characteristics of the district or country in which the vein or lode, in any particular instance claimed to exist, is located, and upon the character, as to boundaries, of the vein itself. Values, therefore, of the filling of the vein must be considered with special reference to the district where the vein or lode is found. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

*Mineral value.* — Rock or matter of any kind, in order to constitute a vein or lode within the meaning of the statute, must be metalliferous and contain such mineral value as will distinguish it from the country rock, especially where no well-defined walls appear. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

*Evidence.* — Under the Acts of Congress the essential elements of a vein are mineral or mineral-bearing rock and boundaries, and, in case of controversy, where one of these elements is well established, very slight evidence may be accepted as to the existence of the other. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

*Complete possessory title.* — To the same effect as the first paragraph of the original note, see *Sharkey v. Candiani*, (1906) 48 Ore. 112, 85 Pac. 219.

*Discovery of vein or lode.* — To the same effect as the first paragraph of the original note, see *Lockhart v. Farrell*, (1906) 31 Utah 155, 86 Pac. 1077.

The discovery is the source of title to a mining claim, and vests in the discoverer a prior right to complete the location within a reasonable time. *McCleary v. Broadus*, (1910) 14 Cal. App. 60, 111 Pac. 125.

A location of a mining claim based on a discovery within the limits of an existing and valid location is void. *Lockhart v. Farrell*, (1906) 31 Utah 155, 86 Pac. 1077.

What may constitute a sufficient discovery to warrant a location of a mining claim may be wholly inadequate to justify the locator in claiming or exercising rights reserved by the statute. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to the adjoining owner. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

Evidence that there were seams of minerals

on a claim without any showing as to what the minerals were was insufficient to establish a discovery of valuable minerals within the lines of the claim essential to the valid location of a mining claim. *Harper v. Hill*, (Cal. 1911) 113 Pac. 162.

In *Lange v. Robinson*, (1906) 148 Fed. 799, 79 C. C. A. 1, it appeared that the plaintiff located certain gold placer mining claims along a creek in Alaska, and before doing so washed on each a few pans of the sediment deposited along the sides of the creek, and in each found small particles or colors of gold. Placer gold in paying quantities had been found on the bed rock on a tributary to the creek, and within a mile of such locations, and the bed rock at the place of the location was from 125 to 150 feet below the surface. The plaintiff and other experienced miners testified that the gold found was sufficient to reasonably justify the investment of money to sink shafts. It was held that there was a sufficient discovery to support the locations as against another mineral claimant.

*Subsequent discoveries may validate earlier locations.* — The discovery of the vein or lode before any other steps are taken to perfect the location is not required by the provision of this section that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," which means nothing more than that no location shall be considered complete until there has been a discovery. *Creede, etc., Min., etc., Co. v. Uinta Tunnel Min., etc., Co.*, (1905) 196 U. S. 337, 25 S. Ct. 266, 49 U. S. (L. ed.) 501.

To the same effect as the original note, see *Sharkey v. Candiani*, (1906) 48 Ore. 112, 85 Pac. 219.

*Location certificates as evidence of discovery.* — Where the validity of a location had been unchallenged for more than five years up to the commencement of ejectment, and the original locators were absent from the country, the certificate of location created a presumption of discovery of mineral and of a valid location, especially on an application for a preliminary injunction depending on affidavits in which plaintiff appeared as a subsequent locator and attached the title of the prior locator and that of his successor in interest. *Vogel v. Warsing*, (C. C. A. 1906) 146 Fed. 949.

*Willing to spend time and money in developing.* — To the same effect as the original note, see *Murray v. White*, (1911) 42 Mont. 423, 113 Pac. 754.

Even as between rival mineral claimants to petroleum lands, there must have been such a discovery, in order to sustain a location, as would justify a prudent person in the expenditure of money and labor in exploitation for petroleum. *Chrisman v. Miller*, (1905) 197 U. S. 313, 25 S. Ct. 468, 49 U. S. (L. ed.) 770.

An instruction that, to constitute a discovery of gold sufficient to support a location of a gold placer mining claim as against an adverse mineral locator, the gold found must be of such character and quantity and found under such circumstances as to justify a

man of ordinary prudence in the expenditure of time and money in the development of the property, is not erroneous; the word "development" as so used being the equivalent of "exploration." *Charlton v. Kelly*, (C. C. A. 1907) 156 Fed. 433.

In an action to recover certain land which was a part of the public domain, plaintiff claimed under a placer mining location. The court charged that it was essential to the validity of such location that the discovery of mineral thereon was such that an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and labor in developing the property, but in the same connection declared that it was essential to a recovery by plaintiffs that they prove with reasonable clearness that for the labor and capital expended in working the ground it would yield a reasonable profit. It was held that the latter instruction was erroneous and in conflict with the correct rule previously charged. *Cascaden v. Bartolis*, (1906) 146 Fed. 739, 77 C. C. A. 496.

**Conclusiveness of patent.** — An entry of a lode mining claim, sustained by a patent, though conclusive evidence that at the time of entry there had been a valid location, does not preclude the owner of a tunnel site located across the lode, who claims that his location was prior to any discovery, notwithstanding the provision of this section that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," which means nothing more than that no location shall be considered complete until there has been a discovery. *Creede, etc., Min., etc., Co. v. Uinta Tunnel Min., etc., Co.*, (1905) 196 U. S. 337, 25 S. Ct. 266, 49 U. S. (L. ed.) 501.

**Object of statute.** — The object of the law in requiring a discovery to precede the location of a mining claim is to insure good faith on the part of the locator and prevent frauds upon the government; and to constitute a discovery which will support the location of a gold placer claim as against another mineral claimant it is not necessary that gold should have been found thereon in paying quantity, but there must have been such a discovery of gold as gives reasonable evidence that the ground is valuable for placer mining, taking into consideration its character, location, and surroundings. *Lange v. Robinson*, (1906) 148 Fed. 799, 79 C. C. A. 1.

**Evidence.** — Upon an issue as to whether there was a sufficient discovery of mineral in a mining claim to meet the requirement of the statute and support a location, where there was evidence that gold had actually been found within the limits of the claim, sufficient to warrant the submission of the case to the jury to determine whether the discovery was sufficient within the rule which requires it to be such as to justify an ordinarily prudent man, not necessarily a miner, in expending his time and money in the development of the property, the locator was entitled to supplement such evidence by showing the situation, character, and value, and mineralogical conditions of adjacent claims,

and to prove by the opinions of experienced miners, based upon the facts, that the discovery was sufficient to justify him in developing the claim. *Cascaden v. Bartolis*, (C. C. A. 1908) 162 Fed. 267, 15 Ann. Cas. 625.

**"Three hundred feet on each side."** — In *McElligott v. Krogh*, (1907) 151 Cal. 126, 90 Pac. 823, it was held that though locators did not place a monument at an intervening point on the line between the end monuments, as under their mistaken belief as to the accuracy of the location of the end monuments there could be no necessity for it, yet they were entitled to have a line established on the correction of the location of one of the end monuments, which would include the corrected corner, that point, and the original corner not corrected, where no part of such line was more than 300 feet from the middle of the vein. On the correction of this corner, the court was not required to fix the boundary line as a straight line between the corner corrected and the original corner not corrected.

**Excess may be rejected.** — Where a mining location made in good faith includes within its boundaries more than this section permits, being 300 feet on each side of the middle of the vein at the surface, it is void only to the extent of the excess. *McElligott v. Krogh*, (1907) 151 Cal. 126, 90 Pac. 823.

The rule that where a locator has marked his corners so that the side lines lie more than 300 feet from the apex of the vein as located at the time, or otherwise marks a claim larger than allowed by statute, he cannot claim the excess as against a subsequent locator of adjoining ground, does not apply to a case where a claim of the statutory size was originally located in good faith, but by a mistake as to the actual location of the vein as evidenced by subsequent exploitation the side lines were not each 300 feet distant from the centre thereof. *Harper v. Hill*, (Cal. 1911) 113 Pac. 163.

**Inaccuracy in location of vein.** — Since the grant of the exclusive right to possession of the ground included within the lines of a location is a present grant, taking effect from the date of the location, a locator, having established his side lines in good faith, is protected against subsequent locators on the land included within the lines as originally located, though it may be subsequently determined by reason of an inaccuracy in the location of the vein or lode when the claim was located that the side lines at the end were more than 300 feet distant from the centre thereof. *Harper v. Hill*, (Cal. 1911) 113 Pac. 163.

**Overlapping claims.** — Where the locators of two association claims, which overlap, are sinking shafts at the same time, the first to discover mineral has priority of right, although the location was staked after the other, if it was made openly and peaceably. *Hanson v. Craig*, (C. C. A. 1909) 170 Fed. 63.

Where the discovery of mineral-bearing vein is made on land subject to location, that the corners were not placed on unappropriated land subject to location does not render the location entirely void, but it is valid to the extent that such location is within the

marked boundaries and on unappropriated land. *McElligott v. Krogh*, (1907) 151 Cal. 126, 90 Pac. 823.

**Conflicting lode claimants.**—It is the object and policy of the law to encourage the prospector and miner in their efforts to discover mineral, and therefore, as between conflicting lode claimants, the law is liberally construed in favor of the senior location; but where one claims what, *prima facie*, belongs to another, because of the apex in the claimant's location, a more rigid rule of construction against the claimant prevails. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

**Asphaltum in lodes or veins in rock in place** may be entered and patented by means of lode mining claims under this section, and it may not be secured by means of placer claims under section 2329, 5 Fed. Stat. Annot. 42. *Webb v. American Asphaltum Min. Co.*, (C. C. A. 1907) 157 Fed. 203.

**Distinction between lode and placer claims.**—The distinguishing test which determines whether or not a valuable mineral deposit may be secured by a lode claim or by a placer claim is the form and character of the deposit. If it is in a vein or lode in rock in place, it may be secured by a lode claim, and it may not be by a placer claim. If it is not in a vein or lode in rock in place, it may be secured by a placer claim, and may not be by a lode claim. *Webb v. American Asphaltum Min. Co.*, (C. C. A. 1907) 157 Fed. 203.

The words "other valuable deposits" in the clause "mining claims upon veins or lodes of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits," in this section, include nonmetalliferous as well as metalliferous deposits. *Webb v. American Asphaltum Min. Co.*, (C. C. A. 1907) 157 Fed. 203.

**Effect of amended location.**—An amended location of a lode mining claim, made because of an error as to the course of the vein when the original location was made, in consequence of which the original side lines became end lines, did not operate as an abandonment of all rights under the original location, where it is expressly stated in the new location notice that such was not the intention; and where the end lines of the amended location do not entirely coincide with the side lines of the original claim, it was not error for the court, in determining collateral rights as against an intervening locator, to draw vertical planes through the side lines of the original claim, which became end lines by operation of law, owing to the course of the vein, and through the end lines of the amended claim, extending both in the direction of the dip of the vein, and to award to the claim extralateral rights in so much of the vein on its dip as lay within both of such exten-

sions; treating as abandoned only so much of the original claim, with its planes so extended, as lay without the extended end-line planes of the amended claim. *Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co.*, (1904) 131 Fed. 591, 66 C. C. A. 99.

**Rights under prior Act.**—Rights in mining property entitled to protection under the Act of May 10, 1872, as previously acquired under existing laws, existed where a lode mining location had been made at the time of the passage of that Act, and the proceedings under the Act of July 26, 1866, had then so far advanced as to exclude adverse claims. *East Cent. Eureka Min. Co. v. Central Eureka Min. Co.*, (1907) 204 U. S. 266, 27 S. Ct. 259, 51 U. S. (L. ed.) 476.

**Waiver.**—An election by the grantee of a patent for a lode mining claim to abandon rights acquired under the Act of July 26, 1866, cannot be imported from the fact that such patent, in addition to granting such rights, also purports to grant all that would have been acquired by a location under this section. *East Cent. Eureka Min. Co. v. Central Eureka Min. Co.*, (1907) 204 U. S. 266, 27 S. Ct. 258, 51 U. S. (L. ed.) 476.

**Parallelism of end lines.**—The requirement of parallelism of end lines of lode mining locations which is made by this section cannot be deemed to apply where the location had been made at the time of the passage of that Act, and the proceedings under the Act of July 26, 1866, had then so far advanced as to exclude adverse claims, in view of the various provisions of the later Act for the protection of all rights previously acquired under existing laws, and of the provision of section 2322 that prior locators shall have "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." *East Cent. Eureka Min. Co. v. Central Eureka Min. Co.*, (1907) 204 U. S. 266, 27 S. Ct. 259, 51 U. S. (L. ed.) 476.

**Strike.**—The course of the vein longitudinally, as it passes through the country, is its strike; and where the dip of the vein is vertical, or practically vertical, the line of its ore bodies may mark the line of its strike. In determining the location and strike of a vein, the geological features of the adjacent country, so far as in evidence, will be considered by the court. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

## Vol. V, p. 13, sec. 2321.

**Proof of citizenship.**—Where, in an action in support of an adverse claim to a mining location, it was admitted on the trial that, as far as the defendant was concerned, plain-

tiffs were citizens of the United States when they made their purported location, and a certified copy of the notice of plaintiffs' location was introduced in evidence, with an affi-

davit of assessment work for the year 1902, which contained evidence showing that each of the plaintiffs was a citizen of the United States at the time of locating the ground in dispute, the proof of citizenship was *prima facie* sufficient under this section. *Stolp v. Treasury Gold Min. Co.*, (1905) 38 Wash. 619, 80 Pac. 817.

**Corporation.**—Where, in an action on an

adverse by a corporation against an application for a patent to a mining claim, the complaint alleged that the plaintiff was a corporation organized under the laws of the state, and the answer admitted the allegation, it was not necessary to prove the citizenship of plaintiff's stockholders. *Jackson v. White Cloud Gold Min., etc., Co.*, (1906) 36 Colo. 122, 85 Pac. 639.

## Vol. V, p. 13, sec. 2322.

**Exclusive right of possession.**—To the same effect as the original note, *Worthen v. Sidway*, (1904) 72 Ark. 215, 79 S. W. 777.

The rights of one entering upon the public domain and locating and working a mineral claim are of as high order as those of a settler, each of whom is in possession under rights initiated which may by the observation of precedent conditions ripen into the right to a final patent. *Southern California R. Co. v. O'Donnell*, (1906) 3 Cal. App. 382, 85 Pac. 932.

The phrase "exclusive right of possession and enjoyment," as used in this section, means enjoyment of the surface for mining purposes alone, and hence the location of a mining claim within a forest reserve did not operate to withdraw the land embraced therein from the jurisdiction of the Secretary of Agriculture, nor give to locators having acquired a possessory interest only any authority to use the surface for the erection and maintenance of a saloon without a permit from the Secretary of Agriculture. *U. S. v. Rizzinelli*, (1910) 182 Fed. 675.

**An interest in real property.**—To the same effect as the original note, see *Worthen v. Sidway*, (1904) 72 Ark. 215, 79 S. W. 777.

Unpatented lode mining claims are "real property," and as such are subject to the lien of a judgment recovered against their owner when docketed pursuant to a statute making a docketed judgment a lien upon the judgment debtor's real property, the term being defined by a statute in force when the judgment was rendered and docketed as coextensive with lands, tenements, and hereditaments. *Bradford v. Morrison*, (1909) 212 U. S. 394, 29 S. Ct. 349, 53 U. S. (L. ed.) 564.

**Apex partly within and partly without.**—Where the apex of a vein is of such width as to extend beyond the side line of a claim onto a junior claim, the extralateral rights therein belong to the senior claim, within its extended end-line planes. *Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co.*, (1904) 131 Fed. 591, 66 C. C. A. 99.

The senior location takes the entire width of the vein on its dip, where the apex of such vein is partly within two or more adjacent lode mining claims. *Lawson v. U. S. Mining Co.*, (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

**Side and end lines.**—Where the apex of a vein crosses what were originally intended as the side lines of a lode claim, and they are parallel, they become, by operation of law, the end lines. *Empire Milling, etc., Co. v.*

*Tombatone Mill, etc., Co.*, (1904) 131 Fed. 339; *Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co.*, (1904) 131 Fed. 579, 66 C. C. A. 299.

Where the vein within a mining claim ran in a northerly and southerly direction, and the location was crosswise of the vein, the side lines were really end lines, considering the direction of the lode on the surface, and the rights of the locators were restricted to the area within the side lines three hundred feet on each side of the vein or lode. *Southern California R. Co. v. O'Donnell*, (1906) 3 Cal. App. 382, 85 Pac. 932.

**Extralateral rights.**—The ownership and possession of the surface of a lode mining claim carries with it the ownership and possession of the lode which has its apex therein to the full extent of the extralateral right given by the statute to the owner of the claim. *Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co.*, (1904) 131 Fed. 579, 66 C. C. A. 299.

The fact that a vein or lode is of such width on the surface as to extend beyond the side line of a claim located thereon does not affect the extralateral rights of such claim as against a junior location. *Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co.*, (1904) 131 Fed. 579.

The owner of a lode mining claim has the right to the ore beneath the surface of his claim in a vein not having its apex there, subject only to the right of the owner of the claim where such vein apexes to follow it downward on its dip. *Mammoth Min. Co. v. Grand Cent. Min. Co.*, (1909) 213 U. S. 72, 29 S. Ct. 413, 53 U. S. (L. ed.) 702. *Compare McElligott v. Krogh*, (1907) 151 Cal. 126, 90 Pac. 823.

The right given by the location of a lode mining claim in that portion of the vein lying within its surface boundaries and that portion lying beyond them in which the statute gives the owner extralateral rights is integral, and no adverse right can be acquired by the locator of another claim in respect to the latter portion that could not in respect to the former. *Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co.*, (1904) 131 Fed. 579, 66 C. C. A. 299.

In order to entitle the owner of a mining claim to extralateral rights, it is not sufficient that the vein he seeks to follow outside the boundaries of his claim consists of rock sufficiently mineralized so that a miner can follow it with a reasonable expectation of finding ore; but it is necessary that there should be a ledge or body of mineral or min-



eral-bearing rock of such value as will distinguish it from the country rock or from the general mass of the mountain. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

The right of the owner to pursue a vein apexing within the surface boundaries of his lode mining claim on its dip downward outside the vertical side lines of such claim, which is given by this section, cannot be deemed to include the right to run a horizontal tunnel from his claim into an adjoining patented lode claim, for the purpose of reaching the vein in its descent through such adjoining claim, in view of the provisions of R. S. sec. 2319, that all valuable mineral deposits in lands belonging to the United States are open to exploration and purchase, and the lands in which they are found to occupation and purchase, and of R. S. sec. 2325, that a patent for any land claimed and located for valuable deposits may be obtained when properly claimed and located. *St. Louis Min., etc., Co. v. Montana Min. Co.*, (1904) 194 U. S. 235, 24 S. Ct. 654, 48 U. S. (L. ed.) 953, *affirming* (1902) 113 Fed. 900, 51 C. C. A. 530, set out in the original note.

**Agreed boundary between overlapping claims.** — An oral agreement between the owners of two overlapping lode mining claims, located on the same day, in accordance with which a monument was built, which it was agreed should be a point on the line between the claims, cannot affect the extralateral rights appertaining to one of the claims which has passed into the hands of other owners, having no knowledge of such agreement, as against third parties owning junior claims, and having no interest in the other claim or privity with the agreement. *Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co.*, (1904) 131 Fed. 591.

**Course of vein.** — Where the end lines of a lode claim cross the surface outcropping of a vein, they determine the extralateral right of the claim, without regard to the angle at which they cross the general course of the vein; its course for that purpose being fixed by the course of the apex on the surface of the claim. *Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co.*, (1904) 131 Fed. 579.

Where a person owns a mining claim having an apex of a vein within its limits extending through the claim lengthwise, he has, by virtue of the extralateral rights reserved under the statute, a right to follow the vein between vertical planes drawn downward through the end lines of the location, from the apex, on the dip, to the deep, although such vein may so far depart from a perpendicular, in its course downward, as to extend outside of the vertical side lines of the surface of the location into ground belonging to the adjoining owner. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

**Burden of proof.** — Where the defendant, who was the owner of a lode claim, claimed ore underlying plaintiff's adjoining claim by virtue of extralateral rights, the defendant was bound to show, not only that the apex

and strike of the vein were within the boundaries of defendant's claim, but that between planes drawn vertically downward through the end line of plaintiff's claim and a certain parallel line the vein from its apex on its dip was continuous, that the continuity extended to and through plaintiff's ground, and that the ore bodies claimed formed a part of such vein. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

**Jury trial.** — In a suit to determine extralateral mining rights, the parties are not entitled, as matter of right, to a trial by jury. *Hickey v. Anaconda Copper Min. Co.*, (1905) 33 Mont. 46, 81 Pac. 806.

**Conflicting locations.** — An attempted location of a mining claim on land which has been subjected to a previous location, made in accordance with law and kept in force by the necessary assessment work, confers no rights on the locator. *Anderson v. Caughey*, (1906) 3 Cal. App. 22, 84 Pac. 223.

**Lode location on placer claim.** — Where the defendant claimed the right to a lode location within the limits of plaintiff's placer location, as excepted from plaintiff's patent, affidavits of representation work done on defendant's alleged lode claim from year to year after the location was made were admissible to show defendant's good faith and belief that the same warranted expenditure to develop it. *Noyes v. Clifford*, (1908) 37 Mont. 138, 94 Pac. 843.

**Presumption.** — The locator of a lode claim is presumed to own all the ore within planes drawn vertically downward to the deep through the boundary lines of such claim, as well as the surface and everything appurtenant to the claim, which presumption continues until some other locator establishes that such deposits belong to another lode having its apex in his ground, so that he is entitled to extralateral rights reserved by this section. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

**Effect of patent.** — The owner of a fee in a patented lode mining claim is presumed to be in possession of the surface included within the lines of the location, and the burden of proof rests on one claiming any part thereof by adverse possession. *Original Consol. Min. Co. v. Abbott*, (1908) 167 Fed. 681.

**Descent of possessory right in unpatented claim.** — The possessory right of a locator of a mining claim, who has not applied for a patent nor done anything to obtain title other than to do the required assessment work, is property, and upon his death passes to his heirs by descent, and not directly as the designated donees or beneficiaries of the United States under the mining laws, and hence such rights may be administered upon and sold as other property by his executor or administrator. *O'Connell v. Pinnacle Gold Mines Co.*, (C. C. A. 1905) 140 Fed. 854, *affirming* (1904) 131 Fed. 106.

**Establishing line on older claim.** — The locator of a lode mining claim has the legal right to lay an end line of his claim on the surface of a prior claim, in the absence of

objection by the owner; and, as against the government and subsequent locators, such location carries precisely the same rights, both surface and extralateral, as it would if

all its lines were laid on unappropriated ground. *Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co.*, (1904) 131 Fed. 591.

## Vol. V, p. 19, sec. 2324.

- I. IN GENERAL, 1484.
- II. LOCATION MUST BE DISTINCTLY MARKED, 1484.
- III. NATURAL OBJECT OR PERMANENT MONUMENT, 1485.
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- VI. FORFEITURE OF INTEREST FOR FAILURE TO CONTRIBUTE TO ASSESSMENT WORK, 1488.
- VII. ALL RECORDS OF MINING CLAIMS, 1489.
- VIII. SHALL BE OPEN TO RELOCATION, 1489.

### I. IN GENERAL.

**Order of steps to complete locations.**—When every act necessary to complete a mining location has been performed before an adverse claim has accrued, the order in which the acts have been performed is immaterial. *McCleary v. Broadus*, (1910) 14 Cal. App. 60, 111 Pac. 125; *Healey v. Rupp*, (1906) 37 Colo. 25, 86 Pac. 1015.

**Forfeiting of location.**—Every reasonable doubt will be solved in favor of the validity of a mining claim as against the assertion of a forfeiture. *Thornton v. Kaufman*, (1910) 40 Mont. 282, 106 Pac. 361.

**Abandonment of interest by co-owner.**—Where a person interested with others in the location of a mining claim abandons his interest in the claim it does not revert to the government, as the other cotenants may acquire the entire claim by compliance with the statute. *Worthen v. Sidway*, (1904) 72 Ark. 215, 79 S. W. 777.

**Presumption from possession.**—Possession and improvement alone give no value to a mining claim, but raise a *prima facie* presumption that the possession is rightful, and prevent the land being subject to original location as wild and unimproved land. *Ware v. White*, (1907) 81 Ark. 220, 108 S. W. 831.

**Conclusiveness of prior entry and patent.**—Priority of entry and patent does not conclusively establish seniority of location, so as to give the holder of a lode mining claim under such patent the right to the entire width of the vein on its dip, where part of the apex of such vein is within such claim and part within an adjoining claim. *Lawson v. U. S. Mining Co.*, (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

**Government recognition of validity of location.**—Acceptance by the government of lode mining location notices given before the Act of July 26, 1866, 14 Stat. L. 251, ch. 262, recognizing the rights of locators who have proceeded in conformity to local customs or rules, and the issue of patents thereon, is a recognition by the Land Department of the conformity of the proceedings to the local

rules and customs of the district, and such ruling is not open to challenge by third parties claiming rights arising subsequently to the notices. *Lawson v. U. S. Mining Co.*, (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

**Rights under occupancy without location.**—Where the person in possession and occupancy of mineral lands does not claim government title under the land laws, his rights are those of a mere licensee of the government, and he must give way at the instance of one who makes a valid entry of the land under the public land laws; but, until a valid entry is made, only the government can complain of his occupancy. *Zeiger v. Dowdy*, (1911) 13 Ariz. 331, 114 Pac. 565.

**The right of the state to pass acts supplementary.**—Of similar effect to the original note, see *Butte City Water Co. v. Baker*, (1905) 196 U. S. 119, 25 S. Ct. 211, 49 U. S. (L. ed.) 409.

### II. LOCATION MUST BE DISTINCTLY MARKED.

**In general.**—See *Phillips v. Smith*, (1908) 11 Ariz. 309, 95 Pac. 91; *McCleary v. Broadus*, (1910) 14 Cal. App. 60, 111 Pac. 125.

**Evidence.**—See *McCleary v. Broadus*, (1910) 14 Cal. App. 60, 111 Pac. 125.

**Stating courses and distances.**—To the same effect as the original note, see *Mutchmor v. McCarty*, (1906) 149 Cal. 603, 87 Pac. 85.

**No particular method of marking is required,** and what is sufficient may depend on the topography of the ground; it being a question of fact in each case whether the lines are so marked that they can be readily traced by a person making a reasonable effort to do so. *Charlton v. Kelly*, (C. C. A. 1907) 156 Fed. 433, 13 Ann. Cas. 518.

**Marking out ground.**—Where the boundaries of a mining claim were not marked on the ground, the location was invalid. *Harper v. Hill*, (Cal. 1911) 113 Pac. 162.

**Requirement mandatory.**—The provision of this section that location of mining claims shall be distinctly marked on the ground so that the boundaries can be readily traced, and the location notice filed shall contain a description of the property by which it can be identified, is mandatory, and must be complied with in order to secure a valid location. *Ware v. White*, (1907) 81 Ark. 220, 108 S. W. 831.

**Sufficiently marked.**—Where notices were posted upon each mineral claim located on public domain, designating the place of posting as the starting point, which notices contained calls and distances to certain stakes at the four corners of each claim, the area of which was 600 feet by 1,500 feet, and the stakes thus called for were set and in some

cases stones piled around them, there was a sufficient marking of the claims. *Holdt v. Hazard*, (1909) 10 Cal. App. 440, 102 Pac. 540.

Two recorded notices of mining locations, each contained the name of the claim, the signature of the locator, the date of location and of record, and the county and mining district where located. One of them described the claim as commencing at discovery, and running 750 feet in a northeasterly direction and 750 feet in a southwesterly direction, "marking the exterior ends by lawful stakes, 1, 2, 3, and 4, a claim 300 feet on each side of the centre." The other was described as commencing at discovery, and claiming 300 feet on each side of the centre of the vein, together with all dips, spurs, angles, and variations, running in a southwesterly direction, and 750 feet in a northeasterly direction from discovery, "marked by lawful stakes on both ends and corners 1, 2, 3, and 4." There was proof that the descriptions and markings indicated in each case were true; that a stake and notice were posted at each discovery, and that a stake three or four inches in diameter and four to four and one-half feet high was marked and set up in each corner, except that at one corner a stump was marked; and that surveys for patents were made, covering the ground practically as originally located and staked. It was held that such notices substantially complied with this section, requiring the locations to be distinctly marked on the ground so that their boundaries can be readily traced, and were not void for uncertainty of description. *Bonanza Consol. Min. Co. v. Golden Head Min. Co.*, (1905) 29 Utah 159, 80 Pac. 736.

**State laws.**—The requirements of a state statute that before filing a location certificate the discoverer shall locate his claim by posting a notice on such claim, and marking the surface boundaries with substantial posts at each angle of the claim, are not invalid as in conflict with the federal statute, but merely add to its general terms, as by inference it had the right to do by *R. S. secs. 2322, 2324*. *Saxton v. Perry*, (1910) 47 Colo. 263, 107 Pac. 281. Of similar effect, see *Wright v. Lyons*, (1904) 45 Ore. 167, 77 Pac. 81.

**Estoppel.**—Where certain of plaintiffs in possession of mining claims were experienced miners, and knew the method generally adopted of marking on the ground the boundaries of mining claims, of which defendant was ignorant, and for eighteen months saw defendant working on an adjoining and conflicting claim, congratulated him on his progress, and made no objections until he had expended about \$8,000 and discovered valuable ore, when it was found he was trespassing on plaintiffs' claims, it was held that an estoppel might arise; the means of information not being equal to the respective parties to prevent plaintiffs from asserting their right to the premises in conflict on the ground of abandonment. *Sharkey v. Candiani*, (1906) 48 Ore. 112, 85 Pac. 219.

**Amendment of location.**—Where one has possession of a mining claim and has done the actual physical work required, such work

being there as evidence of possession, and there are no intervening rights, he may amend his location and thereby perfect his entry, and his right cannot be defeated by one who has made no peaceful entry and possession of the land, nor done any work thereon. *Ware v. White*, (1907) 81 Ark. 220, 108 S. W. 831.

### III. NATURAL OBJECT OR PERMANENT MONUMENT.

**In general.**—The natural objects or permanent monuments referred to in this section may be on the ground located, or off, as the case may be. *Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, (1908) 14 Idaho 516, 95 Pac. 14.

The object of the law in requiring the location of mining claims to be made with reference to some natural object or permanent monument is for the purpose of directing attention, in a general way, to the vicinity or locality in which the mining claim was to be found. *Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, (1908) 14 Idaho 516, 95 Pac. 14.

**Reference to "discovery claim."**—Where it was shown that under the system of locating placer mining claims in Alaska the one first discovered upon a gulch or creek is generally called "discovery claim," and other claims are numbered from such claim up or down the gulch or stream, and that it is customary in a certain locality to give to side or bench claims the same numbers as those upon the creek, with the addition of a letter of the alphabet, as "A," "B," or "C," to designate the tiers back from the creek claims, it was held that recorded notice of location of a claim in such locality, which describes it as "13 A, below discovery, on Cleary creek," is sufficient under this section. *Smith v. Cascaden*, (1906) 148 Fed. 792, 78 C. C. A. 458.

**Question of fact.**—The sufficiency of the location of a mining claim, with reference to natural objects or permanent monuments, is a mere question of fact. *Bonanza Consol. Min. Co. v. Golden Head Min. Co.*, (1905) 29 Utah 159, 80 Pac. 736.

**Conclusiveness of certificate.**—A reference to a natural object or permanent monument in a mining location certificate is not conclusive that the law has been complied with requiring such a reference to natural objects or permanent monuments as will identify the claim, but evidence is admissible that one could not take the description therein, and, by referring to the natural objects or permanent monuments therein mentioned, find the premises claimed. *Londonderry Min. Co. v. United Gold Mines Co.*, (1906) 38 Colo. 480, 88 Pac. 455.

### IV. NOTICE OF LOCATION.

**Liberal construction.**—Where it appears that the location of a mining claim is made in good faith, the court will not hold the locator to a very strict compliance with the law in respect to his location notice; and if by any reasonable construction, in view of

the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient. *Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, (1908) 14 Idaho 516, 95 Pac. 14.

**The object and purpose of a location notice** is to give notice to subsequent locators; and if there be a defect in the notice, and the subsequent locator has actual notice of the prior location, he will be bound thereby, at least so far as defects are concerned. *Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, (1908) 14 Idaho 516, 95 Pac. 14.

**Error in notice.**—An error in the location notice of a mining claim in its reference to the location of a permanent monument is not material in an action between the locators and a subsequent locator, where the claim was properly marked by stakes, and especially where the subsequent locator never saw the notice and could not have been misled thereby. *Sturtevant v. Vogel*, (C. C. A. 1909) 167 Fed. 448.

**Mistake in date.**—Where the location of a mining claim in controversy by defendant's grantor was in fact made before plaintiff's entry on the land, the location notice being there visible and the boundaries of the claim properly marked, the defendants were not bound by an erroneous date in the location notice, the date recited in the location being only *prima facie* evidence of the actual date of the location. *Webb v. Carlon*, (1906) 148 Cal. 555, 83 Pac. 998.

**Who may raise objection.**—One who attempts to relocate a mining claim on the theory that the required amount of annual assessment work has not been done, with full knowledge of the location and boundaries of the claim, cannot assert a forfeiture of title for failure, on the part of the original locators, to comply with the mining rules respecting notices of location. *Yosemite Gold Min., etc., Co. v. Emerson*, (1908) 208 U. S. 25, 28 S. Ct. 196, 52 U. S. (L. ed.) 374.

**Effect of notice as evidence.**—The location notice or certificate, when recorded, is *prima facie* evidence of all the facts the statute requires it to contain, and which are therein sufficiently set forth; and the affidavit of the locator attached to the notice, setting forth the fact that the ground was unoccupied mineral land of the United States at the time of his location, when introduced in evidence in an adverse suit, makes a *prima facie* case of such fact. Such notices are *prima facie* evidence of all the facts required by the statute to be stated therein which are, in fact, sufficiently stated therein. *Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, (1908) 14 Idaho 516, 95 Pac. 14.

**Sufficient notices.**—Ordinarily a notice of the location of a mining claim which does not sufficiently mark the boundaries of the claim is sufficient to hold the claim for a reasonable time in which to mark the boundaries, in the absence of an adverse prior discovery and a prior marking of boundaries. *McCleary v. Broadbuss*, (1910) 14 Cal. App. 60, 111 Pac. 125.

Where a mining claim location notice described the claim by metes and bounds and with reference to stakes set in the land, adding that the claim lay "about a mile from Anvil Mountain in a southeasterly direction," the notice was not defective for failure to point out a particular portion of Anvil Mountain as the beginning point. *Vogel v. Waring*, (C. C. A. 1906) 146 Fed. 949. See also *Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, (1908) 14 Idaho 516, 95 Pac. 14.

**Follow local statutes.**—Of similar effect to the first paragraph of the original note, *Anderson v. Caughey*, (1906) 3 Cal. App. 22, 84 Pac. 223; *McCleary v. Broadbuss*, (1910) 14 Cal. App. 60, 111 Pac. 125.

**Posting notice.**—See *Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, (1908) 14 Idaho 516, 95 Pac. 14.

#### V. ONE HUNDRED DOLLARS' WORTH OF LABOR OR IMPROVEMENTS.

**Locator prevented from performing work.**—Where the defendants wrongfully held possession of a mining claim adversely to the plaintiff, who had made a prior location thereon, and prevented him from performing the required assessment work thereon, it was held that they could not set up his failure to do the work to support their title as against him. *Field v. Tanner*, (1904) 32 Colo. 278, 75 Pac. 916.

**Valuation of work.**—Where, in an action in support of an adverse claim to a mining location, qualified witnesses for the plaintiffs testified that the reasonable value of assessment work done by plaintiffs for the year 1902 was at least \$100, it was held that such proof was not nullified by other evidence that the work was done in seven and one-half days by three men, working together; that the going wages for such work was five dollars per day per man; and that miner's wages were \$3.50 per day. *Stolp v. Treasury Gold Min. Co.*, (1905) 38 Wash. 619, 80 Pac. 817.

**Discretion as to method of work.**—Where a mining locator does work in good faith for the purpose of developing a mine, in strict compliance with the statute, a court cannot substitute its own judgment as to the wisdom and expediency of the method employed in the development in place of the owner's. *Gear v. Ford*, (1906) 4 Cal. App. 556, 88 Pac. 600.

**Work contributed gratuitously** to the improvement of a mining claim by one who has no enforceable interest therein is properly computed in determining whether the requisite assessment work has been done or not. *Anderson v. Caughey*, (1906) 3 Cal. App. 22, 84 Pac. 223.

**Character of work required.**—This section does not specify the kind of labor, and labor expended in extracting ore from the claim is within the requirement. It is only when labor is performed without the boundaries of the claim that its character becomes material, and in that case it must tend to the development or improvement of the claim or it will not count. *Wailes v. Davies*, (1907) 158 Fed. 607, affirmed (C. C. A. 1908) 164 Fed. 397.

**Possession for the statutory period, under R. S. sec. 2332, 5 Fed. Stat. Annot. 44,** does not relieve the possessor from doing the annual assessment work required by this section, and upon his failure to do such work in any one year the land becomes subject to relocation, notwithstanding he may have occupied it for more than the statutory period preceding such relocation. *Upton v. Santa Rita Min. Co.*, (1907) 14 N. M. 96, 89 Pac. 275.

**Resumption of work.**—The government or a subsequent locator under a valid location is the only one who can complain of a failure on the part of a locator to do the necessary annual work required by this section, and a subsequent locator is not in a position to make complaint until he has completed a valid location, and if prior to the completion of such subsequent location the original locator has resumed work on his claim in good faith, his previous delinquency is not a matter of consequence. *Thornton v. Kaufman*, (1910) 40 Mont. 282, 106 Pac. 361.

The word "improvement" means such an artificial change of the physical conditions of the earth in, on, or so reasonably near a mining claim as to evidence a design to discover mineral therein, or to facilitate its extraction, and in all cases the alteration must be reasonably permanent in character. *Fredricks v. Klauser*, (1908) 52 Ore. 110, 96 Pac. 679.

**Equity maxim not applicable.**—In the development of a mining claim, the maxim that equity regards as done what was intended has no application, and material taken to a mining claim and not used cannot be reckoned as an improvement of the claim. *Fredricks v. Klauser*, (1908) 52 Ore. 110, 96 Pac. 679.

**When several claims are held in common.**—To the same effect as the first paragraph of the original note, see *Big Three Min., etc., Co. v. Hamilton*, (1910) 157 Cal. 130, 107 Pac. 301; *Fredricks v. Klauser*, (1908) 52 Ore. 110, 96 Pac. 679.

One who does the assessment work on an association placer mining claim for which he is paid by one of the part owners has no right to enforce a forfeiture of the interest of another part owner for failure to contribute. *Knickerbocker v. Halla*, (C. C. A. 1910) 177 Fed. 172.

Where sufficient annual assessment work is done on a particular claim to represent such claim, and contention is made by a junior locator that the work was done for the purpose of representing several claims, and for that reason was insufficient to represent the particular claim, in determining the sufficiency of the work the court will apply the labor shown to have been done to the particular claim upon which the work was done. *Swanson v. Kettler*, (1910) 17 Idaho 321, 105 Pac. 1059.

Improvements placed upon one of a group of contiguous claims for the purpose of aiding in the development of all and tending to such result may be considered in determining whether the annual labor for a given year has been done upon any one of such group. Before, however, such testimony can be consid-

ered in aid of any one claim, there must be sufficient testimony as to the other claims to enable the jury to determine what proportion of such benefit is referable to the claim in question. *Upton v. Santa Rita Min. Co.*, (1907) 14 N. M. 96, 89 Pac. 275.

**Actual possession.**—After a valid mining location is made, the locator need not keep actual possession of the claim, but his right of possession continues until he in fact abandons or forfeits it by failure to do the work required by law. *Gear v. Ford*, (1906) 4 Cal. App. 556, 88 Pac. 600; *Holdt v. Hazard*, (1909) 10 Cal. App. 440, 102 Pac. 540.

**The burden of proof to establish a forfeiture.**—To the same effect as the original note, see *Wailles v. Davies*, (1907) 158 Fed. 667, *affirmed* (C. C. A. 1908) 164 Fed. 397; *Gear v. Ford*, (1906) 4 Cal. App. 556, 88 Pac. 601.

**Quantum of proof to establish forfeiture.**—To the same effect as the original note, see *Gear v. Ford*, (1906) 4 Cal. App. 556, 88 Pac. 600.

**Evidence.**—A forfeiture of a mining claim for failure to do annual work can be established only upon clear and convincing proof of such default proved against the former owner by the party assailing his title. *Upton v. Santa Rita Min. Co.*, (1907) 14 N. M. 96, 89 Pac. 275. For other cases as to sufficiency of evidence, see *New York, etc., First Nat. Gold Min. Co. v. Altvater*, (C. C. A. 1906) 149 Fed. 393. See also *McCleary v. Broadus*, (1910) 14 Cal. App. 60, 111 Pac. 125; *Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, (1908) 14 Idaho 516, 95 Pac. 14.

**Question for jury.**—Whether a prior location was forfeited as against an adverse location, and whether work was done for the purpose of developing the claim or was adapted to that purpose, are questions of fact. *Gear v. Ford*, (1906) 4 Cal. App. 556, 88 Pac. 600.

Whether work done on a mining claim is such as to benefit or develop other claims and so satisfy the requirement as to development of such claims is a question of fact. *Big Three Min., etc., Co. v. Hamilton*, (1910) 157 Cal. 130, 107 Pac. 301.

**Work done by stockholder of corporation.**—A stockholder in a mining company has such a beneficial interest in the corporate property that any mining work done by him on unpatented claims of the company must be counted as representation work, and if sufficient in amount, and done at the proper time, will prevent a forfeiture of the claims. *Wailles v. Davies*, (1907) 158 Fed. 667, *affirmed* (C. C. A. 1908) 164 Fed. 397.

**Illustrations.**—The price paid for tools used in the development work of a mining claim cannot be considered as development work, although a reasonable compensation for their use may be so considered. *Fredricks v. Klauser*, (1908) 52 Ore. 110, 96 Pac. 679.

**Service of watchman.**—Where the original locator of a mining claim suspended work from 1900 until 1904, when an adverse location was made, it was held that money expended by her in employing a watchman for the premises was not a compliance with this

section, requiring not less than one hundred dollars' worth of work to be performed or improvements made during each year. *Gear v. Ford*, (1906) 4 Cal. App. 556, 88 Pac. 600.

Where there was no machinery or fixtures at a mining claim which necessitated the employment of a watchman after the development work ceased, it was held that the worth of the actual labor of an employee in making an honest effort to discover minerals on the claim was the only credit to which the locator was entitled, but credit should be allowed for the actual labor which the employee performed. *Fredricks v. Klauser*, (1908) 52 Ore. 110, 96 Pac. 679.

*Cutlery, dishes, tinware, groceries, provisions, tobacco, and bedclothing* do not constitute an improvement of a mining claim, though candles included in the items and used at a tunnel on the claim may be credited as an expenditure. *Fredricks v. Klauser*, (1908) 52 Ore. 110, 96 Pac. 679.

*Drainage*. — Work done on a mining claim to withdraw water from the mine so that it could be examined by a prospective purchaser, not operating to develop or improve the mine, or to enable the co-owners performing the work to work the mine, was not assessment work required by this section to preserve the co-owners' right to the claim. *Evalina Gold Min. Co. v. Yosemite Gold Min., etc., Co.*, (1911) 15 Cal. App. 714, 115 Pac. 946.

*Iron rails for tunnel*. — A locator of a mining claim procured iron rails, a part of which were used in laying a track in a tunnel on the claim, and the remaining rails were taken to another mine, under an agreement that they should be returned on demand. The cost of hauling the rails used on the claim could not be segregated from the payment made. It was held that the value of the rails used on the claim must be estimated in determining the worth of the development work performed. The worth of rails laid on ties in a tunnel on a mining claim will be estimated in determining the value of the development work on the claim, but the payment for the rails will be disregarded. *Fredricks v. Klauser*, (1908) 52 Ore. 110, 96 Pac. 679.

*The value of powder, fuse, candles, etc.*, used in development work of a mining claim will be estimated in determining the worth of the work. *Fredricks v. Klauser*, (1908) 52 Ore. 110, 96 Pac. 679.

*The reasonable value of meals* furnished men employed in doing development work on a mining claim, who received board in addition to their wages, should augment the earnings of the men employed, but the money expended in transporting the supplies is not a proper charge for development work. *Fredricks v. Klauser*, (1908) 52 Ore. 110, 96 Pac. 679.

*Services and cost of horses*. — While the reasonable compensation for the daily services of horses used in development work of a mining claim may be treated as labor performed in the development, the sum paid for the purchase of horses cannot be so viewed. *Fredricks v. Klauser*, (1908) 52 Ore. 110, 96 Pac. 679.

## VI. FORFEITURE OF INTEREST FOR FAILURE TO CONTRIBUTE TO ASSESSMENT WORK.

**Constitutionality.** — The provision for the extinguishment of the interest of a co-owner in a mining claim for his failure to contribute to the assessment work required thereby is constitutional and valid. *Van Sice v. Ibex Min. Co.*, (C. C. A. 1909) 173 Fed. 895.

**Effect of deed to corporation.** — The fact that after the owners of a part interest in a mining claim had done the assessment work thereon for a particular year they conveyed the claim to a corporation, taking in payment substantially all of its capital stock, which they retained, did not preclude the forfeiture of the interest of their co-owner for failure to contribute to the work by a notice given in accordance with this section and signed both by them and by the corporation, and the vesting of such interest in the corporation by virtue of their deed, which purported to convey the entire claim. *Badger Gold Min., etc., Co. v. Stockton Gold, etc., Min. Co.*, (1905) 139 Fed. 838.

**Tender of contribution to assessment work.** — A part owner of a mining claim who holds an option to purchase the interest of a co-owner has the right to tender the contribution of the latter to the cost of assessment work to avoid a forfeiture. A part owner of a mining claim has implied authority to make a tender of the amount due from a co-owner as a contribution to the cost of assessment work to avoid a forfeiture. *Kniekerbocker v. Halla*, (C. C. A. 1910) 177 Fed. 172.

**Mining property situated in foreign country.** — The provisions of this section respecting the rights of co-owners of mining claims where some of such owners have done all the assessment work thereon have no application to mining property situated in a foreign country. *Gaines v. Chew*, (1909) 167 Fed. 630.

**Abandonment.** — The abandonment of a mining claim, the legal title to which is in the United States, by a part owner, does not vest any right or title to his interest in his co-owner. *Badger Gold Min., etc., Co. v. Stockton Gold, etc., Min. Co.*, (1905) 139 Fed. 838.

**Parties to give notice.** — The beneficial owners of part interests in a mining claim are the proper parties to give the notice to a co-owner, to forfeit his interest for a failure to contribute to assessment work, although they have conveyed their interests in trust. *Van Sice v. Ibex Min. Co.*, (C. C. A. 1909) 173 Fed. 895.

**Personal responsibility after default.** — Under this section where a co-owner of a mining claim fails to do his assessment work or fails to contribute his portion of the expenditure required in doing such work, his co-owners who have performed the labor may give such delinquent personal notice in writing or by publication, as provided in said statute, and if at the expiration of ninety days such delinquent should fail or refuse to contribute his proportion of such expenditure, his interest in the claim shall become the property of his co-owners who made such expenditures, and

the defaulting co-owner is not personally responsible for any part of the assessment work, under the provisions of said section. *McDaniel v. Moore*, (1910) 19 Idaho 43, 112 Pac. 317.

**Notice to co-owner.**—A published notice of forfeiture is invalid as to a co-owner whose name does not appear therein. *Ballard v. Golob*, (1905) 34 Colo. 417, 83 Pac. 376.

**Notice to grantee of co-owner.**—Where notice to contribute for annual assessment work was addressed personally to the individuals supposed to be the co-owners in default and was personally served on them, and was delivered immediately to their grantee under a prior unrecorded deed, it was sufficient to forfeit the rights of their grantee, the co-owners serving the notice having neither actual nor constructive notice of the conveyance. *Evalina Gold Min. Co. v. Yosemite Gold Min., etc., Co.*, (1911) 15 Cal. App. 714, 115 Pac. 947.

**Waiver of prior personal notice.**—The publication of notice to a part owner of a mining claim to contribute to the cost of doing the assessment work thereon for the previous year under penalty of forfeiture of his interest under this section is a waiver of a prior personal notice, and the delinquent may make his contribution at any time within ninety days from such notice by publication. *Knickerbocker v. Halla*, (C. C. A. 1910) 177 Fed. 172.

## VII. ALL RECORDS OF MINING CLAIMS.

**Recording location notice.**—This section does not require the recording of location notices, but leaves that subject open to legislation by the states or to regulation by the miners. *Sturtevant v. Vogel*, (C. C. A. 1909) 167 Fed. 448.

**Presumptions as to local customs.**—In the absence of proof of a local custom of miners requiring a notice of location of a mining claim to be posted or recorded, it must be presumed that the United States law, which does not require such posting or recording, was in force in the mining district in question at the time in question. *Anderson v. Caughey*, (1906) 3 Cal. App. 22, 84 Pac. 223.

**Accuracy of description on recorded notice.**—In *Mitchell v. Hutchinson*, (1904) 142 Cal. 404, 76 Pac. 55, it appeared that a description of a location omitted the last course and distance; describing the next to the last distance as running to the place of beginning, instead of to the last monument. In a subsequent action to quiet title to the claim, it appeared that a straight line from the next to the last monument to the place of beginning would include all the land in controversy, and that if the course and distance last given in the recorded description were followed it would reach the monument described, from which a straight line to the place of beginning furnished an exact description. It was held that the inaccuracy in the description in the recorded notice did not render the location invalid, but that the description was sufficient under the statute.

## VIII. SHALL BE OPEN TO RELOCATION.

**In general.**—A relocater of a mining claim is not a discoverer of the mineral contained therein, but an appropriator thereof, and cannot hold the ground except on proof that the original locator had abandoned or forfeited his right by failure to comply with the mining laws. *Zerres v. Vanina*, (1905) 134 Fed. 610, *affirmed* (C. C. A. 1907) 150 Fed. 564.

A claim of mining lands under a relocation is an implied admission of the validity of the location, but one who has attempted a relocation and then expressly renounced any claim under it, but who yet claims an interest in some other right which would entitle him to show that he never attempted such relocation, is not necessarily precluded from showing that the original locator never made a location, but is, in fact, perpetrating a fraud upon the government. *Zeiger v. Dowdy*, (1911) 13 Ariz. 331, 114 Pac. 565.

Where the plaintiff's alleged lode claims were mostly reclamations of abandoned claims and he failed to show actual possession prior to the commencement of the action, the doing of the requisite assessment work, or that there existed within the described boundaries of any of the claims a vein or deposit of ore sufficiently valuable to pay the cost of extraction or the cost of reduction, it was held that the claims were invalid. *Mutchmor v. McCarty*, (1906) 149 Cal. 603, 87 Pac. 85.

An entry upon a mining claim before the owner of it is in default.—To the same effect as the second paragraph of the original note, see *Swanson v. Kettler*, (1910) 17 Idaho 321, 105 Pac. 1059; *Lockhart v. Farrell*, (1906) 31 Utah 155, 86 Pac. 1077; *Slothower v. Hunter*, (1906) 15 Wyo. 189, 88 Pac. 36.

A junior location made on ground covered by a valid existing senior location will not prevail over a relocation on the same ground, made after a failure to do the work on the senior location. *Nash v. McNamara*, (1908) 30 Nev. 114, 93 Pac. 405.

In *Malone v. Jackson*, (1905) 137 Fed. 878, 70 C. C. A. 216, it appeared that the plaintiff located the mining claim in controversy on Jan. 1, 1899, which had been previously located in December, 1898. The plaintiff remained in actual possession from 1900 to 1902, but made no relocation of the claim after Jan. 1, 1900, when the original locator's rights expired for failure to do required assessment work, and on Jan. 1, 1902, defendant entered peaceably and relocated the claim. It was held that the defendant's relocation gave him the exclusive right of possession for one year from the date of his location.

**Resumption of work before relocation perfected.**—To the same effect as the original note, see *Worthen v. Sidway*, (1904) 72 Ark. 215, 79 S. W. 777; *Thornton v. Kaufman*, (1910) 40 Mont. 282, 106 Pac. 361.

**While locator in actual possession.**—For the purpose of relocation of a mining claim, the land must be subject to location, and there can be no relocation where the claim is in the actual possession of persons who have done the requisite amount of assessment work

under an insufficient location. *Ware v. White*, (1907) 81 Ark. 220, 108 S. W. 831.

A mere failure to comply with the statutory requirement does not terminate the right of the locator, but the sole effect of the failure is to throw the land open to location by others, and, in the absence of such other location, the original claimant's right to resume work and to hold his claim remains, and the estate of the original claimant is not divested until there has been a peaceable entry for the purpose of relocation. *Madison v. Octave Oil Co.*, (1908) 154 Cal. 768, 99 Pac. 176.

**Relocation in night when original locators not working.**—Where the locators of a claim were at work thereon on the 31st of December, and that night left their tools in the cut, intending to resume work the next morning at the usual time, which they did, their possession and work were in law continuous, and one who made a relocation in the night, during their absence, was a trespasser, and acquired no rights by the relocation. *Willitt v. Baker*, (1904) 133 Fed. 937.

**Amendment of relocation certificate.**—Where the defendants, claiming a forfeiture of a location by the plaintiff of a mining claim, relocated thereon, defects in their location certificate could not be cured, as against him, by filing amended certificates after he had re-entered the claim. *Field v. Tanner*, (1904) 32 Colo. 278, 75 Pac. 916.

**Time of relocation.**—In *Malone v. Jackson*, (1905) 137 Fed. 878, 70 C. C. A. 216, it was held that where a claim was located on Dec.

6, 1898, it was not subject to relocation for the locator's failure to do the required work until after Dec. 31, 1899.

**The burden of proof to establish a forfeiture.**—One basing a relocation of a mining claim on the existence of a forfeiture of the original location by reason of neglect to make the required improvement has the burden of establishing the forfeiture, which is *prima facie* done by proof that no labor was performed within the limits of the original claim during a specified year, and the burden then shifts to the original locator to show that work performed on an adjacent claim inured to the benefit of the claim in controversy. *Fredricks v. Klauser*, (1908) 53 Ore. 110, 96 Pac. 679.

**Abandonment.**—A senior locator, possessed of a paramount right in mineral land for which a patent is sought, may abandon such right, and thereby render the ground covered by such location subject to relocation before the expiration of the period prescribed by statute, within which the annual labor must be performed. *Swanson v. Kettler*, (1909) 17 Idaho 321, 105 Pac. 1059.

**Relocation of patented claims.**—Where the validity of mining claims is established by a patent therefor, until abandonment thereof by the patentees, so as to render the premises a part of the unappropriated public domain, no location can be made thereon by other parties. *Sharkey v. Candiani*, (1906) 48 Ore. 112, 85 Pac. 219.

## Vol. V, p. 21. [*Moneys expended on tunnels for mining purposes to be deemed expended on lode.*]

**Assessment work.**—Under this Act and section 2324, Rev. Stat., *supra*, of which it is an amendment, work done in a tunnel may be applied as assessment work on a mining location, though the person doing the work

does not own a continuous strip of territory from the portal of the tunnel to the boundary of such location. *Hain v. Mattes*, (1905) 34 Colo. 345, 83 Pac. 127.

## Vol. V, p. 21, sec. 1.

**Filing of notice.**—The filing of the notice required by this Act is equivalent to the actual performance of the assessment work so as to revive the claimant's rights, forfeited

by failure to do the assessment work for the preceding year, where no one else has located there in the meantime. *Field v. Tanner*, (1904) 32 Colo. 278, 75 Pac. 916.

## Vol. V, p. 31, sec. 2325.

**Notice.**—The notices required to be given by an applicant for a patent for a mining claim are in effect a summons to all adverse claimants who are required to assert their right by filing an adverse within the sixty days' publication of notice as provided by this section. *Healey v. Rupp*, (1906) 37 Colo. 25, 86 Pac. 1015.

**Jurisdiction of land department.**—The jurisdiction of the Land Office on the filing of an application for a patent to public mineral lands is exclusive, and can be stayed only by the filing of an adverse claim, as provided by R. S. 2326, 5 Fed. Stat. Annot. 35.

*Warnekros v. Cowan*, (1910) 13 Ariz. 42, 103 Pac. 238.

**Cancellation of entry on motion of commissioner of land office.**—The provision of this section that if no adverse claim shall have been filed with the register and receiver of the land office at the expiration of sixty days from the date of publication of an application for a patent to a mining claim, it shall be assumed that the applicant is entitled to a patent, when construed in connection with other sections *in pari materia*, does not prevent the Commissioner of the General Land Office from canceling an entry, of his



own motion, for failure of the applicant to comply with some statute or rule of the department, even though no adverse claim is filed. *Mineral Farm Min. Co. v. Barrick*, (1905) 33 Colo. 410, 80 Pac. 1055.

**Controversies between co-owners.**—The provision for the filing of adverse claims on the application for a patent to a mining claim has reference to adverse claims arising from independent and conflicting locations, and not to a controversy between co-owners or others claiming under the same location; and the fact that one owner did not adverse the application of his co-owner does not affect his right to establish and enforce a trust in the patented claim. *Stevens v. Grand Cent. Min. Co.*, (C. C. A. 1904) 133 Fed. 28.

**Presumptions.**—On an application for a patent to a mining claim located by the applicant, the land office, in the absence of the filing of an adverse claim, will indulge the presumption that no conflicting claims exist to the premises described in the application, but when an adverse claim is filed, the presumption does not arise. *Lockhart v. Farrell*, (1906) 31 Utah 156, 86 Pac. 1077.

**Conclusiveness of patent.**—The issuance of a patent for a mining claim is conclusive evidence of the sufficiency of the steps taken by the locator as against one claiming adverse rights. *Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co.*, (C. C. A. 1904) 131 Fed. 579; *Sharkey v. Candiani*, (1906) 48 Ore. 112, 85 Pac. 219.

It is a common and approved practice to obtain patents from the government to mining claims in the names of the original locators, without regard to intervening changes in right or ownership, and the fact that a corporation grantee of certain owners proceeded upon an application made by prior

owners, and obtained a patent running to them or their heirs and assigns, did not estop it from asserting that the interest of one of such patentees had been forfeited under the statute and vested in its grantors prior to the patent. *Van Sice v. Ibex Min. Co.*, (C. C. A. 1909) 173 Fed. 895.

Where an application for a patent was made by the owner of one of two overlapping claims, the issuance of a patent to him including the area within the overlapping boundaries is necessarily a determination that at the time of the proceedings such area was a part of that claim; but it does not necessarily determine the priority of location, and, where it does not appear that such question was put in issue and actually decided in the course of the patent proceedings, the owner of the other claim is not estopped from asserting the priority of his claim in a subsequent controversy respecting extralateral rights, which were not involved in the proceedings for a patent. *U. S. Mining Co. v. Lawson*, (1904) 134 Fed. 769, 67 C. C. A. 587, *affirmed* (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

A patent to a mining claim raises the conclusive presumption that there is an apex of a vein within the patented ground, but there is no presumption that such vein embraces ore without the side lines of the claim, or that the vein presumed is the one in dispute. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

**The claimant of a tunnel site is not required to file an adverse claim.**—*Creede, etc., Min., etc., Co. v. Uinta Tunnel Min., etc., Co.*, (1905) 106 U. S. 337, 25 S. Ct. 266, 49 U. S. (L. ed.) 501, *affirming* (C. C. A. 1902) 119 Fed. 164, cited in the original note.

## Vol. V, p. 35, sec. 910.

**Right of possession.**—Where, prior to the time the plaintiff's grantor staked out a placer claim on public land, the defendants had taken steps to appropriate the same land as a lode claim, and there was some evidence of mineral bearing rock on the surface, but an entire absence of proof that there was not a vein of metallic ore, such as might be located only as a vein or lode claim, it was held that the defendants' right to possession was superior to that acquired by the plaintiff. *Bevis v. Markland*, (1904) 130 Fed. 226.

**Issues.**—Where neither party to a suit to recover possession of land held under conflicting mining claims had acquired a perfect right to a conveyance from the United States, and the requirements of the statutes providing for adverse proceedings and suits for the determination of questions respecting conflicting claims had not been complied with, the

only issue determinable in such suit was the right of possession. *Bevis v. Markland*, (1904) 130 Fed. 226.

**Burden of proof.**—Where the plaintiff and the defendants claimed land covered by conflicting mining claims, and the defendants had not molested the plaintiff, or interfered with his possession or that of his grantor, otherwise than by continuing to hold possession in the same manner as before the attempted laying out of plaintiff's claim, the burden was on the plaintiff to prove that defendants were mere intruders, having no color of title or right to possession. *Bevis v. Markland*, (1904) 130 Fed. 226.

**This section was cited in** *O'Connell v. Pin-nacle Gold Mines Co.*, (1904) 131 Fed. 106, *affirmed* (C. C. A. 1905) 140 Fed. 854; *Reed v. Munn*, (1906) 148 Fed. 737, 80 C. C. A. 215.

## Vol. V, p. 35, sec. 2326.

**Suits arising under laws of United States.**—To the same effect as the first paragraph of the original note, see *Willitt v. Baker*, (1904) 133 Fed. 937.

The mere fact that the suit was brought under this section to try adverse rights to a mining claim does not necessarily involve a federal question so as to authorize a writ

of error from the Supreme Court of the United States to a state court. *McMillen v. Ferrum Min. Co.*, (1905) 197 U. S. 343, 25 S. Ct. 533, 49 U. S. (L. ed.) 784.

The purpose of a suit in support of an adverse to a mining location is to determine for the information of the officers of the land department, which, if either of the parties thereto, is entitled to a patent to the premises in dispute. *Healey v. Rupp*, (1906) 37 Colo. 25, 86 Pac. 1015.

**Jurisdiction.**—Where a state statute authorizes a suit to quiet title regardless of possession, a federal court of equity in such state is a court of competent jurisdiction, in which a suit in support of an adverse claim to mining ground may be maintained under this section when it appears that neither of the parties is in possession. *Willitt v. Baker*, (1904) 133 Fed. 937.

**Controversies as to character of land.**—This section confers jurisdiction on the courts only of suits between adverse mining claimants to the same mineral land, but does not confer jurisdiction to determine the character of the land involved as mineral or nonmineral, that question being for the Land Department. *Wright v. Hartville*, (1905) 13 Wyo. 497, 81 Pac. 649, 82 Pac. 450.

A complaint affirmatively showing the filing by the defendant of an application for patent, there being no allegation that the plaintiff had filed an adverse claim, is subject to a special demurrer to the jurisdiction of the trial court; the subject-matter of the action being within the exclusive jurisdiction of the Land Office. *Warnekros v. Cowan*, (1910) 13 Ariz. 42, 108 Pac. 238.

In an action for damages for encroaching on the plaintiff's mining claim, the defendant answered that the plaintiff had made application for a patent on his mine, and that the defendant had filed its protest against the issuance of a patent, and the Land Department had ordered a hearing. It was held that under this section the court had jurisdiction of the action; for, if the protest was not an adverse claim within the statute, there was no controversy to be settled by the Land Department, and, if it was an adverse claim, the court had jurisdiction to decide the controversy. *Lightner Min. Co. v. Superior Ct.*, (1911) 14 Cal. App. 642, 112 Pac. 909.

**"Within thirty days after filing his claim."**

—A complaint which states no cause of action, filed within thirty days, does not cause an amended complaint filed after the expiration of thirty days to relate back to the time of filing the original complaint, but the amended complaint is too late. *Keppler v. Becker*, (1905) 9 Ariz. 234, 80 Pac. 334. *Contra*, *Woody v. Hinds*, (1904) 30 Mont. 189, 76 Pac. 1.

**What constitutes the commencement of an action.**—See *Harris v. Helena Gold Min. Co.*, (1907) 29 Nev. 506, 92 Pac. 1.

**The form of an action.**—An adverse suit under this section to determine the right of possession of a mining claim on government land, praying that defendants be ejected, the answer presenting no equitable defense, was a law action, and contained no elements of

equity jurisdiction. *Ware v. White*, (1907) 81 Ark. 220, 108 S. W. 831.

**Following state practice.**—Since this section does not prescribe the form of action, the character of the suit to be brought thereunder depends on state practice. *Mares v. Dillon*, (1904) 30 Mont. 117, 75 Pac. 963.

**An ordinary declaration in ejectment.**—To the same effect as the first paragraph of the original note and re-affirming the case there cited, *Upton v. Santa Rita Min. Co.*, (1907) 14 N. M. 96, 89 Pac. 275.

**Allegations of complaint — Time adverse claim filed and suit brought.**—A complaint in an action to contest an adverse claim in patent proceedings, which fails to allege that the adverse claim was filed in the proper Land Office within the sixty days allowed by the statute, is defective. *Thornton v. Kaufman*, (1907) 35 Mont. 181, 88 Pac. 796.

**That suit is an adverse suit.**—In an adverse suit the rules governing ordinary ejectment suits are modified by the Act of March 3, 1881, ch. 140, 21 Stat. L. 305, 5 Fed. Stat. Annot. 36, which requires that the defendant, no less than the plaintiff, shall recover on the strength of his own title. In order, therefore, that the court may be advised of the nature of the suit so as to apply these exceptional rules, there should, in addition to the ordinary allegations in ejectment, be appropriate allegations showing the fact that such suit is designed as an adverse suit. *Upton v. Santa Rita Min. Co.*, (1907) 14 N. M. 96, 89 Pac. 275.

**The complaint should describe the land.**—The complaint must contain a definite description of the area in conflict in order to support the judgment, which must designate the part, if any, of the area in conflict, that might belong to each of the adverse claimants. *Smith v. Imperial Copper Co.*, (1907) 11 Ariz. 193, 89 Pac. 510.

**For other cases see** *Keppler v. Becker*, (1905) 9 Ariz. 234, 80 Pac. 334; *Woody v. Hinds*, (1904) 30 Mont. 189, 76 Pac. 1. See *Tonopah Fraction Min. Co. v. Douglass*, (1903) 123 Fed. 936.

**Amended complaint.**—In *Davidson v. Fraser*, (1906) 36 Colo. 1, 84 Pac. 695, it was held that though an amended complaint in ejectment, in support of an adverse to a mining location, was inartificial, in that it contained averments in support of an adverse between hostile locations, instead of limiting the allegations to a statement that plaintiff had been ousted from his interest in the premises in controversy by a co-owner, on which he relied to maintain his action, it was not for that reason objectionable, because the original complaint only embraced parts of the claim which did not conflict with another claim, while the amended complaint limited the ground in controversy to the conflict between the two.

**Each party must rely upon the strength of his own title.**—In a suit brought under this section by an adverse claimant to determine the right to the possession of a mining location, each party must show affirmatively his title, and the court, on finding that one party is entitled to the possession of a claim as

located by him, which includes a part of a claim of the adverse party, must find on the issues of possession and the right to patent the other part of the claim of the adverse party. *Slothower v. Hunter*, (1906) 15 Wyo. 189, 88 Pac. 36.

In a suit brought under this section by an adverse claimant to determine the right to the possession of a mining claim, the title of each party is brought in question; and, to entitle the defendant to a judgment or decree establishing his title, even where the plaintiff's case fails, he must prove that he did the assessment work for each year as required by the statute. *Willitt v. Baker*, (1904) 133 Fed. 937.

In an action in support of an adverse to a mining location it was held that plaintiff was not entitled to recover, in the absence of evidence that the ground he sought to locate was unoccupied and unappropriated public mineral domain, subject to location prior to his attempted location. *McWilliams v. Winslow*, (1905) 34 Colo. 341, 82 Pac. 538.

**Evidence — Proceedings in Land Office.** — In a suit to quiet title to a mining claim in support of an adverse claim filed in the United States Land Office, the proceedings in the Land Office are immaterial unless they show title or right of possession in one of the parties. *Bernard v. Parmelee*, (1907) 6 Cal. App. 537, 92 Pac. 658.

**Sufficiency.** — In an action in support of an adverse claim to a mining location, the plaintiffs are not required to prove that they have performed sufficient work to entitle them to a patent; the object of the litigation being merely to defeat the defendant's application for a patent by showing that it was not in possession of the property, and was not entitled to possession thereof. *Stolp v. Treasury Gold Min. Co.*, (1905) 38 Wash. 619, 80 Pac. 817.

*For other cases see* *Porter v. Tonopah North Star Tunnel, etc., Co.*, (C. C. A. 1906) 146 Fed. 385; *Slothower v. Hunter*, (1906) 15 Wyo. 189, 88 Pac. 36.

**Verdict.** — In a suit under this section a verdict in the form, "We, the jury, find the defendant guilty," was held to be sufficient to answer all the purposes of the proceeding. *Upton v. Santa Rita Min. Co.*, (1907) 14 N. M. 96, 89 Pac. 275.

**Special findings.** — In a suit under this section the parties are, upon proper request, entitled to special findings upon questions relevant to the cause; but, in the absence of such request, it is not error for the court to fail to require findings of the jury. *Upton v. Santa Rita Min. Co.*, (1907) 14 N. M. 96, 89 Pac. 275.

**Controversies between co-owners.** — The provisions of this and the preceding section for the issuance of patents for mineral lands and the prosecution of adverse claims to mining locations, apply only to adverse claims arising out of independent conflicting locations of the same ground, and not to controversies between co-owners claiming under the same location. *Davidson v. Fraser*, (1906) 36 Colo. 1, 84 Pac. 695; *Allen v. Blanche Gold Min. Co.*, (1909) 46 Colo. 199, 102 Pac. 1072.

**Burden of proof.** — In *Lockhart v. Farrell*, (1906) 31 Utah 155, 86 Pac. 1077, it appeared that the defendant located a mining claim, and applied for a patent thereto. The plaintiff adverse the application, claiming the right to the possession of the same as claimant, and brought an action pursuant to this section to adjudicate the adverse claim. It was held that as the court was entitled to presume that the defendant's location, prior in time, had *prima facie* the better right, the plaintiff had the burden of rebutting the presumption by showing the invalidity of the prior location.

**Parties.** — A part owner of a mining claim, who joins with the other owners in filing an adverse claim under this section, but afterwards becomes vested by conveyances with title to the interests of the others, may maintain the suit required by said section in support of the adverse claim in his own name. *Willitt v. Baker*, (1904) 133 Fed. 937.

The government is not a party to a suit to determine an adverse claim, except in so far as it has agreed to accept the judgment therein rendered as conclusive of the right of possession as between the contending claimants; and such judgment is not conclusive on a subsequent patentee from the government of land embraced therein, who was not a party, or privy to a party, to the suit in which the judgment was rendered. *Butte Land, etc., Co. v. Merriman*, (1905) 32 Mont. 402, 80 Pac. 675.

**Limiting issues by stipulation.** — A stipulation in an adverse suit that the parties waive all other points raised by the pleadings and submit the sole issue whether plaintiffs under their location resumed work on the claim, after forfeitures, before defendant's location, is valid, and dispenses with proof of other matters. *Giberson v. Wilson*, (1906) 79 Ark. 581, 96 S. W. 137.

**Adverse claim by third locator.** — In an application for a patent by a junior locator, upon failure of the senior locator to adverse, it will be presumed that there was no senior location, and that at the time the junior location was made the ground was open to entry under the mineral laws of the United States; but where it also appears that there is a third location made subsequent to the junior location, such third locator may adverse the application for patent by the junior locator, and show that the junior location is void because at the time it was made the ground was not open to location under the mineral laws of the United States. *Swanson v. Kettler*, (1910) 17 Idaho 321, 105 Pac. 1059.

**Necessity for trial de novo on appeal.** — Where, in a suit brought under this section, by an adverse claimant to determine the right to the possession of a mining claim, there is no conflict in the evidence, and the possession and right to a patent are supported by evidence so that a contrary decree would be unsupported by the evidence, the case, on the failure of the court to find on the issues of possession and the right to patent, need not be tried *de novo* on such issues. *Slothower v. Hunter*, (1906) 15 Wyo. 189, 88 Pac. 36.

**Matters determined.**—In the absence of the record of an adverse suit, there is no presumption that subterranean rights under lode mining locations were therein considered and determined. *Lawson v. U. S. Mining Co.*, (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

**Effect of forfeiture of senior location.**—The area of conflict between two mining locations does not, upon the forfeiture of the senior location, become unoccupied mineral lands of the United States, so as to enable a relocater of the forfeited location to adverse successfully the application for a patent by the junior locator, since the latter's right, under this section, to a patent, which would exist in case of the failure of the owner of a

subsisting senior location either to adverse the application or to prosecute such adverse if one was made, must also arise from the forfeiture of the claim of the senior locator to adverse successfully after the forfeiture is complete. *Lavagnino v. Uhlig*, (1905) 199 U. S. 443, 25 S. Ct. 716, 49 U. S. (L. ed.) 1119.

**Subsequent discovery.**—The rights of an adverse claimant to a mining location are limited to those existing at the time of the filing of his adverse so that he is not entitled to urge a subsequent discovery for the purpose of preventing the issuance of a patent to the applicant. *Healey v. Rupp*, (1906) 37 Colo. 25, 86 Pac. 1015.

## Vol. V, p. 36. [*Findings by jury — costs.*]

**Equity actions.**—This Act does not require that the findings should be by a jury, where the suit to determine the adverse claim is in equity. *Mares v. Dillon*, (1904) 30 Mont. 117, 75 Pac. 963.

**Nonsuit.**—To the same effect as the original note and following the Colorado case

there cited. *McWilliams v. Winslow*, (1905) 34 Colo. 341, 82 Pac. 538.

For other cases see *Brown v. Gurney*, (1906) 201 U. S. 184, 26 S. Ct. 509, 50 U. S. (L. ed.) 717; *Connolly v. Hughes*, (1902) 18 Colo. App. 372, 71 Pac. 681.

## Vol. V, p. 42, sec. 2329.

**Discovery.**—It is essential, under sections 2329, 2330, to the validity of a mining claim that the ground be mineral in character, and that a discovery of mineral within the confines of the claim be made. *Zeiger v. Dowdy*, (1911) 13 Ariz. 331, 114 Pac. 565.

**Marking boundaries.**—Under Rev. Stat. sec. 2324, 5 Fed. Stat. Annot. 19, requiring that the location of mining claims must be distinctly marked on the ground, so that their boundaries can be readily traced, and this section, directing that placer claims shall be subject to entry and patent under like conditions, but where the lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivision of the public lands, an attempted location of a placer mining claim by posting a notice on a tree, claiming the exclusive right to prospect on a certain quarter section, without any effort to distinctly mark the location on the ground, is insufficient, and no rights are acquired thereby. *Worthen v. Sidway*, (1904) 72 Ark. 215, 79 S. W. 777.

**Building sand a "mineral."**—Under this section by which claims usually called placers, including all forms of deposits excepting veins of quartz or other rock in place, shall be subject to entry, building sand is a mineral; and hence land more valuable for the building sand it contains than for agriculture is mineral land, subject to placer locations. *Loney v. Scott*, (Ore. 1910) 112 Pac. 172.

**Sufficient conformation to public survey.**—Under this section and section 2331, requiring placer claims to conform to the lines of the public survey, they are required to so conform only where it is reasonably practicable, and otherwise it is sufficient if they conform as near as is reasonably practicable. *Mitchell v. Hutchinson*, (1904) 142 Cal. 404, 76 Pac. 55.

**Distinction between lode and placer claims.**—See under this title, vol. 5, p. 8, sec. 2320.

**Asphaltum in lodes or veins.**—See under this title, vol. 5, p. 8, sec. 2320.

## Vol. V, p. 42, sec. 2330.

**Manner of location.**—An association placer mining claim cannot be located over other prior claims, so as to include within its boundaries and appropriate a number of unlocated and noncontiguous fractions lying between such prior claims. *Stenfjeld v. Espe*, (C. C. A. 1909) 171 Fed. 825.

**Excessive location.**—A placer mining claim located in good faith is not wholly void because it exceeds twenty acres, but is void only as to the excess, which may be rejected from any portion the owner may select; and

until he has been advised of the excess, and has had a reasonable time to make his selection, his possession extends to the entire claim, and another who goes upon it and makes a location of any part is a trespasser, and his location a nullity and void for any purpose. *Jones v. Wild Goose Min., etc., Co.*, (C. C. A. 1910) 177 Fed. 95.

**Interest of each individual in association.**—Any scheme or device whereby one individual is to acquire more than twenty acres constitutes a fraud on the law, and consequently

a fraud on the government, rendering the entire location invalid, so that where a partnership, consisting of five persons, attempted to locate a single claim covering one hundred acres, and formed a joint-stock association, by which two of the members acquired only a nominal interest, one less than a fifth, one more than a fifth, and one more than half, the location was void. *Nome, etc., Co. v. Snyder*, (C. C. A. 1911) 187 Fed. 385. Of

similar effect see *Cook v. Klonos*, (C. C. A. 1908) 164 Fed. 529, *modified* (C. C. A. 1909) 168 Fed. 700.

**Relocation.**—Where locators of a placer mine are at most in constructive possession only, their location must be valid, to be effectual against one who seeks to relocate the ground. *Saxton v. Perry*, (1910) 47 Colo. 263, 107 Pac. 281.

### Vol. V, p. 43, sec. 2331.

**Marking boundaries.**—This section does not dispense with the requirement of section 2324, 5 Fed. Stat. Annot. 19, directing that the location of mining claims must be distinctly marked on the ground, so that its boundaries can be readily traced. *Worthen v. Sidway*, (1904) 72 Ark. 215, 79 S. W. 777.

In *Kern Oil Co. v. Crawford*, (1903) 143 Cal. 298, 76 Pac. 1111, it appeared that plaintiff's grantors entered on a quarter section of land, with intent to locate a placer mining claim. They posted notice on the land, claiming such quarter section, and, after due preliminary steps, caused survey to be made, and set up stakes at the supposed corners, marked "N. E. corner section 32" and "S. E. corner section 32," and set laths between them to mark the line: These stakes were in reality some distance west of the true line. On

the strip between the true line and that marked by the grantors, defendant afterwards entered. It was held that the notice and stakes posted by plaintiff's grantors were sufficient to notify the defendant that the plaintiff's claim extended to the whole quarter section, so that she acquired no title to the strip erroneously omitted from the boundaries.

**State laws.**—A state law requiring boundary stakes at the angle of a placer mine does not conflict with this section, providing that where placer claims are on surveyed lands, and conform to the legal subdivisions, no further survey or plat shall be required, since the latter refers only to the plat and survey required to be filed on applications for patent, and has no reference to location. *Saxton v. Perry*, (1910) 47 Colo. 263, 107 Pac. 281.

### Vol. V, p. 44, sec. 2332.

**Construction of statute.**—This section is to be construed in connection with the other federal mining statutes. When so construed, its effect is simply to declare that possession for the statutory period is the equivalent of a

valid location. *Upton v. Santa Rita Min. Co.*, (1907) 14 N. M. 96, 89 Pac. 275.

**Possession for the statutory period.**—See under this title, vol. 5, p. 19, sec. 2324.

### Vol. V, p. 45, sec. 2333.

**Vein or lode.**—A "vein or lode" within this section is a body of mineral or mineral bearing rock within defined boundaries in the general mass of the mountain, and a "known vein or lode" is one clearly ascertained, and of such extent as to render the land more valuable on that account and justify its exploitation and development. *Noyes v. Clifford*, (1908) 37 Mont. 138, 94 Pac. 842.

**Veins or lodes** are lines or aggregations of metal imbedded in quartz or other rock in place, consisting of a strip of mineral bearing rock within defined boundaries in the general mass of the mountain, which must be continuous and without interruption, bounded by country rock mineralized to no greater extent than the general condition of the vicinity. *Grand Cent. Min. Co. v. Mammoth Min. Co.*, (1905) 29 Utah 490, 83 Pac. 648.

"Known vein" is not synonymous with a "located vein."—To the same effect as the original note see *Mutchmor v. McCarty*, (1906) 149 Cal. 603, 87 Pac. 85.

A quartz vein which contains so small a portion of gold, silver, etc., as to be of no value for mining purposes, is not a known

vein, within this section providing for the disposition of mining claims. *Mutchmor v. McCarty*, (1906) 149 Cal. 603, 87 Pac. 85.

The terms "vein" and "lode" are synonymous, and the same definition of such terms as used in R. S. sec. 2320, 5 Fed. Stat. Annot. 8, must be applied to them in this section. *Noyes v. Clifford*, (1908) 37 Mont. 138, 94 Pac. 842.

**Exception of lode or vein.**—If the lode or vein within the limits of a placer location is excepted from the patent to the placer claim, such lode or vein and twenty-five feet on either side thereof are open to exploitation and location by any citizen of the United States, for which purpose he is entitled to enter into possession thereof. *Noyes v. Clifford*, (1908) 37 Mont. 138, 94 Pac. 843.

**Evidence.**—Where the defendant claimed that a lode or vein within the limits of a placer location was excepted from the patent to the placer, evidence of the character, extent, and value of the contents of the vein at any time before or after the beginning of the patent proceedings for the placer was competent on the issue whether it was such a vein as would justify a location and the

expenditure of labor and money to develop and utilize it; evidence of what it contained at the date of the location being relevant to the question of its contents at the date of the application for the patent. *Noyes v. Clifford*, (1908) 37 Mont. 138, 94 Pac. 842.

**Expert opinion.** — On an issue whether a lode or vein within the limits of plaintiff's placer location was of sufficient value to justify exploitation and development so as to except it from the terms of the plaintiff's placer patent, the opinion of an expert based on his experience and observation of the conditions in the district that the prospects of the vein were good and that it carried some mineral values was admissible as bearing on the contents of the vein at the time the application of plaintiff's patent was made. *Noyes v. Clifford*, (1908) 37 Mont. 138, 94 Pac. 843.

**Question of fact.** — It is a question for the jury whether a vein or lode within the limits of a placer location was excepted from the patent to the holder, and therefore subject to defendant's location, whether such vein was "known" at the date of plaintiff's appli-

cation for patent as a clearly ascertained vein, and whether it contained such mineral as made the ground more valuable on that account and justified expenditure. *Noyes v. Clifford*, (1908) 37 Mont. 138, 94 Pac. 842.

**Right to possession.** — In *Loney v. Scott*, (Ore. 1910) 112 Pac. 172, it appeared that the plaintiffs made placer locations upon public lands while they were withdrawn from entry and gave the notices as required by law. After the reopening of the land to entry, the defendant's grantor, a railroad company, obtained a patent to the land as lieu land under its land grant, defendant making the nonmineral affidavit, which showed the land to be in fact mineral in character and that it was claimed under placer filings, and after conveyance to him the defendant sued the placer claimants for possession. It was held that the possession of the plaintiffs as placer claimants at the time of the application of the defendant for a patent was sufficient to defeat defendant's action for possession, and that plaintiffs might enjoin defendant's action.

## Vol. V, p. 47. [*Entry of petroleum or other mineral oil lands under placer claims laws.*]

**Necessity for actual discovery of oil.** — To constitute a valid location of an oil claim the locator must have actually discovered oil within the limits of the claim. Where no discovery of oil is made under an oil claim, the locator is not in the actual *bona fide* possession of the claim, and therefore the same is open to peaceable entry by others. *Miller v. Chrisman*, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444; *McLemore v. Express Oil Co.*, (1910) 158 Cal. 559, 112 Pac. 59.

**A location of an oil claim, embracing 160 acres of land made by an association of persons, is but a single location covering 160 acres, and not eight locations each covering twenty acres, and therefore a single discovery of oil is sufficient to support it.** *Miller v. Chrisman*, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444.

**Time of discovery with reference to location of claim.** — It is not essential to the validity of an oil or mineral claim that the discovery of oil or mineral within its limits shall have preceded or shall coexist with the posting of the notice and the demarkation of the boundaries, but the discovery may be made subsequently, and when made operates to perfect the location against the world, save those whose *bona fide* rights have intervened. *Miller v. Chrisman*, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444.

**Conveyance of location.** — Where a location of an oil claim was made by an association of persons, the associates acquired a right to the claim before the location was perfected, which they could convey. *Miller v. Chrisman*, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, *affirmed* (1905) 197 U. S. 313, 25 S. Ct. 468, 49 U. S. (L. ed.) 770.

**A fraudulent and clandestine entry on the oil claim of another with knowledge of the**

latter's occupancy of the territory cannot be made the basis of any right. *Miller v. Chrisman*, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, *affirmed* (1905) 197 U. S. 313, 25 S. Ct. 468, 49 U. S. (L. ed.) 770.

**Abandonment of location.** — Where a location of an oil claim was invalid, the abandonment and relinquishment thereof by the grantee of the locator did not invalidate a location subsequently made by the grantee. *Miller v. Chrisman*, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, *affirmed* (1905) 197 U. S. 313, 25 S. Ct. 468, 49 U. S. (L. ed.) 770.

**Asphaltum in lodes or veins in rock in place may not be secured under this Act regarding the entry of lands containing petroleum or other mineral oils.** *Webb v. American Asphaltum Min. Co.*, (C. C. A. 1907) 157 Fed. 203, wherein the court said: "The Act of 1897 was not enacted for scientists or for those specially learned in the composition and analysis of geological formations alone or chiefly, but for citizens of common intelligence and learning who might desire to buy valuable deposits upon the lands of the United States; and to them the significance of these words, 'other mineral oils,' in this law, following, as they do, the word 'petroleum,' which describes a liquid, is liquid or semi-liquid mineral oils, and it does not include gilsonite or the hard forms of asphaltum. The sense in which the reader of ordinary knowledge and intelligence would take these words, the obvious common meaning of them, should be preferred to the recondite signification which would include the solid forms of asphaltum, and for this reason the Act of 1897 did not authorize the entry of lands which contain these deposits, by means of placer claims."

## Vol. V, p. 49, sec. 2334.

A government mineral surveyor appointed under this section is not an officer, clerk, or employee in the General Land Office, within Rev. Stat. sec. 452, 6 Fed. Stat. Annot. 212, prohibiting such persons from obtaining title

to government land, and hence is not disqualified thereby from locating a mining claim under R. S. 2207, 6 Fed. Stat. Annot. 219, providing for such location. *Hand v. Cook*, (1907) 29 Nev. 518, 92 Pac. 3.

## Vol. V, p. 50, sec. 2336.

**Integral character of vein.** — Where two or more mining claims longitudinally bisect or divide the apex of a vein, the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downwards outside of the side lines. *U. S. Mining Co. v. Lawson*, (1904) 134 Fed. 769, 67 C. C. A. 587, *affirmed* (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

**Determination of seniority.** — In respect of conflicting mining claims, seniority is determined by the order in which they were located, whether they have been patented or remain unpatented. *U. S. Mining Co. v. Lawson*, (1904) 134 Fed. 769, 67 C. C. A. 587, *affirmed* (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

## Vol. V, p. 52, sec. 2338.

**Tunnel rights.** — Under this section a state is authorized to pass an act granting to an owner of ground, with a mining tunnel located thereon, the right to run the same through the claims of other parties, and pro-

viding for the payment of all "actual damages or injury done to the owner of the claims crossed" by such tunnel. *Baillie v. Larson*, (1905) 138 Fed. 177.

## Vol. V, p. 55, sec. 2347.

**An attempt to acquire land.** — Of similar effect to the original note and following the case there cited, see *U. S. v. Portland Coal, etc., Co.*, (1908) 173 Fed. 566.

**Bona fide purchasers.** — In *U. S. v. Allen*, (1910) 180 Fed. 855, it appeared that a corporation was formed to take over two patented coal land claims, the patents being in fact voidable, having been illegally obtained, one of the incorporators being father of the patent holder, and he and another incorporator having been parties to the transaction whereby the patents were obtained. The holder of the patent subscribed for all but four shares of the capital stock and sold to the corporation the two claims in payment of her subscription. Upon issuance to her of the shares she immediately transferred part of them to the treasurer of the company to be sold for the company's use. She was made secretary of the corporation, and her father manager, and they continued to hold those offices until the time of the suit, covering a period of five years. It was held that the corporation was not a *bona fide* purchaser for value without notice, precluding the government from proceeding to cancel the patents, as one holding a voidable patent to public lands cannot protect himself against the process of the government by forming a corporation in which he is the dominant factor and conveying to it the premises which he has acquired in violation of law.

**Combination to procure title in behalf of a**

**single association in excess of amount allowed.** — Where two persons were engaged in an unlawful combination to procure title in behalf of a single association to an area of coal lands in excess of the limits prescribed by law, that only two claims aggregating 320 acres allowed by this section were actually patented to them, would not make the patents valid; the unlawful combination making the proceeding illegal from the beginning. *U. S. v. Allen*, (1910) 180 Fed. 855.

**Evidence.** — In *U. S. v. Allen*, (1910) 180 Fed. 855, the evidence was held to show that two patents of public coal lands running to two persons were acquired as part of a general plan for procuring title in behalf of a single association to an area of coal lands in excess of the limits prescribed by law.

**Sale of entry.** — Under this and the following sections authorizing individuals to enter 160 acres of vacant public coal lands, and associations to enter 320 acres, and prohibiting more than one entry by each person or association, one who has perfected an entry can sell or dispose of it as he pleases, and an individual or corporation can purchase as many entries made by others as he or it pleases, regardless of the entryman's intent to sell at the time of entry. *Ireland v. Henkle*, (1910) 179 Fed. 993.

This section was cited in *Pereles v. Weil*, (1907) 157 Fed. 419; *Leonard v. Lennox*, (C. C. A. 1910) 181 Fed. 760; *U. S. v. Doughten*, (1911) 186 Fed. 227.

## Vol. V, p. 55, sec. 2348.

**Right to coal incidentally removed in course of lawful development work.** — Under sections 2347-2352, a qualified individual or associa-

tion who, in response to the government's invitation, enters upon public lands in search of coal deposits, and expends time, labor, and

means in an honest effort to open and develop such deposits when found, intending to purchase the lands according to the statute if the coal proves to be such as to give character and value to them, is not a trespasser, but is in the exercise of a privilege con-

ferred by law, and is entitled to such coal as is extracted and removed as an incident only to the reasonable prosecution of that work. *Ghost v. U. S.*, (1909) 168 Fed. 841, 94 C. C. A. 253.

## Vol. V, p. 56, sec. 2349.

This section was cited in *U. S. v. Doughten*, (1911) 186 Fed. 226.

## Vol. V, p. 56, sec. 2350.

**Entry for disqualified principal.**—The prohibition against more than one entry of coal lands by the same person, which is made by this section, prohibits a qualified person from entering such lands apparently for himself, but in fact as the agent for a person who is himself disqualified because he has already

purchased the full quantity permitted by law. *U. S. v. Keitel*, (1908) 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230; *U. S. v. Forrester*, (1908) 211 U. S. 399, 29 S. Ct. 132, 53 U. S. (L. ed.) 245.

This section was cited in *U. S. v. Doughten*, (1911) 186 Fed. 226.

## Vol. V, p. 57. [*Coal land laws extended to Alaska.*]

This section was cited in *U. S. v. Doughten*, (1911) 186 Fed. 226; *U. S. v. Munday*, (1911) 186 Fed. 375.

## Vol. V, p. 58, sec. 6.

**Duty of mine owner.**—This section is sufficiently complied with where air is forced through to certain working places in a mine and the places not fit for working places on account of the accumulation of gas are properly dead-lined, signals being there placed warning employees not to enter such places. *Central Coal, etc., Co. v. Gregory*, (1906) 78 Ark. 43, 93 S. W. 56.

**Negligence of fellow servants.**—In an action by a servant, under this Act requiring working places in coal mines to be properly ventilated, for injuries received as a result of an explosion of gas in a coal mine, evi-

dence that the defendant had forced air through to the working places in the mine, dead-lining such places as were not safe, and that, with knowledge of such danger signals, and of the defendant's rules forbidding employees to cross such dead lines, certain of defendant's employees did cross the lines with open lamps, thereby igniting the gas, which exploded, was held to show that the injury was caused solely by the negligence of plaintiff's fellow servants. *Central Coal, etc., Co. v. Gregory*, (1906) 78 Ark. 43, 93 S. W. 56.

## Vol. V, p. 61, sec. 1.

**Construction of statute.**—While the purpose of this Act was to prevent injuries from the discharge of debris from hydraulic mines, it was not intended to exonerate the miner from liability therefor, nor to limit the powers of the state courts to protect private

property from threatened injury, and to redress inflicted injury thereto from the operation of hydraulic mines, though carried on under a permit and in strict compliance with the plans of the commission. *Sutter County v. Nicols*, (1908) 152 Cal. 688, 93 Pac. 872.

## Vol. V, p. 63, sec. 12.

**Purpose of notice.**—The provisions of this Act directing notice to be given and authorizing a hearing at which all persons interested may appear were not intended to conclude and estop the owners of lands below with respect to subsequent injuries that might be in-

flicted, but were designed to enable the commission in reaching its decision to obtain all aid which it could derive from the suggestions of all interested persons. *Sutter County v. Nicols*, (1908) 152 Cal. 688, 93 Pac. 872.



## MONEY PAID INTO COURT.

### Vol. V, p. 70, sec. 995.

For cases citing this section see U. S. v. Mason, (1910) 218 U. S. 517, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133; Michigan Cent. R. Co. v. Harsha, (1904) 134 Fed. 217, 67 C. C. A. 145; Butte, etc., Consol. Min. Co. v. Montana

Ore Purchasing Co., (1907) 158 Fed. 131; U. S. v. Abeel, (1909) 174 Fed. 12, 98 C. C. A. 50; Edwards v. Bay State Gas Co., (1910) 177 Fed. 573.

### Vol. V, p. 71, sec. 996.

**Amendment unconstitutional.**—This section in so far as it required money deposited in a federal court unclaimed for ten years to be turned over to the United States, was unconstitutional, as depriving the owners thereof of their property without due process of law. *American L. & T. Co. v. Grand Rivers Co.*, (1908) 159 Fed. 775, wherein the court said: "We need not contend, in respect to property of which there is no individual ownership ascertainable, that the powers of the appropriate government may not be exerted to forfeit or escheat it, but if a government inherently possesses such a right and might enforce it by due proceedings, the proposition here is to enforce or assert the right by mere legislative enactment without any proceeding whatever, either by a court or by a duly authorized public officer. In many of the states, and in all other countries where the common law has prevailed, so far as we can ascertain, there must be a proceeding instituted—formerly a writ of escheat or inquest of office—in which either actual or constructive notice is given to all persons in interest before a judgment declaring the property to have been forfeited or to have escheated can be entered by a court. Here Congress has undertaken to take the power of adjudication or ascertainment from the courts in whose hands the property is, and to whose credit it had been placed in a depository, and itself to exercise that power, making indeed not the 'court' but the 'judge' the person to execute its decree, *ipso facto* the lapse of a certain length of time, all without requiring notice to anybody (not even the parties to the suit) and without any power in the court to exercise any discretion even though the litigation might still be in progress. . . . It will also be remembered that the Constitution of the United States, which definitely fixes the

rights surrendered by the states to the nation, makes no provision for escheats, and though article 3, section 3, gives Congress the power to declare the punishment of treason, yet, even as to treason, it provides that no forfeiture of property shall be for more than 'the life of the person attainted.' Section 996, Rev. Stat., proposes much more, and that not for the high crime of treason, but for mere neglect or omission to claim what is one's own. Furthermore, escheats are always bottomed upon the fundamental proposition that an owner of property has died entirely without heirs. If any heirs are found the escheat always fails. Section 996 does not proceed upon any notion that there are no heirs, nor does it make any provision for ascertaining the facts in the premises, but goes altogether upon a mere failure for ten years to withdraw money from the court's registry, thus entirely ignoring the prime factor in escheats, namely, failure of heirs, and arbitrarily forfeits the money to the government. All that is necessary is the lapse of ten years. Now, there is nothing magical in the period of ten years fixed in the statute. If that period may be fixed so may one of five years, or of one year, or one month, and Congress might as well assume the judicial function and once for all direct the court or the judge thereof to make any other order in a case; as one requiring money, under the control of the court, but payable ultimately to the persons entitled, to be paid over to the United States although the United States is not a party to the litigation, and shows no right to the money unless the statute *ex proprio vigore* confers it."

For other cases citing this section see U. S. v. Mason, (1910) 218 U. S. 517, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133; U. S. v. Abeel, (1909) 174 Fed. 12, 98 C. C. A. 50.

# NATIONAL BANKS.

## Vol. V, p. 79, sec. 5133.

**State control and regulation.**—To the same effect as the original note, *Larabee v. Dolley*, (1909) 175 Fed. 365; *Elizabeth First Nat. Bank v. Com.*, (1911) 143 Ky. 816, 137 S. W. 518; *Farmers' Deposit Nat. Bank v. Western Pennsylvania Fuel Co.*, (1906) 215 Pa. St. 115, 64 Atl. 374; *Green v. Bennett*, (Tex. 1908) 110 S. W. 108; *State v. Clement Nat. Bank*, (Vt. 1911) 78 Atl. 944.

The rule that a state can exercise no control over a national bank, or in any manner affect its operation except as Congress may permit, excepts the bank only from such legislation as tends to impair its utility as an instrumentality of the federal government.

## Vol. V, p. 81, sec. 5134.

**Residence.**—Under this section it was held that a national bank, the articles of which fixed its principal place of business at Johnson City, Tenn., should be regarded as a resident of that state, within the Tennessee stat-

*State v. Clement Nat. Bank*, (Vt. 1911) 78 Atl. 944.

In *Merchants' Nat. Bank v. Ford*, (1907) 124 Ky. 403, 99 S. W. 260, it was held that a state statute placing notes payable and negotiable at banks organized in the state under the state or federal laws, and indorsed to, or discounted by, any such bank, on the same footing as foreign bills of exchange, violates no rights secured to national banks by Acts of Congress, such banks being subject to the control of the state in which they are situated, as regards the construction of contracts, the transfer of property, or creation of debts and liability to suit.

## Vol. V, p. 82, sec. 5136.

### NOTES ON SECTION 5136.

- I. IN GENERAL, 1500.
- II. AUTHORITY OF OFFICERS, 1500.
- III. BANKING POWERS, 1501.

#### I. IN GENERAL.

**Nature of deposits.**—The deposits of a national bank constitute loans to it and confer on the depositor a mere chose in action. *State v. Clement Nat. Bank*, (Vt. 1911) 78 Atl. 944.

**By-laws.**—A by-law of a national bank necessitating the production of an old certificate of stock before the issuance of a new certificate to take its place will not impair the authority of the court to order the bank to issue a new certificate of stock where the one in possession of the old certificate after service of constructive process fails to appear. *Letcher v. German Nat. Bank*, (1909) 134 Ky. 24, 119 S. W. 236.

**Other officers.**—A "solicitor of business" is not within the phrase "and other officers," in the fifth clause of this section, giving a national bank power to appoint a president, vice-president, cashier, and other officers, and dismiss such officers at pleasure; but under clauses 3 and 7 of said section, empowering such a bank to make contracts and to exercise, by duly authorized officers or agents, all such incidental powers as shall be necessary

ute (Acts Tenn. 1877, p. 45, ch. 31, sec. 5), giving to resident creditors of an insolvent foreign corporation priority in the payment of debts over all other creditors. *In re Standard Oak Veneer Co.*, (1909) 173 Fed. 105.

to carry on the banking business, it may employ a solicitor of business for a year. *Case v. Brooklyn First Nat. Bank*, (1908) 59 Misc. 269, 109 N. Y. S. 1119.

#### II. AUTHORITY OF OFFICERS.

**In general.**—A national bank has power under the banking laws of the United States to intrust to its agents such authority as is required to meet the legitimate demands of its authorized business and to conduct its affairs within the scope of its charter. *Ricker Nat. Bank v. Stone*, (1908) 21 Okla. 833, 97 Pac. 577.

**Borrowing money.**—The executive officers of a national bank may legitimately borrow money for the bank's use, in the usual course of business, without special authority from their board of directors. *Cherry v. Kansas City Nat. Bank*, (1906) 144 Fed. 587, 75 C. C. A. 343.

**President.**—Where the president of a bank certified a noncommercial instrument for the accommodation of the drawers solely in his official capacity and *ultra vires* the bank's powers, he was not individually liable on such certificate. *Fidelity, etc., Co. v. National Bank of Commerce*, (1908) 48 Tex. Civ. App. 301, 106 S. W. 782.

Under this Act, which authorizes banks to elect boards of directors to which are com-

mitted the management and control of the bank, and which are empowered to select one of their number as president, in the absence of any by-law or any other fact extending the authority of the president elected by the directors, a statement by him that a note which was in fact a forgery was properly signed by the purported signer is without authority from the bank and not binding upon it. *Commercial Nat. Bank v. Cuero First Nat. Bank*, (1904) 97 Tex. 536, 80 S. W. 601, *reversing* (1903) 77 S. W. 239.

In absence of evidence that the president and cashier of a national bank were the agents of a depositor in transferring to their account money of the depositor, which they agreed to loan on real estate security, and that the depositor knew at any time that they were acting for her in that capacity, it was held that the bank and its receiver were liable to the depositor for her funds so transferred, though it could not lend money on such security. *Short v. Butler*, (1909) 136 Mo. App. 356, 117 S. W. 114.

**Vice-president.**—In an action on a note representing a loan made by plaintiff national bank to the defendant, where it appeared that the negotiations for the loan were carried on by one M., plaintiff's vice-president, and that as a result of such negotiations the loan was made to defendant, M. was an agent of the bank, and evidence as to what officers regularly had authority to make loans was immaterial. *National Bank of North America v. Thomas*, (1910) 30 R. I. 294, 74 Atl. 1092.

**Cashier.**—The cashier of a national bank, who is its active executive officer and is intrusted with the duty of selling lands acquired by the bank in satisfaction of debts, and who has authority to employ a broker to sell such lands, acts within the scope of his authority in designating to the broker the lands to be offered for sale, and a mistake in such designation is likewise within the scope of his authority, and is in effect the act of the bank, for which it is responsible. *Arnold v. National Bank*, (1905) 126 Wis. 362, 105 N. W. 828.

In contemplation of law, the leasing of property belonging to a national banking association is not within the ordinary powers and duties of the cashier of the bank. *Sponberg v. Montpelier First Nat. Bank*, (1910) 18 Idaho 524, 110 Pac. 716.

**Discount clerk.**—In *Slade v. Bennett*, (1909) 133 App. Div. 666, 118 N. Y. S. 278, it was held that the discount clerk of a national bank had no authority by virtue of his office or his agency resulting from the assignment to him of a bond and mortgage for the use of the bank to secure a debt due to the bank to bind the bank by a stipulation in a suit to which it was not a party, to the effect that he was the holder and owner of the bond and mortgage, where he had executed an unrecorded assignment thereof to the bank.

### III. BANKING POWERS.

**Ultra vires acts.**—To the same effect as the original note, *The Seattle*, (C. C. A. 1909) 170 Fed. 284; *Independence First Nat.*

*Bank v. Shewalter*, (1911) 153 Mo. App. 635, 134 S. W. 42.

**Right of bank to plead ultra vires acts as defense.**—In an action against a national bank for breach of contract, a plea that defendant was a national bank, and had no authority to carry out the contract on its part, was good. *Metropolitan Stock Exch. v. Lyndonville Nat. Bank*, (1904) 76 Vt. 303, 57 Atl. 101.

The want of authority of a national bank to become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell a leasehold, is a valid defense to an action against it founded upon its liability for the partnership debts. *Merchants' Nat. Bank v. Wehrmann*, (1906) 202 U. S. 295, 26 S. Ct. 613, 50 U. S. (L. ed.) 1036.

Where the president and cashier of a bank had no authority to certify a noncommercial instrument by which the drawers sought to indemnify their surety on a building contractor's bond for any liability the surety might sustain by virtue of such bond, it was held that the bank was not estopped to plead that the certification of such instrument was *ultra vires* and void. *Fidelity, etc., Co. v. National Bank of Commerce*, (1908) 48 Tex. Civ. App. 301, 106 S. W. 782.

**Accounting for benefits received.**—A national bank, having lawfully received property, must account for it or its proceeds, notwithstanding some *ultra vires* agreement connected with the transaction; and it cannot escape liability to a depositor for money which he placed in its hands by pleading that it made with him an *ultra vires* agreement to pay out the money to some third person on deposit of collaterals for his benefit, when the evidence shows it paid out the money without taking the collaterals agreed on. *Decatur First Nat. Bank v. Henry*, (1906) 159 Ala. 367, 49 So. 97.

A national bank which, in pursuance of a previous agreement with its debtor that he will devote to the discharge of his indebtedness a part of the proceeds of a loan to be obtained by him from another bank, requests the making of such loan, and guarantees its payment at maturity, must account to the lending bank for the sum which it receives for its own use in the execution of the agreement, even though such guaranty is beyond its powers under the national banking statutes. *Citizens' Cent. Nat. Bank v. Appleton*, (1910) 216 U. S. 196, 30 S. Ct. 364, 54 U. S. (L. ed.) 443, *affirming* (1908) 190 N. Y. 417, 83 N. E. 470.

**Action to rescind a contract.**—In an action to rescind for fraud a contract as a part of which a national bank agreed to discount notes and renew them from time to time until they were discharged as provided, it was held to be immaterial whether the agreement by the bank was beyond its powers under the federal statutes; the action being not to enforce, but to rescind, the contract. *Baker v. Berry Hill Mineral Springs Co.*, (1909) 109 Va. 776, 65 S. E. 656.

**Estoppel.**—An act of a national bank, void because *ultra vires*, cannot be made good by

estoppel. *Merchants' Bank v. Baird*, (C. C. A. 1908) 160 Fed. 642.

**Collection and security of debts.**—A national bank may not become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell a leasehold. *Merchants' Nat. Bank v. Wehrmann*, (1906) 202 U. S. 295, 26 S. Ct. 613, 50 U. S. (L. ed.) 1036.

A national bank, which, in the usual course of its business, has become the owner of notes secured by mortgage, may lawfully agree with others holding conflicting mortgages on the same property, to represent all in an action to enforce the security, their respective rights in the proceeds to be subsequently determined, where such action was deemed best for its own interests, and, when vested with title to the other mortgages by proper assignments, its right to maintain the suit cannot be questioned by the defendant on the ground that its agreement was *ultra vires*. *Morris v. Springfield Third Nat. Bank*, (1905) 142 Fed. 25, 73 C. C. A. 211.

**Borrowing money.**—The notes of a national bank, given when embarrassed by pressing demands, in part consideration of the assumption by the payee of all its outstanding obligations, secured by a pledge of all its assets remaining after turning over cash and such bills receivable as the payee would accept at par, are its valid obligations, which can be enforced against its stockholders after voluntary liquidation. *Wyman v. Wallace*, (1906) 201 U. S. 230, 26 S. Ct. 495, 50 U. S. (L. ed.) 738, *affirming* (1904) 135 Fed. 286, 68 C. C. A. 40; *Frenzer v. Wallace*, (1906) 201 U. S. 244, 26 S. Ct. 498, 50 U. S. (L. ed.) 742.

**Loan of credit.**—A national bank has no power or authority to become a mere accommodation indorser or guarantor of the payment of a debt of another, without benefit to the bank. *Barnwell Bank v. Philadelphia Sixth Nat. Bank*, (1905) 28 Pa. Super. Ct. 413; *Fidelity, etc., Co. v. National Bank of Commerce*, (1908) 48 Tex. Civ. App. 301, 106 S. W. 782.

**Agreement to pay draft.**—To the same effect as the first paragraph of the original note, *National Bank v. Philadelphia Sixth Nat. Bank*, (1905) 212 Pa. St. 238, 61 Atl. 889; *Barnwell Bank v. Philadelphia Sixth Nat. Bank*, (1905) 28 Pa. Super. Ct. 413.

**Contra.**—It is not *ultra vires* for a national bank to promise to honor a draft upon a patron. *Farmers', etc., Nat. Bank v. Illinois Nat. Bank*, (1908) 146 Ill. App. 136.

**Guaranty of paper.**—While a national bank in negotiating its paper can bind itself for the payment thereof by its indorsement thereon, it cannot guarantee payment of paper of others or become surety thereon, solely for such other's benefit. *Tallapoosa First Nat. Bank v. Monroe*, (1911) 135 Ga. 614, 69 S. E. 1123; *Appleton v. Citizens' Cent. Nat. Bank*, (1906) 116 App. Div. 404, 101 N. Y. S. 1027; *Fidelity, etc., Co. v. National Bank of Commerce*, (1908) 48 Tex. Civ. App. 301, 106 S. W. 782.

Where a national bank, in order to induce a person to purchase certain steamship stocks owned by it, agreed to take such person's note for \$50,000 for the stock and hold the stock as collateral security, and to guarantee him against any loss in the transaction from the execution and delivery of the note, it was held that such guaranty was not an ordinary commercial guaranty, but one outside the ordinary business of banking, and *ultra vires*. *Barron v. McKinnon*, (1910) 179 Fed. 759.

A national bank lent to one of its customers, a private corporation, an amount greater than ten per cent. of its unimpaired capital stock and surplus, in violation of R. S. sec. 5200, 5 Fed. Stat. Annot. 139, as amended by Act Cong. June 22, 1906, ch. 3516, 34 Stat. L. 451, 1909 Supp. Fed. Stat. Annot. 353. The cashier of the bank, who was secretary and treasurer of the borrower, notified another of such fact and induced him to lend the bank's borrower an additional sum upon the guaranty of the cashier individually, and of the bank through the cashier, of the payment thereof. It was held that the bank could not ratify such *ultra vires* act of the cashier, and that the cashier's object in inducing the other person to make the loan was to secure to the bank payment of the amount lent by it, and to release the cashier from his liability in making the excessive loan, and that the bank received a considerable portion of the amount borrowed from it did not estop it from setting up the invalidity of its guaranty. *Tallapoosa First Nat. Bank v. Monroe*, (1911) 135 Ga. 614, 69 S. E. 1123.

A state bank, at the request of a national bank, loaned \$12,000 to a third person on his personal obligation. The national bank guaranteed the repayment of the loan. The third person, pursuant to his previous agreement with the national bank, paid to it \$10,000 of the loan, though he was not indebted to it in any amount. It was held that the national bank's contract of guaranty was void as *ultra vires*, and that no action could be maintained thereon. *Appleton v. Citizens' Cent. Nat. Bank*, (1906) 116 App. Div. 404, 101 N. Y. S. 1027.

A national bank may warrant the title to property it conveys, or become liable as an indorser or guarantor of obligations which it rediscounts or sells, but it cannot lend its credit to another by becoming surety, indorser, or guarantor for him, such an act being *ultra vires*, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction. *Merchants' Bank v. Baird*, (C. C. A. 1908) 160 Fed. 642.

**Effect of ultra vires act.**—To the same effect as the first paragraph of the original note, *Appleton v. Citizens' Cent. Nat. Bank*, (1908) 190 N. Y. 417, 83 N. E. 470, *reversing* (1907) 119 App. Div. 889, 105 N. Y. S. 1105.

**Notice of invalidity of transaction.**—In *Merchants' Bank v. Baird*, (1908) 160 Fed. 642, 90 C. C. A. 338, it was held that a state bank was chargeable with notice that the credit and resources of a national bank were being unlawfully used, barring recovery

against the national bank's receiver on checks on the national bank by a corporation, where the national bank's president had written the state bank obligating his bank unconditionally to pay all checks of the corporation, not aggregating more than \$5,000 weekly, and the national bank afterwards wired that it would "protect" the corporation's checks for \$5,000 weekly in excess of "present guaranty," and later that the state bank would pay checks in excess of "guaranty" drawn during the current week.

**Dealing in stocks of other corporations.** — It is *ultra vires* of a national bank to take stock in a corporation organized to embark in the purely speculative business of buying and selling the stocks and assets of an existing and insolvent corporation, with power, but without the obligation, to engage, as an independent enterprise, in a manufacturing business, although the bank takes such stock in exchange for a claim against the insolvent corporation. *Ottawa First Nat. Bank v. Converse*, (1906) 200 U. S. 425, 26 S. Ct. 306, 50 U. S. (L. ed.) 537.

A national bank, which in the ordinary course of business receives stock as collateral security for a loan, may protect itself from loss by taking the stock in payment of the loan. *Westminster Nat. Bank v. New England Electrical Works*, (1906) 73 N. H. 465, 62 Atl. 971.

**Stock of other national banks.** — A national bank has no power to invest its surplus fund in the stock of another national bank. *Shaw v. National German-American Bank*, (1905) 190 U. S. 603, 26 S. Ct. 750, 50 U. S. (L. ed.) 328, *affirming* (1904) 132 Fed. 658, 65 C. C. A. 620.

The purchase of national bank stock for speculation by a national bank is *ultra vires*. *Metropolitan Trust Co. v. McKinnon*, (C. C. A. 1909) 172 Fed. 846.

**Liability as stockholder.** — Want of authority of a national bank to subscribe for capital stock in a speculative enterprise is a valid defense to an action against it to enforce its statutory liability as a stockholder. *Shaw v. National German-American Bank*, (1905) 190 U. S. 603, 26 S. Ct. 750, 50 U. S. (L. ed.) 328, *affirming* (1904) 132 Fed. 658, 65 C. C. A. 620; *Ottawa First Nat. Bank v. Converse*, (1906) 200 U. S. 425, 26 S. Ct. 306, 50 U. S. (L. ed.) 537.

**Loans and discounts.** — A national bank may lawfully acquire title to commercial paper, although it may be unable to show that it has made a profit upon the purchase of the paper. *Blairsville Nat. Bank v. Crabbs*, (1910) 44 Pa. Super. Ct. 454.

**Security for loans.** — Under this section prescribing the powers of national banks, authorizing them to take personal property as security for loans or for bills of exchange purchased by them, but not to deal in merchandise of any kind, the fact that the transfer to a national bank of bills of lading attached to drafts on a purchaser of hay amounted to a sale of the hay would not entitle the final purchaser to recover from the bank for deficiency in the quality of the hay, since the transaction would be *ultra*

*vires*. *Leonhardt v. Small*, (1906) 117 Tenn. 153, 96 S. W. 1051, 6 L. R. A. N. S. 887.

**Independent business enterprises.** — Where a national bank took over the operation of a creamery corporation which was largely indebted to it, and continued the operation of the creamery until a receiver was appointed for the bank, at which time it held certain funds actually identified in trust for the patrons of the creamery, it was no answer to the receiver's obligation to pay over such funds that the bank had no power to engage in the creamery business. *Emigh v. Earling*, (1908) 134 Wis. 565, 115 N. W. 128.

**Assuming obligations of an insolvent bank.** — Where a contract by which a national bank assumed all the obligations of an insolvent bank in contemplated liquidation was fully explained at a meeting at which 1,665 out of 2,000 shares were represented, and after the contract was executed it was ratified by a vote exceeding the proportion of stock specified by R. S. secs. 5220, 5221, 5 Fed. Stat. Annot. 166, 167, the stockholders were not thereafter entitled to claim that such contract was *ultra vires*. *George v. Wallace*, (1904) 135 Fed. 286, 68 C. C. A. 40.

**Certification of noncommercial checks.** — Under this section, empowering national banks to perform all acts incident to the carrying on of banking business by discounting or negotiating notes, bills of exchange, or other evidence of debt, and by loaning money on personal security, etc., a bank had no power to certify an instrument by which the drawers agreed to pay their surety any amount the surety might be legally required to pay by virtue of such suretyship, not exceeding \$10,159, the check to be void in the absence of such liability; such instrument not being a commercial check, drawn in the ordinary course of banking business. *Fidelity, etc., Co. v. National Bank of Commerce*, (1908) 48 Tex. Civ. App. 301, 106 S. W. 782.

**Savings bank business.** — A national bank is not a savings bank, and it cannot transact the same kind of business that a savings bank is incorporated to do, and, though a national bank has a savings department, it does not receive deposits to be invested in specified securities under the supervision of the bank commissioners, and it does not hold the deposits on a trust creating the relation of trustee and *cestui que trust*, but on a contract creating the relation of debtor and creditor. *State v. People's Nat. Bank*, (1908) 75 N. H. 27, 70 Atl. 542. See also *Barrett v. Bloomfield Sav. Inst.*, (1904) 66 N. J. Eq. 431, 57 Atl. 1131.

If a national bank attempts to compete with a savings institution, the latter should appeal to the law to prevent the national bank from seeking savings deposits. *Barrett v. Bloomfield Sav. Inst.*, (1904) 66 N. J. Eq. 431, 57 Atl. 1131, *affirming* (1903) 64 N. J. Eq. 425, 54 Atl. 543.

**Nature of agreement to pay interest.** — A national bank receiving money from depositors for investment, under an agreement to pay a fixed rate of interest thereon, is a debtor to the depositors for the deposits and

interest, for the interest agreed to be paid on the money received is not in the nature of a dividend of profits realized from the successful management of the bank, but the depositors' security depends on the general solvency of the bank. *State v. People's Nat. Bank*, (1908) 75 N. H. 27, 70 Atl. 542.

**Member of partnership.**—A national bank cannot be a member of a partnership, or become liable as a partner. *Merchants' Nat. Bank v. Wehrmann*, (1903) 69 Ohio St. 160, 88 N. E. 1004.

In *Merchants' Nat. Bank v. Wehrmann*, (1903) 69 Ohio St. 160, 88 N. E. 1004, it appeared that a customer of a national bank, being largely indebted to it, and being in failing circumstances, and being the owner of nine shares in a partnership consisting of forty shares, each evidenced by a certificate transferable on the books of the firm, transferred his nine shares to the bank to secure payment of his indebtedness, the bank becoming the owner of such shares. It was held not to make the bank a partner, but a part owner in severalty of the property then owned by the partnership, and liable for nine-fortieths of the debts and expenses in purchasing, improving, and disposing of the firm property.

**Procuring signature to a note for another bank.**—The procurement of a signature to a note for another bank, in order that it may lend money to a third person, and a representation that the signature is genuine, are not within the powers of a national bank, and it is not liable where the note turns out to be a forgery. *Commercial Nat. Bank v. Cuero First Nat. Bank*, (1904) 97 Tex. 536, 80 S. W. 601, *reversing* (1903) 77 S. W. 239.

**Purchasing notes at less than face value.**—The power to discount promissory notes and other evidences of debt expressly given to national banks by this section is sufficiently comprehensive to include the purchase of notes at less than their face value. *Morris v. Springfield Third Nat. Bank*, (1905) 142 Fed. 25, 73 C. C. A. 211.

**Taking assignment of claims for collection.**—A national bank may take an absolute assignment of a claim for collection, and agree to pay the proceeds or part thereof to another, and by such transfer the legal title passes to the bank, and its agent to collect the money thereon cannot refuse to pay it to the bank, on the ground that it had no legal right to own such claim. *King v. Miller*, (1908) 53 Ore. 53, 97 Pac. 542.

## Vol. V, p. 90, sec. 1. [*Act of July 12, 1882.*]

**Presumption of acceptance of extended charter.**—Where a national bank continues its existence and performs the functions of such an association after the expiration of its original corporate existence for a long

period of time, it will be presumed to have accepted the benefit of a certificate executed by the Comptroller of the Currency extending its corporate existence. *Clement v. U. S.*, (1906) 149 Fed. 305, 79 C. C. A. 243.

## Vol. V, p. 91, sec. 3.

**Certificate as evidence.**—Where a certificate of the Comptroller of the Currency recited that a certain bank had complied with all the provisions of this Act authorizing an extension of the corporate existence of such banks, and declared that the bank was authorized to have succession until Nov. 21,

1908, such certificate was conclusive evidence, in a prosecution of the president of the bank for violating the National Bank Act, of a compliance by the bank with all necessary conditions precedent to the extension of its charter. *Clement v. U. S.*, (1906) 149 Fed. 305, 79 C. C. A. 243.

## Vol. V, p. 91, sec. 5.

**Liability of withdrawing shareholders.**—Shareholders in a national bank which has extended its corporate existence, conformably to this Act, cease to be such upon the expiration of the original term of the bank's corporate life, and therefore cannot thereafter be chargeable with the personal liability for its debts, where they took the steps

required of nonassenting stockholders in section 5 by giving notice of a desire to withdraw, and by appointing an appraiser to obtain a valuation of their shares. *Apsey v. Kimball*, (1911) 221 U. S. 514, 31 S. Ct. 695, 55 U. S. (L. ed.) 834, *affirming* (1908) 164 Fed. 830, 90 C. C. A. 634.

## Vol. V, p. 92, sec. 7.

**Right to sue bank after expiration of charter.**—An objection that a national bank whose charter had expired had no corporate existence for the purpose of being sued by a stockholder and *cestui que trust* of a special trust fund for the appointment of a receiver

is without merit, under this section, extending their franchises, in such case "for the sole purpose of liquidating their affairs, until such affairs are finally closed." *Cogswell v. Norwich Second Nat. Bank*, (1903) 76 Conn. 252, 56 Atl. 574.

## Vol. V, p. 93, sec. 5137.

**Improvement of real estate.**—Where a national bank in flourishing condition had been for many years the rightful owner of a lot improved by its bank building, it had power to alter and enlarge the improvement thereon so as to furnish better accommodation for the bank's business, and at the same time provide offices which could be rented to tenants. *Wingert v. Hagerstown First Nat. Bank*, (1909) 175 Fed. 739, 99 C. C. A. 315.

**Escheat.**—The Kentucky statute (Ky. Stat., sec. 567, Russell's Stat., sec. 2153) providing for escheat of real property held by banks, not necessary to their business, for more than five years, was held not to be in conflict with this section, so that realty held by a national bank not necessary for its business for more than five years was subject to escheat. *Elizabeth First Nat. Bank v. Com.*, (1911) 143 Ky. 816, 137 S. W. 518.

**Effect of ultra vires act.**—An objection that a corporation organized under the National Banking Act has no capacity to pur-

chase land can only be raised by the federal government. *De Witt County Nat. Bank v. Mickelberry*, (1910) 244 Ill. 77, 91 N. E. 86; *Minneapolis Threshing Mach. Co. v. Jones*, (1905) 95 Minn. 127, 103 N. W. 1017.

The United States alone can object to the want of authority of a national bank, under this section, to accept a conveyance of real property to be held in trust. *Kerfoot v. Farmers', etc., Bank*, (1910) 218 U. S. 281, 31 S. Ct. 14, 55 U. S. (L. ed.) 1042, *affirming* (1898) 145 Mo. 418, 46 S. W. 1000.

The validity of a mortgage upon realty executed to a national bank can only be questioned by the federal government. *Taylor v. Davidson*, (Tex. 1909) 120 S. W. 1018.

A national bank may enforce a real estate mortgage assigned to an employee for its benefit, though it is subject to liability to the federal government for exceeding its powers. *Slade v. Bennett*, (1909) 133 App. Div. 666, 118 N. Y. S. 278.

## Vol. V, p. 95, sec. 5138.

The capital stock of a national bank is the sum on which it is authorized to do business, constituting the permanent basis of its credit,

and does not include the deposits of the bank. *State v. Clement Nat. Bank*, (Vt. 1911) 78 Atl. 944.

## Vol. V, p. 96, sec. 5139.

**Scope of notes.**—This section has been construed most often in connection with R. S. sec. 5161, 5 Fed. Stat. Annot. 106, in relation to the individual liability of shareholders for debts. For convenience of the reader the cases on the question of liability, so far as they turn upon the question of ownership or transfer of the shares, are treated hereunder.

**Control by bank.**—To the same effect as the first paragraph of the original note, *Buffalo Third Nat. Bank v. Buffalo German Ins. Co.*, (1904) 193 U. S. 581, 24 S. Ct. 524, 48 U. S. (L. ed.) 801.

To the same effect as the second paragraph of the original note and *following* *McNeil v. New York Tenth Nat. Bank*, (1871) 46 N. Y. 325, therein cited, *Gray v. Fankhauser*, (Ore. 1911) 115 Pac. 146.

**Real and apparent owner.**—As a general rule, the question of liability for an assessment on the shares of an insolvent national bank depends upon who was the actual owner of the stock when the operations of the bank were suspended. *Hullitt v. Ohio Valley Nat. Bank*, (1905) 137 Fed. 461, 69 C. C. A. 609, *affirmed* (1907) 204 U. S. 162, 27 S. Ct. 179, 51 U. S. (L. ed.) 423.

A colorable transfer of shares of stock in a national bank, made for the benefit of the registered owner, cannot relieve the latter from his liability under R. S. sec. 5151, 5 Fed. Stat. Annot. 105, as a shareholder, for the debts of the bank. *McDonald v. Dewey*, (1906) 202 U. S. 510, 26 S. Ct. 731, 50 U. S. (L. ed.) 1128, *reversing* (1905) 134 Fed. 528, 67 C. C. A. 408.

**Apparent holder.**—One who was notified that shares of stock in a national bank had been transferred into his name, although he had in fact no interest therein, and who indorsed the certificates in blank, but took no steps to have the stock transferred to the name of the true owner, cannot avoid liability for an assessment thereon made by the comptroller to meet the debts of the bank after its insolvency. *Kenyon v. Fowler*, (1910) 215 U. S. 593, 30 S. Ct. 409, *affirming* (1907) 155 Fed. 107, 83 C. C. A. 567.

**Necessity of transfer on books of bank.**—*Neglect to have transfer made.*—In *Schofield v. Twining*, (1904) 127 Fed. 486, it appeared that the defendant, prior to the failure of a national bank in which his son was a director, owned certain shares of the bank's stock, which he sold to his son, receiving in payment a demand note, secured by certain collateral. At the time of the sale the son promised that he would see that the shares were properly transferred, but he failed to do so. Defendant made no attempt to see that the stock was transferred, and it stood in his name on the books of the bank at the time of its failure. It was held that the son was *prima facie* the father's agent to transfer the shares, and that in the absence of proof that the transfer was in good faith, and of a prompt attempt to have the stock transferred on the books of the bank, the father was liable to assessment thereon.

**As between the parties.**—Failure to transfer stock in a national bank on the books of the bank, as required by this section, does not affect the validity of the transfer as between

the parties, nor as to the person for whose benefit the stock was transferred. *Larimer v. Beardsley*, (1906) 130 Ia. 706, 107 N. W. 935.

**Transfer in pledge.**—For the purposes of the National Banking Act, the pledgor of stock not transferred on the books is to be regarded as the owner until and unless something further transpires which operates to transfer the ownership to another. *Hulitt v. Ohio Valley Nat. Bank*, (1905) 137 Fed. 461, 69 C. C. A. 609, *affirmed* (1907) 204 U. S. 162, 27 S. Ct. 179, 51 U. S. (L. ed.) 423.

**Transfer with knowledge of insolvency.**—One who, with knowledge of the insolvency of a national bank, transfers his stock to an irresponsible vendee with intent to evade his liability under R. S. sec. 5151, 5 Fed. Stat. Annot. 105, for the debts of the bank, can only be held responsible for the unsatisfied debts existing when the fraudulent transfer was made, in view of the requirement of sec. 5210, 5 Fed. Stat. Annot. 152, that the list of the names and residences of all the shareholders and the number of shares held by each be kept by the bank, subject to the inspection of all shareholders and creditors, and of the provision of this section that every person becoming a shareholder by a transfer of shares to himself shall succeed to all the rights and liabilities of the prior holder of such shares, and that no change shall be made in the articles of association by which the rights, remedies, or securities of the existing creditors of the association shall be impaired. *McDonald v. Dewey*, (1906) 202 U. S. 510, 26 S. Ct. 731, 50 U. S. (L. ed.) 1128, *reversing* (1905) 134 Fed. 528, 67 C. C. A. 408.

The transferrer of national bank stock cannot be made liable for an assessment upon the stock on the ground that the bank was insolvent at the time of the transfer, unless he knew of such insolvency, and intended to evade his liability. *Vandagriff v. Rich Hill Bank*, (C. C. A. 1908) 163 Fed. 823.

**Knowledge of insolvency.**—The fact that a stockholder in a national bank having a capital of \$200,000, at the time he sold and transferred his stock, was a director and was dissatisfied with the management, was held not sufficient to charge him with knowledge of its insolvency, so as to render him liable for a subsequent assessment on the stock, although it was in fact insolvent, where its assets on their face largely exceed its lia-

bilities, and it appeared that the directors were deceived as to their value. *Fowler v. Crouse*, (C. C. A. 1910) 175 Fed. 646.

**Transfer to irresponsible party.**—A stockholder in a national bank cannot evade his liability under R. S. sec. 5151, 5 Fed. Stat. Annot. 105, for the debts of the bank, by a transfer of his shares of stock to a person financially irresponsible, provided he knew or should have known at the time that the bank was then insolvent. *McDonald v. Dewey*, (1906) 202 U. S. 510, 26 S. Ct. 731, 50 U. S. (L. ed.) 1128, *reversing* (1905) 134 Fed. 528, 67 C. C. A. 408.

**Rights of transferors in charged off assets.**—Where assets of a national bank are charged off against withdrawn capital stock, and set apart in trust for the benefit of the then stockholders, a subsequent transfer of shares by the stockholders does not pass the right to the interest of the transferors in the trust fund, notwithstanding the provision of this section that transferees of national bank stock shall succeed to all the rights and liabilities of their transferors. *Cogswell v. Second Nat. Bank*, (1905) 78 Conn. 75, 60 Atl. 1059, *affirmed* (1907) 204 U. S. 1, 27 S. Ct. 241, 51 U. S. (L. ed.) 343.

Similarly, shareholders at the time of the creation of the trust fund may at any time thereafter transfer their rights in the trust fund, with or without a transfer of their shares of stock. *Cogswell v. Second Nat. Bank*, (1905) 78 Conn. 75, 60 Atl. 1059, *affirmed* (1907) 204 U. S. 1, 27 S. Ct. 241, 51 U. S. (L. ed.) 343.

**Effect of transfer.**—A stockholder in a national bank divests himself of the double liability imposed by the statute for the protection of creditors by a transfer of his stock when the bank is solvent, or even if insolvent by a *bona fide* transfer without knowledge of the insolvency; the only ground for holding him liable after a transfer being fraud. *Fowler v. Crouse*, (C. C. A. 1910) 175 Fed. 646.

**Infants.**—In *Aldrich v. Bingham*, (1904) 131 Fed. 363, it was held that a transfer of stock in a national bank, while it was a going concern, to the stockholder's infant children under five years of age, not legally liable to assume all the obligations of stockholders, did not relieve the father from his liability for assessments levied on the stock so transferred after the bank's insolvency.

## Vol. V, p. 101, sec. 5141.

**Appointment of receiver by state court.**—See under this title, vol. 5, p. 170, sec. 5234.

## Vol. V, p. 103, sec. 5143.

**Charging off assets.**—A national bank, in charging off assets against capital stock withdrawn by consent of the Comptroller of the Currency, may list in the schedule of charged-off assets claims which are also and primarily listed at a lesser valuation as part of the capital stock. *Cogswell v. Second Nat. Bank*, (1905) 78 Conn. 75, 60 Atl. 1059, *affirmed*

(1907) 204 U. S. 1, 27 S. Ct. 241, 51 U. S. (L. ed.) 343.

**Special trust fund for original stockholders.**—Under an averment in a complaint by an original stockholder of a national bank, for the appointment of a receiver, that a certain fund was set apart for the benefit of the original stockholders when they consented to a



reduction of capital and by direction of the Comptroller of the Currency, it was held that an objection that no special trust fund ever existed, because the directors had no authority to make it, was without merit, since no reduction in capital could have been made under this section without the approval of the

Comptroller, and it was fairly within his authority to condition his approval on the adoption of such measures as he might think proper to do justice to the holders of the original shares. *Cogswell v. Norwich Second Nat. Bank*, (1903) 76 Conn. 252, 56 Atl. 574.

### Vol. V, p. 104, sec. 5144.

**Voting trust.**—In *Bridgers v. Tarboro First Nat. Bank*, (1910) 152 N. C. 293, 67 S. E. 770, it appeared that a voting trust agreement between the majority stockholders of a national bank was intended to prevent the control of a majority of the stock passing by purchase into the hands of a stockholder seemingly *persona non grata* to many of them. It conferred on the trustees and their successors uncontrolled power to manage the bank for fifteen years. It gave the trustees unrestricted power to fill vacancies in their number and completely separated the legal and equitable ownership of the stock. The trustees were officers of the bank, forbidden by this section to act as proxies, but the agreement conferred an irrevocable represen-

tation by proxy for the term. It was not coupled with an interest, and by it the subscribers stripped themselves of their power to vote and to participate in the annual meetings at which are elected directors, each of whom is required by sections 5146 and 5147 to be the *bona fide* owner of at least ten shares of stock, and of their power to determine the bank's policy. The avowed purpose was to assure the subscribers of the undisturbed continuance of the existing conditions, except by an unanimous consent. The surrender of their duties was complete, and the power of the trustees to do as they saw fit was absolute. It was held that the agreement was against public policy and void.

### Vol. V, p. 104, sec. 5145.

**Charging off bad and doubtful assets.**—Under this section providing that the affairs of a national bank shall be managed by the directors, the directors may, on a reduction of the capital stock of the bank by a vote of the shareholders, approved by the Comptroller of the Currency on the assurance of the president and directors that bad and doubtful assets will be charged off and set aside for the benefit of the then shareholders, charge off the bad and doubtful assets as, in

effect, a dividend from assets in excess of capital stock, and on so doing the right to receive the proceeds of the assets thus set apart is irrevocably vested in those who are shareholders on the date of the approval of the reduction of stock by the Comptroller of the Currency. *Cogswell v. Second Nat. Bank*, (1905) 78 Conn. 75, 60 Atl. 1059, *affirmed* (1907) 204 U. S. 1, 27 S. Ct. 241, 51 U. S. (L. ed.) 343.

### Vol. V, p. 105, sec. 5151.

**Liability of pledgee.**—A *bona fide* pledgee of shares of the stock of a national banking association is not individually liable for its debts under this section. *Williamson v. American Bank*, (C. C. A. 1911) 185 Fed. 66.

The pledgee of national bank stock as collateral security for a note, with power of public or private sale for the liquidation of the pledge, becomes the beneficial owner of such stock, and, as such, subject to the liability of a stockholder under this section, where, after the death of the pledgor, it causes the stock to be registered in the name of an employee with no beneficial interest, and afterwards indorses upon the note the supposed value of the stock as of the date of the credit, and presents the note, as reduced by the amount of such valuation, to the pledgor's administrator, who allows the claim in this form. *Ohio Valley Nat. Bank v. Hulitt*, (1907) 204 U. S. 162, 27 S. Ct. 179, 51 U. S. (L. ed.) 423, *affirming* (1905) 137 Fed. 461, 69 C. C. A. 609.

**Married women are liable.**—The coverture of the legatee of shares of stock in a national bank when her name was placed upon the

bank's books as a stockholder and when she received the certificate of stock does not protect her against a personal judgment at law for the amount due as a shareholder under an assessment made by the Comptroller of the Currency to pay the debts of the bank, although a married woman may be incapable, under the local law, of making or binding herself personally by contract, if such law does not incapacitate her from becoming an owner of such stock, by bequest or otherwise. *Christopher v. Norvell*, (1906) 201 U. S. 216, 26 S. Ct. 502, 50 U. S. (L. ed.) 732, *affirming* (1905) 134 Fed. 842, 67 C. C. A. 438.

**Liability of stockholders who vote against liquidation.**—Valid obligations of a national bank may, after voluntary liquidation, be enforced against a stockholder who voted against the resolutions looking towards such liquidation, where the requisite amount of stock was voted in favor of that course. *Poppleton v. Wallace*, (1906) 201 U. S. 245, 26 S. Ct. 498, 50 U. S. (L. ed.) 743, *affirming* (1904) 135 Fed. 286, 68 C. C. A. 40.

**"Contracts, debts, and engagements."**—Where a national bank assumed the debts of

an insolvent bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts, and engagements" of the insolvent bank in equity, for which its stock-

holders were liable, as provided by this section. *George v. Wallace*, (1904) 135 Fed. 286, 68 C. C. A. 40, *affirmed* (1906) 201 U. S. 245, 26 S. Ct. 498, 50 U. S. (L. ed.) 743.

**Liability as affected by transfer of stock.** — See under this title, vol. 5, p. 96, sec. 5139.

## Vol. V, p. 106, sec. 2.

**Effect of latter Acts.** — This section was not repealed by Act July 12, 1882, ch. 290, sec. 4, 22 Stat. L. 163, 5 Fed. Stat. Annot. 194 note, providing that the jurisdiction for suits by or against any national bank, except suits between them and the United States, shall be the same as the jurisdiction for suits by or against state banks, nor by Act Aug. 13, 1888, ch. 866, sec. 4, 25 Stat. L. 436, 5 Fed. Stat. Annot. 193, declaring that all national banks, for the purpose of actions by or against them, shall be deemed citizens of the states in which they are respectively located, etc., as such latter sections relate exclusively to suits by or against banking associations themselves. *George v. Wallace*, (1904) 135 Fed. 286, 68 C. C. A. 40, *affirmed* (1906) 201 U. S. 230, 26 S. Ct. 495, 50 U. S. (L. ed.) 738.

**Who may maintain suit.** — See *George v. Wallace*, (1904) 135 Fed. 286, 68 C. C. A. 40.

**Limitation of actions.** — A state statute of limitations does not begin to run against the right to enforce the individual liability of stockholders in a national bank until the amount of such liability has been ascertained and assessed by the Comptroller of the Currency. *Rankin v. Barton*, (1905) 190 U. S.

228, 26 S. Ct. 29, 50 U. S. (L. ed.) 163, *reversing* (1904) 69 Kan. 629, 77 Pac. 531. See also *King v. Armstrong*, (1908) 9 Cal. App. 368, 99 Pac. 527.

In *McClaine v. Rankin*, (1905) 197 U. S. 164, 25 S. Ct. 410, 49 U. S. (L. ed.) 702, it was held that the personal liability of shareholders in a national bank, under R. S. sec. 5151, for the contracts, debts, and engagements of the bank, cannot be regarded as a contract liability, for the purpose of making applicable the limitation prescribed by a state statute for an "action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument."

**Burden of proof.** — One who relies upon a sale of shares of stock in a national bank, made with knowledge of its insolvency, to escape his liability as a shareholder under R. S. sec. 5151, for the debts of the bank, has the burden of proving that the vendee was financially responsible to the extent of the assessment. *McDonald v. Dewey*, (1906) 202 U. S. 510, 26 S. Ct. 731, 50 U. S. (L. ed.) 1128, *reversing* (1904) 134 Fed. 528, 67 C. C. A. 408.

## Vol. V, p. 108, sec. 5152.

**Father holding stock for children.** — R. S. sec. 5152 is not confined to express trusts, but applies to every one holding stock as trustee, and a father who invested funds belonging to his children in such stock, taken in his own name simply as "trustee," cannot be held personally liable for an assessment thereon, although the fund so invested arose from an investment of his own money previously made by him in their names and behalf. *Fowler v. Gowing*, (C. C. A. 1908) 105 Fed. 891, *affirming* (1907) 152 Fed. 801.

**Determination of liability of trust estate.** — Where the question of the liability of a trust estate for an assessment on shares of an insolvent national bank held by the trustee depends upon the power of the trustee, un-

der the terms of the trust, to purchase such shares for the estate, such question cannot be determined in an action at law by the bank receiver against the stockholder, though it is alleged that he holds the stock as trustee. *Hampton v. Foster*, (1904) 127 Fed. 468.

Where stock in a national bank at the time of its failure was held by a trustee for the benefit of his children, the fact that the trust estate was wiped out of existence, so far as value or financial responsibility was concerned, by the failure of the bank, did not charge the trustee individually as a stockholder with the additional statutory liability imposed by this section. *Fowler v. Gowing*, (1907) 152 Fed. 801.

## Vol. V, p. 109, sec. 5153.

**Amendment.** — This section was amended by Act of March 4, 1907, ch. 2913, 34 Stat. L. 1289, 1909 Supp. Fed. Stat. Annot. 355.

## Vol. V, p. 109, sec. 5154.

**Conversion of banks organized under territorial laws.** — The conversion of a bank, organized under the territorial laws, into a national bank transfers the assets of the former

to the latter, which succeeds thereto by operation of law, and not as a purchaser. *People's Nat. Bank v. Kingfisher County*, (Okla. 1908) 103 Pac. 632,

**Rights of shareholders.**—Where a stockholder in a state bank, after its reorganization as a national bank, accepted dividends on his individual shares, and in view of the tender age of certain children, to whom he had transferred part of his stock, it might be presumed that he also received dividend

checks made payable by the bank to the order of such children, he was estopped to deny his liability for assessments levied on such stock by the Comptroller on the insolvency of the bank on the ground that he did not expressly assent to the reorganization of the bank. *Aldrich v. Bingham*, (1904) 181 Fed. 363.

## Vol. V, p. 118, sec. 5172.

**Amendment.**—This section was amended by Act of May 30, 1908, ch. 229, 35 Stat. L. 548, 1909 Supp. Fed. Stat. Annot. 361.

## Vol. V, p. 124, sec. 5191,

**Appointment of receiver by state court.**—See under this title, vol. 5, p. 170, sec. 5234.

## Vol. V, p. 130, sec. 5197.

**Constitutionality.**—To the same effect as the original note, *Schlesinger v. Gilhooly*, (1907) 189 N. Y. 1, 81 N. E. 619, *affirming* (1906) 116 App. Div. 914, 101 N. Y. S. 1143.

**Highest rate allowed by state law.**—By compounding interest offender than is permitted by a state law, a national bank charges interest at a higher rate than that

allowed by the laws of the state, within the meaning of this section, although the compounded interest is less than the state laws permit to be charged directly without compounding. *Citizens' Nat. Bank v. Donnell*, (1904) 195 U. S. 369, 25 S. Ct. 49, 49 U. S. (L. ed.) 238, *affirming* (1903) 172 Mo. 384, 72 S. W. 925.

## Vol. V, p. 133, sec. 5198.

### NOTES ON SECTION 5198.

- I. EFFECT OF USURY GENERALLY, 1509.
- II. PAYMENT OF USURY, 1509.
- III. FORFEITURE OF INTEREST, 1509.
- IV. PENALTY, 1510.
- V. STATUTORY REMEDY EXCLUSIVE, 1510.

#### I. EFFECT OF USURY GENERALLY.

**This section is constitutional.**—*Schlesinger v. Gilhooly*, (1907) 189 N. Y. 1, 81 N. E. 619, *affirming* (1906) 116 App. Div. 914, 101 N. Y. S. 1143.

**The validity of the contract.**—To the same effect as the original note, *Meadors v. Johnson*, (1910) 27 Okla. 544, 112 Pac. 1121.

#### II. PAYMENT OF USURY.

**Extension or renewal notes.**—To the same effect as the original note, *Jacksboro First Nat. Bank v. Lasater*, (1905) 196 U. S. 115, 25 S. Ct. 206, 49 U. S. (L. ed.) 408, *reversing* (Tex. 1902) 72 S. W. 1054.

**Renewal note by surety.**—A discharge of a note by a surety by giving his own note in renewal thereof does not operate as a payment by the principal in such sense as to entitle him to avail himself of the federal statute authorizing the recovery from a national bank of twice the amount of usurious interest paid to the bank, nor does the subsequent payment of the renewal note by the surety operate to give the principal a cause of action under such statute. *Lasater v. Jacksboro First Nat. Bank*, (1905) 40 Tex. Civ. App. 237, 88 S. W. 429.

**Partial payments.**—To the same effect as the first paragraph of the original note, *Richmond Second Nat. Bank v. Fitzpatrick*,

(1905) 84 S. W. 1150, 27 Ky. L. Rep. 283; *Citizens' Nat. Bank v. Donnell*, (1903) 173 Mo. 384, 72 S. W. 925.

#### III. FORFEITURE OF INTEREST.

**Personal defense.**—Where two persons execute a note to a national bank and one of them pays usurious interest thereon, the other cannot take advantage of such payment in an action by the bank to collect the note, as the party paying the interest or his legal representative alone has a right of action to recover the penalty for receiving such interest, and such payment cannot be set up as an offset or defense in an action brought by the bank on the note. *Trabue v. Cook*, (Tex. 1910) 124 S. W. 455.

An accommodation maker of a note given to a national bank can set up the defense of usury to defeat the recovery of interest. *Trabue v. Cook*, (Tex. 1910) 124 S. W. 455.

**Set-off.**—In an action by a national bank on a note defendant can, under this section, reduce the recovery by the amount of usury included in the note, but for illegal interest paid he must bring action. *National Bank v. Lynch*, (W. Va. 1911) 71 S. E. 389.

**Note in excess of amount received and interest.**—Where a note is given for a sum in excess of the amount actually received and proper interest thereon, a forfeiture of the entire interest on the loan is warranted. *Wagoner Nat. Bank v. Welch*, (1907) 7 Ind. Ter. 259, 104 S. W. 611.

**Recovery of principal.**—Under this section providing that knowingly charging usurious interest forfeits all interest, a national bank holding for value and innocently a bond and mortgage tainted with usury may recover the

principal due. *Slade v. Squier*, (1909) 133 App. Div. 666, 118 N. Y. S. 278.

**Election to remit excessive interest.**—A national bank, whose action on a promissory note is met by the plea of usury, may not avoid the forfeiture of the entire interest, imposed by this section in absolute terms, by then declaring an election to remit the excessive interest. *Citizens' Nat. Bank v. Donnell*, (1904) 195 U. S. 369, 25 S. Ct. 49, 49 U. S. (L. ed.) 238, *affirming* (1903) 172 Mo. 384, 72 S. W. 925.

A national bank, which has made a twelve per cent. charge on overdrafts, where eight per cent. is the highest rate of interest permitted by the state laws, cannot escape the forfeiture prescribed by this section where a greater rate of interest is charged than the state laws allow, because of the trifling amount, or on the theory that the charge is a penalty because of the failure to pay a debt when due. *Citizens' Nat. Bank v. Donnell*, (1904) 195 U. S. 369, 25 S. Ct. 49, 49 U. S. (L. ed.) 238, *affirming* (1903) 172 Mo. 384, 72 S. W. 925.

#### IV. PENALTY.

**Actual payment necessary.**—To the same effect as the original note, *Abbeville First Nat. Bank v. Clark*, (1909) 161 Ala. 497, 49 So. 807.

**The payment of the principal sum.**—To the same effect as the original note, *McCarthy v. Rapid City First Nat. Bank*, (1909) 23 S. D. 269, 121 N. W. 853.

**Knowledge.**—In an action under this section for usury on a note to a national bank, refusal to instruct that the defendant must have received the usury knowingly was held to be error. *Merchants', etc., Nat. Bank v. Horton*, (1911) 27 Okla. 689, 117 Pac. 201.

**Mode of payment.**—This section comprehends payment of the usurious interest by transfer of property as well as payment in money. But to constitute a payment by transfer of property within the statute, the parties must intend that the property be accepted as a payment. *Blakely First Nat. Bank v. Davis*, (1911) 135 Ga. 687, 70 S. E. 246.

Where property is accepted as payment its market value at the time must exceed the principal and lawful interest, to amount to payment and receipt of illegal interest. *Blakely First Nat. Bank v. Davis*, (1911) 135 Ga. 687, 70 S. E. 246.

Where property is accepted in payment of

a debt infected with usury, it must appear, not only that the market value of the property was in excess of the principal debt and legal interest, but that the transfer and delivery thereof was intended by the debtor and accepted by the bank as payment, not only of the lawful interest, but also of the illegal interest; the word "knowingly," as used in this section, meaning "with knowledge." *Blakely First Nat. Bank v. Davis*, (1911) 135 Ga. 687, 70 S. E. 246.

**Who may sue for penalty.**—Joint makers of a note to a national bank who have separately, but from a joint fund, paid usury, are entitled to jointly maintain an action for penalty under this section. *Merchants', etc., Nat. Bank v. Horton*, (1911) 27 Okla. 689, 117 Pac. 201.

**A complaint under this section making the taking or reserving of usurious interest, when knowingly done, a forfeiture of all interest, and if such interest has been paid, authorizing a recovery of double the amount thereof, must allege that the interest was knowingly taken.** *Garfinkle v. Charleston Bank*, (1908) 79 S. C. 404, 60 S. E. 942.

**Limitation of action.**—An application by a national bank of a payment on a usurious note to payment of the usurious interest, with the knowledge and consent of the maker, so that the two-year limitation for recovery prescribed by this section, of the penalty, begins to run, is shown, where on the back of the note is indorsed interest paid at a usurious rate, and such note is taken up and a new note given, in renewal, for the amount remaining unpaid after allowing such usurious rate. *McCarthy v. Rapid City First Nat. Bank*, (1909) 23 S. D. 269, 121 N. W. 853.

**Voluntary payments by third persons.**—This section does not apply to voluntary payments of debts of third persons to the bank, which may be infected with usury. *Blakely First Nat. Bank v. Davis*, (1911) 135 Ga. 687, 70 S. E. 246.

**Burden of proof.**—One seeking to recover the penalty given by this section for usury on a note to a national bank, has the burden of showing that the interest paid exceeded the legal rate, and that the bank received it knowingly. *Merchants', etc., Nat. Bank v. Horton*, (1911) 27 Okla. 689, 117 Pac. 201.

#### V. STATUTORY REMEDY EXCLUSIVE.

**Set-off of interest paid.**—To the same effect as the original note, *National Bank v. Lynch*, (W. Va. 1911) 71 S. E. 389.

### Vol. V, p. 139, sec. 5199.

**Assets not necessary to retain as capital or surplus.**—Under R. S. secs. 5199, 5204, authorizing directors of a national bank to declare semi-annual dividends out of net profits after carrying one-tenth part of the net profits of the preceding half year to the surplus fund until the same shall amount to twenty per centum of the capital stock, and prohibiting the withdrawal, in the form of

dividends or otherwise, of any portion of the capital, assets which it is not necessary to retain as capital or for the surplus fund may be returned to the shareholders by the directors, and dividends so ordered may be made payable in the future, and on the contingency of future collections on such assets. *Cogswell v. Second Nat. Bank*, (1905) 78 Conn. 75, 60 Atl. 1059.

## Vol. V, p. 139, sec. 5200.

**Amendment.**—This section was amended by Act of June 22, 1906, ch. 3516, 34 Stat. L. 451, 1909 Supp. Fed. Stat. Annot. 353.

**Effect of ultra vires act.**—To the same effect as the original note, *Richeson v. National Bank*, (1910) 96 Ark. 594, 132 S. W. 913.

A violation of this section, prohibiting a national bank from loaning more than ten per cent. of its capital to any person or corporation, can be taken advantage of only by the government. *Maryland Trust Co. v. Na-*

*tional Mechanics' Bank*, (1906) 102 Md. 608, 63 Atl. 70.

Where, in evidence of a loan actually made to a bank, the loaning bank accepted from the borrowing bank a note signed by the latter's cashier personally and indorsed by the borrowing bank, to avoid disclosing on the face of the transaction an excessive loan, it was held that the borrowing bank was not thereby relieved from its obligation as a debtor. *Portage First Nat. Bank v. Northwood State Bank*, (1906) 15 N. D. 594, 109 N. W. 61.

## Vol. V, p. 140, sec. 5201.

**Appointment of receiver by state court.**—See under this title, vol. 5, p. 170, sec. 5234.

## Vol. V, p. 141, sec. 5202.

**Extent of indebtedness.**—To the same effect as the second paragraph of the original note, *Waterbury v. McKinnon*, (1906) 146 Fed. 737, 77 C. C. A. 294.

**Bond to secure deposit of public money.**—The execution of a bond by a national bank to secure county deposits does not constitute an increase of the bank's liability, in viola-

tion of this section, declaring that no national banking association shall at any time be indebted or liable to an amount exceeding its capital stock actually paid in, except on account of moneys deposited with or collected by the association. *Gratiot County v. Munson*, (1909) 157 Mich. 505, 122 N. W. 117.

## Vol. V, p. 143, sec. 5205.

**Decision of Comptroller conclusive.**—The decision of the Comptroller of the Currency that the capital stock of a national bank is impaired is conclusive on the stockholders of the bank and on the courts; the bank having

no alternative but to make good the impairment or liquidate. *Thomas v. Gilbert*, (1909) 55 Ore. 14, 101 Pac. 393, 104 Pac. 888.

**Appointment of receiver by state court.**—See under this title, vol. 5, p. 170, sec. 5234.

## Vol. V, p. 144, sec. 5208.

**Construction of statute.**—This section declares that it shall be unlawful for any officer, agent, or clerk of any national bank to certify any check when the drawer has not on deposit with the bank an amount of money equal to the amount specified in the check; and Act Cong. July 12, 1882, ch. 290, sec. 13, 22 Stat. L. 166, 5 Fed. Stat. Annot. 145, declares that any officer, clerk, or agent of a national bank who shall certify checks before the amount thereof shall have been regularly entered to the credit of the drawer on the books of the bank shall be guilty of a misdemeanor. It has been held that section 5208 does not create any criminal offense, but that such section should be read with section 13,

and that the two create one offense, viz., the certification of a check when the drawer has not sufficient money to cover it, or before the amount shall have been regularly entered. *U. S. v. Heinze*, (1908) 161 Fed. 425.

The word "certify," as applied to bank checks, indicates that certain words have been written or printed on a check, and that the check has passed from the custody of the bank into the hands of some other party, and that thereby the person certifying created an obligation of the bank. *U. S. v. Heinze*, (1908) 161 Fed. 425.

**Appointment of receiver by state court.**—See under this title, vol. 5, p. 170, sec. 5234.

## Vol. V, p. 145, sec. 13.

**Indictment.**—An indictment against an officer of a national bank, alleging unlawful certification of checks, was not fatally defective for failure to set out *totidem verbis* the written certifications, under the rule that in an indictment in federal courts it is not necessary to allege the tenor of an instrument unless it touches the gist of the crime. *U. S. v. Heinze*, (1908) 161 Fed. 425.

**Proof.**—Where an indictment against a national bank officer charged him personally with illegally certifying certain checks, it was necessary for the government, in order to sustain such charge, to prove that the individuals who actually executed the certification indorsement were but the physical instruments of the defendant and acted in accordance with his orders. *U. S. v. Heinze*, (1908) 161 Fed. 425.

## Vol. V, p. 145, sec. 5209.

## NOTES ON SECTION 5209.

- I. IN GENERAL, 1512.
- II. EMBEZZLEMENT, 1512.
- III. ABSTRACTING FUNDS, ETC., 1512.
- IV. MISAPPLICATION OF FUNDS, ETC., 1513.
- V. FALSE ENTRIES, 1515.
- VI. AIDERS AND ABETTERS, 1518.

## I. IN GENERAL.

**"Moneys, funds, or credits."**—In this section the word "moneys" refers to the currency or circulating medium of the country, the word "funds" refers to government, state, county, municipal, or other bonds, and to other forms of obligations and securities in which investments may be made; and the word "credits" refers to notes and bills payable to the bank, and to other forms of direct promises to pay money to it. *U. S. v. Smith*, (1907) 152 Fed. 542.

**Intent.**—The intent to injure or defraud, made by this section an element of the offenses of embezzlement, abstraction, or wilful misapplication of funds by an officer, clerk, or agent of a national bank, need not necessarily have been the object or purpose with which the act was done; but it is sufficient if the natural and necessary effect of the act was to injure or defraud the bank or others, and it was wilfully and intentionally done. *U. S. v. Breese*, (1904) 131 Fed. 915.

**No criminal liability except under this section.**—Gross maladministration and inexcusable breach of duty on the part of the officers of a national bank in its management, however disastrous to its stockholders, are not punishable unless in violation of this section. *Prettyman v. U. S.*, (C. C. A. 1910) 180 Fed. 30.

**Indictment.**—An indictment against a national bank cashier for an offense against the national banking law was not defective for failure to allege that the bank was doing business at the time the alleged offenses were committed. *Geiger v. U. S.*, (C. C. A. 1908) 162 Fed. 844.

**False report.**—Where the president of a national bank made a false report to the Comptroller of the Currency with intent to deceive an examiner who might be appointed to make an examination of the bank, as provided by section 5240, 5 Fed. Stat. Annot. 187, it was held that such act constituted an offense, irrespective of the existence of any other incidents disjunctively mentioned in section 5209. *Clement v. U. S.*, (1906) 149 Fed. 305, 79 C. C. A. 243.

## II. EMBEZZLEMENT.

**Elements of offense.**—The crime of embezzlement from a national bank by an officer, clerk, or agent, within this section, involves two general elements: first, a breach of trust or duty with respect to the moneys, funds, or credits of the bank embezzled, which must have been lawfully in the custody or possession of the accused by virtue of his office or employment, although such posses-

sion need not have been exclusive of that of other officers, clerks, or agents; and, second, the wrongful appropriation of such moneys, funds, or credits to his own use, with intent to injure or defraud the association or others. *U. S. v. Breese*, (1904) 131 Fed. 915.

**Includes abstraction and misapplication.**—The crime of embezzlement by an officer, clerk, or agent of a national bank, under this section, necessarily includes the offenses of abstraction and wilful misappropriation, but either of the latter offenses may be committed without embezzlement. *U. S. v. Breese*, (1904) 131 Fed. 915.

**Collection by agent.**—In *Spencer v. U. S.*, (1909) 169 Fed. 562, 95 C. C. A. 60, it appeared that the accused's duty was to take drafts or other items received by a national bank by which he was employed from its patrons for collection, present them to the drawees or others liable thereon, receive the money due, and return it to the bank. He, however, reported a less amount collected than he actually received, and converted the difference. It was held that in making the collection he acted as the bank's agent, and that the money while in his possession and before it had been actually deposited in the bank, belonged to it, and that he was therefore properly convicted of embezzling the same.

**Indictment.**—An indictment under this section is bad for insufficient description of the offense, where it charges the embezzlement, as well as the misapplication, of the "funds and credits" of a national bank by the defendant as president, without setting forth any particular description of either, and without any separate statement as to the amount either of "funds" or of "credits" so embezzled or misapplied. *U. S. v. Smith*, (1907) 152 Fed. 542.

## III. ABSTRACTING FUNDS, ETC.

**Abstract defined.**—Abstraction, under this section, is the act of one who, being an officer, clerk, or agent of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. *U. S. v. Breese*, (1904) 131 Fed. 915.

**Cashing check and converting proceeds.**—Where a customer of a national banking association, whose note to the bank was about to mature, delivered a check to the bank to pay the note when due, and, the check coming into the hands of defendant as cashier of the bank, he cashed it and converted the proceeds, it was held that the loss was that of the bank, and the defendant's offense a wilful misapplication and abstraction of the bank's funds and credits, and not a mere breach of trust. *Geiger v. U. S.*, (C. C. A. 1908) 162 Fed. 844.

**Indictment.** — An indictment charging that the defendant, being then and there the cashier of a certain "national banking association," to wit, etc., was not fatally defective for failure to allege that the national banking association specified was a national banking association organized under the laws of the United States. *Geiger v. U. S.*, (C. C. A. 1908) 162 Fed. 844.

#### IV. MISAPPLICATION OF FUNDS, ETC.

**Misapplication defined.** — To the same effect as the second paragraph of the original note, *U. S. v. Heinze*, (1908) 161 Fed. 425.

Wilful misapplication of the moneys, funds, or credits of a national bank consists in their misapplication by an officer, clerk, or agent of the bank, made wilfully and wrongfully, and with intent to injure or defraud the association or some other person or company, and their conversion to his own use, or to the use of some one other than the bank. No previous lawful possession is necessary to constitute the crime. *U. S. v. Breese*, (1904) 131 Fed. 915.

**Gravamen of offense.** — To the same effect as the original note, *U. S. v. Steinman*, (C. C. A. 1909) 172 Fed. 913.

**Withdrawal of funds necessary.** — Funds of a national bank are not misapplied by an officer for the purpose of constituting a criminal offense, under this section, merely by the drawing of a draft on a fund on deposit in another bank, or by entering a credit to a depositor on the books; but it is necessary that the fund should have been actually withdrawn or converted in some form, so that it is lost to the bank, and such loss must be averred in an indictment for the offense, and the facts set out showing it to have been unlawful. *U. S. v. Martindale*, (1903) 146 Fed. 280.

The mere renewal of a note by the officers of a national bank to cover a loan not sufficiently secured did not constitute a misapplication of the bank's funds, because the transaction was accomplished in the form of a discount of the renewal note, by placing the proceeds to the customer's credit and receiving from him a check against the fund for an amount sufficient to pay the old note, without the bank parting with any money. *Adler v. U. S.*, (C. C. A. 1910) 182 Fed. 464.

**Overdrafts.** — An overdraft on a national bank may be legal or criminal, according to the intent of the person committing it, inferred from the surrounding circumstances shown by the evidence. *U. S. v. Heinze*, (1908) 161 Fed. 425.

The fact alone that an officer of a national bank causes it to pay overdrafts, drawn by himself or other customers of the bank, or makes a loan without security, does not constitute an offense, under this section; nor does an indictment averring such facts charge an offense, because it further avers an intent to injure and defraud the bank. *U. S. v. Norton*, (1911) 188 Fed. 256.

An unintentional overdraft by a depositor in good standing and possessing ample means to pay, or an overdraft to be paid pursuant to

a prior agreement resting on abundant credit, does not constitute a wilful misapplication of a national bank's funds, in violation of this section. *U. S. v. Steinman*, (C. C. A. 1909) 172 Fed. 913.

In *Adler v. U. S.*, (C. C. A. 1910) 182 Fed. 464, it appeared that the accused, who was president of a national bank, having overdrawn his account \$18,303.80, executed his note to the bank for \$20,000, secured by certain corporate stock, the proceeds of the note being used to cancel the overdraft, and the balance credited to his account, subject to check. The note not having been paid, the collateral was sold for \$5,000 cash, which paid the \$1,146 additional advancement, and \$3,800 on the overdraft. It was held that the execution of the note was a benefit and not a loss to the bank, and that accused by that transaction was not guilty of misapplying the bank's funds, in violation of this section.

**Proof of intent.** — Where, in a prosecution of the vice-president of a bank for alleged misappropriation of the bank's funds in the payment of overdrafts by the bank's cashier, there was no evidence that the checks representing the overdrafts were paid with the knowledge or under the directions of the vice-president, the offense as to him was not proved, under the rule that to constitute a wilful misappropriation of a national bank's funds there must in fact be an unlawful application by the person charged, with intent to injure and defraud the bank. *Prettyman v. U. S.*, (C. C. A. 1910) 180 Fed. 30.

**Discounting worthless paper.** — The discounting by the president of a national bank with the funds of the bank of commercial paper known to him to be worthless or fictitious, for the benefit of an insolvent corporation of which he is an officer, and with intent to injure and defraud the bank, is a wilful misapplication of its funds, constituting a criminal offense under this section. *Flickinger v. U. S.*, (1906) 150 Fed. 1, 79 C. C. A. 515.

**Effect of knowledge and consent of directors.** — An officer of a national bank is not guilty of embezzlement, abstraction, or wilful misapplication of its funds because of his obtaining money from the bank for his own use by means of overdrafts or loans by *bona fide* arrangement with its authorized officers or committee, but he is only protected by such arrangement where it was made by those representing the bank, in good faith, and in the supposed interest of the bank. *U. S. v. Breese*, (1904) 131 Fed. 915.

An indictment under this section charging the defendant, as president and director, with having wilfully misapplied certain credits of the bank, "by procuring the authority of the board of directors . . . to an acceptance of an assignment" of an interest in a partnership in satisfaction of an indebtedness due the bank, and charging the amount of such indebtedness to the account of stocks and bonds, knowing that the assignor had in fact no interest in such partnership, was held not to state an offense under the statute, since what was done appeared to have been by authority of the board of directors, and the facts

set out did not show a misapplication of credits by the defendant, nor was it averred that such misapplication was made to his own use, benefit, or gain, nor to that of any person other than the bank. *U. S. v. Smith*, (1907) 152 Fed. 542.

**Bad loans.**—For an officer of a national bank who is also a promoter of various enterprises to obtain the funds of the bank on the security of unmarketable bonds of his own enterprises, at the risk of the interest of the bank, is a misapplication of the funds which cannot be covered up by entering the transactions on the books as loans and investments. *Walsh v. U. S.*, (1909) 174 Fed. 615, 98 C. C. A. 461.

**Indictment — Definiteness.**—A count in an indictment, under this section, charging that defendant, as a director of a national bank, between certain given dates abstracted and misapplied a stated sum of the moneys, funds, and credits of the bank, without further specification, was held to be insufficient, as too general and indefinite. *U. S. v. Martindale*, (1903) 146 Fed. 280.

Where, in a prosecution against a national bank officer for wilful misapplication of the moneys, funds, and credits of the bank, the indictment definitely charged the value in lawful money of the United States of the misapplied property, it was not defective for failure to specify the exact thing misapplied, whether moneys, funds, or credits. *U. S. v. Heinze*, (1908) 161 Fed. 425. *Compare U. S. v. Smith*, (1907) 152 Fed. 542.

**Allegation of possession of funds.**—An indictment of an officer of a national bank, under this section, for misapplication of funds, sufficiently alleges his possession of the funds by an averment that he was president of the bank, and as such had access to its funds, properties, moneys, and credits, with duties to perform in their control, management, and application. *U. S. v. Eastman*, (1904) 132 Fed. 551.

**Manner of misapplication.**—An indictment of an officer of a national bank, under this section, for misapplication of the funds or property of the association, sufficiently alleges the manner in which the misapplication was accomplished where it charges that, having access to the funds and properties of the bank, he wilfully, unlawfully, fraudulently, and without the consent of the bank, converted them to his own use, or to the use of persons other than himself and other than the association. *U. S. v. Eastman*, (1904) 132 Fed. 551.

An indictment alleging that F., as cashier of a national bank, unlawfully "converted" certain "moneys, funds, credit and credits" to the use of D., was held to sufficiently charge the manner in which the misapplication was effected. *Dickinson v. U. S.*, (C. C. A. 1908) 159 Fed. 801.

**Allegation of conversion.**—A conversion is charged by the allegation of an indictment for wilful misapplication of the funds of a national bank, that the defendant, being president of the bank, and having control of its funds, with intent to injure and defraud, received and discounted a promissory note for

a specified sum, for his use, benefit, and advantage, knowing that the note was wholly unsecured, whereby the proceeds of the discount were wholly lost to the bank. *U. S. v. Heinze*, (1910) 218 U. S. 532, 31 S. Ct. 98, 54 U. S. (L. ed.) 1139, *followed in U. S. v. Heinze*, (1910) 218 U. S. 547, 31 S. Ct. 102, 54 U. S. (L. ed.) 1145.

An indictment for the wilful misapplication of funds of a national bank by an officer, with intent to defraud, in violation of this section, by receiving and discounting with its money an absolutely unsecured promissory note of a named partnership, whereby the proceeds of the discount of the note were wholly lost to the bank, need not charge a conversion by the recipient of the proceeds of the discount, provided it does allege a conversion by such officer. *U. S. v. Heinze*, (1910) 218 U. S. 532, 31 S. Ct. 98, 54 U. S. (L. ed.) 1139, *followed in U. S. v. Heinze*, (1910) 218 U. S. 547, 31 S. Ct. 102, 54 U. S. (L. ed.) 1145.

**Allegation of fraud.**—An indictment under this section which charged that the defendant, while an officer of a national bank, with intent to injure or defraud the bank, unlawfully and wilfully misapplied and converted to his own use funds of the bank, by withdrawing money therefrom upon a charge ticket, pursuant to which the amount was charged to his account, was held to be insufficient to charge an offense, in the absence of averments showing that the bank was in fact defrauded, or a probability that it would be defrauded, thereby, as that defendant was insolvent, and that the overdraft was not paid. *U. S. v. Norton*, (1911) 188 Fed. 256.

**Allegation of felonious intent.**—An indictment charging an officer of a national bank with misapplication of its funds, or with making false entries in its books, need not allege that the acts were done feloniously, where they are charged to have been done wilfully and with intent to defraud the bank, and are such as are made misdemeanors by the statute. *U. S. v. Eastman*, (1904) 132 Fed. 551.

**Allegation of want of authority.**—In an indictment under this section charging an officer of a national bank with a wilful misapplication of its funds with intent to injure and defraud the association, it is not necessary to aver that the acts set out were done without authority from the directors. *Flickinger v. U. S.*, (1906) 150 Fed. 1, 79 C. C. A. 515. *Compare U. S. v. Martindale*, (1903) 146 Fed. 280.

**Separate counts.**—Where an officer of a national bank is charged in an indictment with the fraudulent misapplication of its funds in the payment of several and distinct notes, each payment constitutes a separate misapplication, and must be charged in a separate count. *U. S. v. Martindale*, (1903) 146 Fed. 280.

**For other cases dealing with indictments for misapplication of the funds of a national bank**, see *U. S. v. Martindale*, (1904) 146 Fed. 289; *U. S. v. Smith*, (1907) 152 Fed. 542; *U. S. v. Morse*, (1908) 161 Fed. 429; *Geiger v. U. S.*, (C. C. A. 1908) 162 Fed. 844.



**Evidence.**—In a prosecution for misappropriation of the funds of a national bank, it was held that a letter written by certain of the directors of the bank to the Comptroller of the Currency, after the misappropriation, was inadmissible either as showing the state of mind of the directors after the offense, or a ratification of the misappropriation. *Dickinson v. U. S.*, (C. C. A. 1908) 159 Fed. 801.

In a trial for aiding a national bank cashier in misapplying a stock certificate held by the bank as collateral for a loan, defendant having used the certificate as collateral on a note he discounted, defended on the ground that he did not know of the bank's interest in the certificate and was innocent of any purpose to aid and abet in abstracting it, the prosecution could show that the bank's minute book disclosed no record of the directors sanctioning the use of the certificate. *Cook v. U. S.*, (C. C. A. 1908) 159 Fed. 919.

In a prosecution of national bank officers and alleged aiders and abettors for misapplying the bank's funds, evidence of the taking of a mortgage to secure an indebtedness represented by overdrafts and the making of an additional loan secured by deposit of other collateral, the effect of which was to give the bank better security than before, was insufficient to sustain a conviction. *Prettyman v. U. S.*, (C. C. A. 1910) 180 Fed. 30.

**Declaration of accused.**—In *May v. U. S.*, (C. C. A. 1907) 157 Fed. 1, it appeared that the defendant was charged with having made a false entry in a report made to the Comptroller of the Currency as president of a national bank, in that he omitted from the statement of deposits for which the bank was liable the amount of a deposit made several years before and which had not been withdrawn. The defense was that the depositor had authorized defendant to loan the money, which had been done, but the depositor denied such agreement. It was shown by the evidence that defendant, in fact, made loans which were charged to the depositor's account, and for which he took notes payable to the depositor. It was held that a statement made by him to a borrower at the time of making such a loan, which was several years before the making of the alleged false report, to the effect that it was made from money left by the depositor to be loaned, was not admissible as a part of the *res gestæ*, but was properly excluded as a self-serving declaration.

**For other cases see** *Lear v. U. S.*, (1906) 147 Fed. 349, 77 C. C. A. 527; *Brock v. U. S.*, (1906) 149 Fed. 173, 79 C. C. A. 121; *Clement v. U. S.*, (1906) 149 Fed. 305, 79 C. C. A. 243.

**Instructions to jury.**—In a prosecution of an officer of a national bank under this section for misapplication of funds with intent to injure and defraud the association, general language used in the charge in explaining the section, stating that a misapplication of funds, in order to constitute an offense, must have been with intent to injure or defraud the bank "or to deceive any officer of the bank or any agent appointed pursuant to law to examine the affairs of the bank," was not misleading, where the jury were subsequently

charged specifically on the precise issue presented by the indictment and that an intent to defraud the bank must be shown. *Morse v. U. S.*, (1909) 174 Fed. 539, 98 C. C. A. 321. See also *U. S. v. Steinman*, (1909) 172 Fed. 913, 97 C. C. A. 271.

**Questions for jury.**—In a prosecution of an officer of a national bank for misapplying its funds, where the transactions as shown by the books of the bank were legitimate and proper on their face, it was held that the question of intent was one for the jury under proper instructions. *Walsh v. U. S.*, (1909) 174 Fed. 615, 98 C. C. A. 461.

#### V. FALSE ENTRIES.

**Who liable.**—To the same effect as the first paragraph of the original note, *Morse v. U. S.*, (1909) 174 Fed. 539, 98 C. C. A. 321; *U. S. v. Wilson*, (1910) 176 Fed. 806; *Richardson v. U. S.*, (1910) 181 Fed. 1.

**False entries in reports.**—The fact that entries in a report made by a national bank to the Comptroller accurately state the facts as shown by the books does not prevent them from being false, where the books themselves do not correctly show the actual transactions or condition of the bank. *Morse v. U. S.*, (1909) 174 Fed. 539, 98 C. C. A. 321.

A schedule on the back of a report where it is covered by the same affidavit as the rest of the report is a part of the report, within this section. *Harper v. U. S.*, (1907) 7 Ind. Ter. 437, 104 S. W. 673.

**Fraudulent intent.**—The intent with which false entries in the books or reports of a national bank are made is of the essence of the offense, and must be proved as laid. *Richardson v. U. S.*, (C. C. A. 1910) 181 Fed. 1.

Intent to injure a bank by a false report to the Comptroller of the Currency is not negated as matter of law by the fact that the report showed the bank to be in better condition than it really was. *U. S. v. Corbett*, (1909) 215 U. S. 233, 30 S. Ct. 81, 54 U. S. (L. ed.) 173, *reversing* (1908) 162 Fed. 687.

**Voluntary reports.**—This section includes a report voluntarily made as well as one required by law, if the false entry was made with the requisite unlawful intent. *Harper v. U. S.*, (C. C. A. 1909) 170 Fed. 385, *reversing* (1907) 7 Ind. Ter. 437, 104 S. W. 673.

**What are false entries.**—A false entry within this section is an entry made in the bank's books by an officer of the bank, that is intentionally and knowingly false when made, and made with intent to deceive the officers of the bank or defraud the association. *U. S. v. Wilson*, (1910) 176 Fed. 806.

Officers of a national bank may not make a false entry in the bank's books with intent to deceive in violation of this section and escape criminal liability because they go through the idle and deceitful form of making a transaction to which the entry might nominally but not really relate. *Billingsley v. U. S.*, (C. C. A. 1910) 178 Fed. 653.

Entries in the books of a national bank showing loans to persons named on the security of stocks deposited as collateral, when

in fact the transactions were purchases of the stock by the bank, the supposed borrowers being merely dummies wholly irresponsible for the amount of the notes which they gave without any intention of paying the same or any knowledge of the actual transactions, were false entries, and, when made by the direction of an officer of the bank who conducted the transactions, a jury was justified in finding that they were fraudulent and made with intent to deceive the bank examiner and his agents in violation of this section. *Morse v. U. S.*, (1909) 174 Fed. 539, 98 C. C. A. 321.

The fact that a national bank is prohibited by R. S. sec. 5201, 5 Fed. Stat. Annot. 140, from purchasing its own stock, does not make such a purchase a nullity, nor does the purchase extinguish the stock, and, where a bank bought and held shares of its own stock, an entry in a report to the comptroller of the bonds, securities, etc., held by the bank from which such stock was omitted, constituted a false entry. *Morse v. U. S.*, (1909) 174 Fed. 539, 98 C. C. A. 321.

Entries in the books of a national bank which correctly record actual transactions of the bank, although such transactions may have been unauthorized, or even fraudulent, are not false entries, within the meaning of this section, and will not sustain an indictment thereunder for the making of false entries. *Twining v. U. S.*, (1905) 141 Fed. 41, 72 C. C. A. 529.

If the officer of a bank procured a note to be given to it by an irresponsible person, with intent of apparently increasing the bank's assets, and should thereafter make an entry in a report required by law to the Comptroller of the Currency, including such note as a *bona fide* asset of the bank, with either of the intents denounced by this section, such entry would be a false entry within this section, though the paper was in actual existence. *Hayes v. U. S.*, (C. C. A. 1909) 169 Fed. 101.

In *Hayes v. U. S.*, (C. C. A. 1909) 169 Fed. 101, it appeared that a national bank, of which the defendant was cashier, was in straitened circumstances, so that the president, cashier, and assistant cashier had not drawn their salaries for five months. Each of the officers having overdrawn his individual account with the bank to the amount of their unpaid salaries, the bank examiner required the overdraft to be made good, and to accomplish this the officers induced F., who was solvent, to execute his note to the bank for their accommodation, and this was discounted and entered as a loan and discount; the proceeds being credited to the officers' individual accounts to make good the overdrafts. It was held that the note, while accommodation paper so far as the officers of the bank were concerned, was enforceable against the maker by the bank, and hence its inclusion in a report made by the cashier to the Comptroller of the Currency as a loan and discount of the bank did not constitute the making of a "false entry," in violation of this section.

**Conspiracy.**—A conspiracy to violate this section by causing false entries to be made in the books of a national bank by an officer or

agent thereof for the purpose of defrauding the bank or others, or deceiving an agent appointed to examine the affairs of the bank, is one to commit "an offense against the United States," within the meaning of section 5440, 2 Fed. Stat. Annot. 247, and is indictable thereunder. *Scott v. U. S.*, (C. C. A. 1904) 130 Fed. 429.

**Presumptions.**—Where entries by the accused in the books of a national bank were false and capable of deceiving the comptroller's agents, it was held that the defendant's intent to deceive and defraud might be inferred from the making of the entries, under the rule that every person is presumed to intend the natural and probable result of his acts knowingly done, and that an unlawful act implies an unlawful intent. *U. S. v. Wilson*, (1910) 176 Fed. 806.

A simple mistake by an officer of a national bank in making an entry in one of the company's books, growing out of a clerical error, is not a violation of this section. *U. S. v. Wilson*, (1910) 176 Fed. 806.

**Officers intended to be deceived.**—The Comptroller of the Currency is an agent with in the provisions of this section, that every officer of a national bank who makes any false entry in a report to any agent appointed to examine the affairs of such association shall be guilty of a misdemeanor, and it is immaterial that R. S. sec. 5240, 5 Fed. Stat. Annot. 187, confers power upon him to appoint suitable agents to examine the affairs of such banks. *U. S. v. Corbett*, (1909) 215 U. S. 233, 30 S. Ct. 81, 54 U. S. (L. ed.) 173, reversing (1908) 162 Fed. 687.

**Indictment.**—In an indictment under this section for making a false entry in a report, it is not necessary to allege that the report in which the false entry was made was one made by the association, since the penalty is affixed to any person making the false entry, and not to the association or its officers for making a false report. *Harper v. U. S.*, (1907) 7 Ind. Ter. 437, 104 S. W. 673.

It is not necessary to allege that the report in which the false entry was made was one required by law; it being sufficient that it be intended to deceive any of the persons mentioned in the statute. *Harper v. U. S.*, (1907) 7 Ind. Ter. 437, 104 S. W. 673.

In a prosecution of a national bank officer for making false entries, an allegation that they were made "in a book of said bank known as 'Journal K'" sufficiently alleged that the book was a book of the association within this section. *Billingsley v. U. S.*, (1910) 178 Fed. 653, 101 C. C. A. 465.

In a prosecution under this section, making it a crime for an officer of a national banking association carrying on a banking business to make a false entry in a report or statement of the association with intent to injure or defraud it, or to deceive an agent appointed to examine its affairs, the indictment alleged that the accused was the duly elected, qualified, and acting cashier of a certain bank; that he made a false entry in a report, describing it; that the entry was made to deceive a certain person who was the duly elected, qualified, and acting president of that

bank; that he made the false entry on a certain date in a report showing the resources and liabilities of the bank on a certain day to the Comptroller of the Currency. It was held that the indictment was sufficient. *Harper v. U. S.*, (1907) 7 Ind. Ter. 437, 104 S. W. 673.

An indictment under this section alleging that the accused, while acting as president of a national bank, made a false entry in a report to the Comptroller of the Currency, that the lawful money reserve in the bank, consisting of gold coin, was \$23,955, when in fact the bank only had \$21,955 in gold coin as lawful money reserve, was not objectionable for want of an allegation that the lawful reserve exceeded the amount the bank actually had on hand, the gist of the offense being the making of false entries in the report. *Clement v. U. S.*, (1906) 149 Fed. 305, 79 C. C. A. 243.

**Definiteness.**—Where an indictment against a national bank cashier for making false entries specified with great particularity and at length the entries the falsification of which was charged, and these entries were fully described, it was held that the indictment was not defective for indefiniteness, because it did not specify the names of the clerks or employees by whose hand the entries were in fact made. *Richardson v. U. S.*, (C. C. A. 1910) 181 Fed. 1.

**Description of report.**—An indictment under this section, which charges the defendant as cashier of a national bank with having made a false entry in a report with intent to deceive an officer of the association, need not describe the report with technical accuracy, and an averment of the date when made, and that it was a report made to the Comptroller of the Currency showing the resources and liabilities of the bank on a certain date, is sufficient to authorize the presumption that it was a report made by the association under section 5211, 5 Fed. Stat. Annot. 152. *Harper v. U. S.*, (C. C. A. 1909) 170 Fed. 385, reversing (1907) 7 Ind. Ter. 437, 104 S. W. 673.

**Designation of officers intended to be deceived.**—An indictment charging a bank officer with false entries "with the intent to deceive any agent appointed to examine the affairs of the bank" was held to sufficiently designate the person intended to be deceived. *Billingsley v. U. S.*, (1910) 178 Fed. 653, 101 C. C. A. 465.

**Allegation of doing business.**—An allegation in an indictment that on a certain date a bank was a corporation duly organized and existing, with a qualified and acting president and cashier, and that on that date the cashier made a certain report to the Comptroller of the Currency, is a sufficient allegation that the bank was carrying on business at the time the report was made. *Harper v. U. S.*, (1907) 7 Ind. Ter. 437, 104 S. W. 673.

**Intent.**—This section contemplates two separate intents, one to injure or defraud the association, and the other to deceive, either of which, when accompanying a forbidden act, constitutes an offense, and hence it is not necessary that an indictment alleging a false

entry with intent to deceive should also charge an intent to injure or defraud the association or any other company or person. *Billingsley v. U. S.*, (1910) 178 Fed. 653, 101 C. C. A. 465.

**Duplicity.**—The making of a false entry, accompanied by an intent either to "injure or defraud" or to "deceive," as defined by this section, constitutes an offense; and a count of an indictment which charges that such a false entry was made with intent to injure or defraud, and also with intent to deceive, charges two offenses, and is bad for duplicity. *U. S. v. Norton*, (1911) 188 Fed. 256.

**Aider by verdict.**—Where the accused, a national bank clerk, was indicted under several counts for making false entries in the bank's books, in violation of this section, and on conviction on several counts was sentenced to imprisonment for a term less than the maximum provided for a single offense, and at least one of the counts in the indictment was sufficient, it was held that the sentence would be applied to such count, and the validity of the remaining counts regarded as immaterial. *Harvey v. U. S.*, (C. C. A. 1908) 159 Fed. 419.

**Evidence.**—**Admissibility.**—On the trial of a defendant charged as an officer or agent of a national bank, under this section, with having made false entries in its books in the accounts showing the indebtedness to it of other banks, periodical statements taken from the bank's files and purporting to have been rendered to it by such other banks, and which are shown to have been under the defendant's charge, are admissible in evidence, and they may also be identified by employees of such other banks as having been made under their direction and duly sent by them, and their correctness verified by reference to the books of such banks, which are in evidence and used in connection with such books for convenience of reference, as evidence of the true state of the account between the two banks. *Goll v. U. S.*, (C. C. A. 1907) 151 Fed. 412.

**Sufficiency.**—Where a national bank cashier was indicted for making false entries, and also for indirectly participating in the making thereof, in that he caused and procured them to be made, it was held that proof of either of such charges was sufficient after verdict to sustain a conviction, even though the other was not proved. *Richardson v. U. S.*, (C. C. A. 1910) 181 Fed. 1. See also *Billingsley v. U. S.*, (1910) 178 Fed. 653, 101 C. C. A. 465.

**Proof of intent.**—Where false entries were made by the officers of a national bank to overcome complaints by the comptroller in order that the bank examiners and the comptroller might be deceived and misled thereby, proof of such false entries was sufficient to sustain a finding that they were made with intent to injure and defraud the bank, and this though they represented the condition of the bank to be more favorable than it was. *Richardson v. U. S.*, (C. C. A. 1910) 181 Fed. 1.

**Burden of proof.**—In a prosecution of a national bank officer for making alleged false entries, a plea of not guilty places on the gov-

ernment the burden of proving that defendant, within the district and within three years prior to the finding of the indictment, knowingly and intentionally made one or more false entries in the books of the bank with intent to deceive or defraud any agent of the government charged with the duty of supervising the transactions of the bank, or inspecting its books or accounts. *U. S. v. Wilson*, (1910) 176 Fed. 806.

**Instructions to jury.**—In the prosecution of defendants under this section, charged as officers with having made false entries in the books of a national bank and in reports to the comptroller with intent to injure and defraud the bank and deceive its officers and the examiner, it was not error to charge the jury that if they found that such false entries were made, they were authorized to presume therefrom, in the absence of any explanation, that defendants knew them to be false, and that if the natural and probable consequence of such entries was to defraud or deceive, they might presume, in the absence of explanation, that such was defendant's intention. *Morse v. U. S.*, (1909) 174 Fed. 539, 98 C. C. A. 321. See also *May v. U. S.*, (C. C. A. 1907) 157 Fed. 1; *Harper v. U. S.*, (C. C. A. 1909) 170 Fed. 385, *reversing* (1907) 7 Ind. Ter. 437, 104 S. W. 673.

#### VI. AIDERS AND ABETTORS.

**Who may be.**—Where a violation of the statute is committed by an officer and an outsider, the one must be prosecuted as a principal and the other as an aider and abettor, but the provision as to aiding and abetting does not apply to those who, as national bank officers, with fraudulent intent make or cause to be made false entries in the books and reports of the bank; as such they are principals, whether they bring about the falsification through the medium of others, innocent or guilty, or do it themselves; the aiding and abetting applying only to those not connected with the bank, who counsel or incite those who are. *Richardson v. U. S.*, (C. C. A. 1910) 181 Fed. 1.

**Necessity to prove conspiracy or conviction of principal.**—To authorize the conviction of

a defendant of the statutory offense of aiding and abetting an officer of a national bank in the misapplication of the funds of the bank, in violation of this section, it is necessary to aver or prove a conspiracy, nor that the principal offender had been convicted; the offenses of the principal and accessory both being misdemeanors of the same grade. *U. S. v. Hillegass*, (1910) 176 Fed. 444.

**Indictment.**—See *Hillegass v. U. S.*, (C. C. A. 1910) 183 Fed. 199, *affirming* 176 Fed. 444.

**Evidence.**—On the prosecution of a defendant, charged under this section with aiding and abetting the cashier of a national bank to misapply the funds of the bank, the misapplication of such funds by the cashier with criminal intent is a material issue, and any competent evidence relevant to such issue is admissible. *U. S. v. Hillegass*, (1910) 176 Fed. 444, *affirmed* (C. C. A.) 183 Fed. 199.

In a prosecution for aiding and abetting the officers of a national bank to wilfully abstract the funds of the bank by means of certain overdrafts, evidence that prior to the making of such overdrafts it was agreed that the bank should furnish funds for the operations of certain corporations in which accused and the bank's president and cashier were officers, and that from time to time notes should be given by such corporations to take up the overdrafts, and that at the time of the advances the value of the corporation's property was more than \$300,000, while the overdrafts aggregated only \$30,872.24, was held to be admissible to show absence of criminal intent. *U. S. v. Steinman*, (1909) 172 Fed. 913, 97 C. C. A. 271.

**Instructions.**—See *May v. U. S.*, (C. C. A. 1907) 157 Fed. 1; *Hillegass v. U. S.*, (C. C. A. 1910) 183 Fed. 199, *affirming* 176 Fed. 444.

**Questions for jury.**—The question whether the criminal intent averred in an indictment charging a person with aiding and abetting a cashier in misapplying the funds of a bank is properly inferable from the facts proved is for the jury. *U. S. v. Hillegass*, (1910) 176 Fed. 444; *Prettyman v. U. S.*, (C. C. A. 1910) 180 Fed. 30.

#### Vol. V, p. 152, sec. 5210.

**Jurisdiction of federal courts.**—On an application to a federal court by a shareholder in a national banking association for a writ of mandamus to compel the association to permit him to inspect a list of its shareholders, based on this section, the pleadings must show that the matter in dispute exceeds the

value of \$2,000 to give the court jurisdiction. *Large v. Consolidated Nat. Bank*, (1905) 137 Fed. 168.

Under this section see *People v. Consolidated Nat. Bank*, (1905) 105 App. Div. 409, 94 N. Y. S. 173.

#### Vol. V, p. 152, sec. 5211.

**Liability for false reports.**—To the same effect as the original note. *Yates v. Jones Nat. Bank*, (1905) 74 Neb. 734, 105 N. W. 287.

**Necessity for knowledge of falsity.**—It is no defense to an action against the officers of a national bank for publishing false reports,

to the injury of the plaintiff, that such reports were made and published by the officers without knowledge of their falsity. *Yates v. Jones Nat. Bank*, (1905) 74 Neb. 734, 105 N. W. 287.

**Loans and discounts.**—Where the directors, in signing a statutory report, knew, or

by the exercise of ordinary diligence should have known, that an item of "Loans and Discounts" contained paper worth much less than its face value, which would materially affect the value of the bank stock, it was held that they were individually liable, under the common law, to a purchaser of the stock who was damaged by in good faith relying on the report. *Smalley v. McGraw*, (1907) 148 Mich. 384, 111 N. W. 1093, 112 N. W. 915.

The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks by this section. *Guthrie v. Harkness*, (1905) 199 U. S. 148, 26 S. Ct. 4, 50 U. S. (L. ed.) 130, *affirming* (1904) 27 Utah 248, 75 Pac. 624.

## Vol. V, p. 155, sec. 5214.

**Amendment.**—This section was amended by Act of May 30, 1908, ch. 229, 35 Stat. L. 546, 1909 Supp. Fed. Stat. Annot. 360.

**Banks whose outstanding circulating notes amount to less than five per cent. of capital.**—A national bank whose outstanding circulating notes amount to less than five per cent. of its capital is not exempted from the payment of the half-yearly duty imposed by this section upon the average amount of its notes in circulation by the provision of R. S. sec. 3411, 3 Fed. Stat. Annot. 758, that the outstanding circulation of any bank, association, corporation, company, or person shall be free from taxation when reduced to an amount not

exceeding five per cent. of its capital, although the latter section is, by R. S. sec. 3417, 3 Fed. Stat. Annot. 762, expressly made applicable to national banking associations, since it was so made applicable, as clearly appears from the legislation from which its provisions were drawn, in order to give national banks representing state banks the benefit of the presumption of loss or liability to retire the circulation of the state bank when ninety-five per cent. thereof had been actually retired. *Merchants' Nat. Bank v. U. S.*, (1909) 214 U. S. 33, 29 S. Ct. 593, 53 U. S. (L. ed.) 900.

## Vol. V, p. 157, sec. 5219.

### NOTES ON SECTION 5219.

#### I. LIMIT OF STATE TAXATION, 1519.

#### II. THE RULE AS TO DISCRIMINATION, 1520.

#### III. EXEMPTIONS AND DEDUCTIONS, 1521.

#### IV. REMEDIES IN CASE OF UNLAWFUL TAX, 1521.

#### I. LIMIT OF STATE TAXATION.

**Construction.**—This section authorizes the assessment of shares of national banking associations located within a state, in such manner as the legislature of the state may provide, subject only to the restrictions that the taxation should not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state, and that the shares owned by nonresidents shall be taxed in the city or town where the bank is located and not elsewhere. *Crocker v. Scott*, (1906) 149 Cal. 575, 87 Pac. 102.

**Power to tax in general.**—To the same effect as the original note, *Weiser Nat. Bank v. Jeffreys*, (1908) 14 Idaho 659, 95 Pac. 23; *People v. Feitner*, (1908) 191 N. Y. 88, 83 N. E. 592.

**The only taxation of national banks contemplated by this section is taxation on shares of stock and on real property.** *Albuquerque First Nat. Bank v. Albright*, (1908) 208 U. S. 548, 28 S. Ct. 349, 52 U. S. (L. ed.) 614; *Batesville First Nat. Bank v. Board of Equalization*, (1909) 92 Ark. 335, 122 S. W. 988.

**Tax on stock.**—A national bank is under no legal obligation to render and pay taxes on its stock. *Lampasas First Nat. Bank v. Lampasas*, (1903) 33 Tex. Civ. App. 530, 78 S. W. 42.

**Taxation by counties.**—A statute authorizing county authorities to levy taxes on the shares of a national bank is not violative of the National Bank Act, inasmuch as such action on the part of the county authorities is the exercise of an authority delegated by the state. *Com. v. Citizens' Nat. Bank*, (1904) 117 Ky. 946, 80 S. W. 158.

**Without deduction.**—To the same effect as the original note, *Hager v. American Nat. Bank*, (C. C. A. 1908) 159 Fed. 396; *Charleston Nat. Bank v. Melton*, (1909) 171 Fed. 743; *Batesville First Nat. Bank v. Board of Equalization*, (1909) 92 Ark. 335, 122 S. W. 988.

**Tax of shares on bank.**—The Arkansas statute (Kirby's Dig., secs. 6902-6924) requiring every bank to annually deliver to the assessor a statement of the amount of capital, undivided profits, value of moneys, credits, etc., the amount loaned to or deposited with the bank, and providing that the shares in banks taxable by law shall be listed by the officers thereof showing the names of the persons owning the same, and that the taxes assessed on the shares of stock thus listed shall be paid by the bank, etc., provides for the taxation of the shares of national bank stock, and not the capital stock of the bank itself, and the requirement of a schedule setting forth the enumerated things is merely intended as a method of arriving at the valuation of the shares, so that the statute meets the requirement of this section, authorizing the taxation of the shares in national banks, subject to the restriction that the tax shall not be at a greater rate than is assessed on other moneyed capital, etc. *Batesville First Nat. Bank*

r. Board of Equalization, (1909) 92 Ark. 335, 122 S. W. 988.

**Bank agent to collect.**—Provisions of a state statute for the taxation of national bank stock, requiring the cashier of the bank to pay the taxes assessed against its stockholders, and making him and the bank liable therefor, and for a penalty in addition in case of default, are not illegal as applied to a bank which has in its possession dividends or other funds belonging to its stockholders sufficient to pay the taxes assessed against them. *Charleston Nat. Bank v. Melton*, (1909) 171 Fed. 742.

A state statute which provides that shares of stock in national banks shall be subject to taxation for all state purposes and the purposes of each county and city in which the bank is located, and that the bank shall be liable for the taxes upon the shares of stock, is not violative of the National Bank Act, since a state may levy a tax on the shares of stock, and require the bank to pay the tax. *Com. v. Citizens' Nat. Bank*, (1904) 117 Ky. 946, 80 S. W. 158.

**Waiver of rights.**—A national bank having voluntarily rendered its capital stock for taxation, and stated, in its answer, in an action to recover the taxes thereon, as increased in value on equalization, that it was willing to pay taxes thereon according to its rendition, it may be held liable for the taxes on the value of its stock as rendered, though taxation of such stock is unauthorized, but an equalization board could not, without its consent, augment its conceded liability by adding other personal property to its rendition, or raising the value of that which had been rendered. *Lampasas First Nat. Bank v. Lampasas*, (1903) 33 Tex. Civ. App. 530, 78 S. W. 42.

## II. THE RULE AS TO DISCRIMINATION.

**Different systems of taxation.**—The adoption of a different method for taxing state banks and other moneyed corporations from that adopted for the taxation of national banks does not necessarily conflict with this section authorizing state taxation of shares of stock in national banks, but exacting that the tax when levied shall be at no greater rate than that imposed on other moneyed corporations. *San Francisco Nat. Bank v. Dodge*, (1905) 197 U. S. 70, 25 S. Ct. 384, 49 U. S. (L. ed.) 669; *Covington v. Covington First Nat. Bank*, (1905) 198 U. S. 100, 25 S. Ct. 562, 49 U. S. (L. ed.) 963; *People v. Feitner*, (1908) 191 N. Y. 88, 83 N. E. 592.

The fact that under the laws of California shares of stock in state banks and other state moneyed corporations are not permitted to be assessed and taxed is not sufficient to show that the California statute (Pol. Code, sec. 3609), providing for the taxation of shares in national banks, constitutes an invalid discrimination against national banks, where a different method has been adopted by the state for the assessment and taxation of all the property of such state corporations embraced in the assessment of shares of stock in national banks. *Crocker v. Scott*, (1906) 149 Cal. 575, 87 Pac. 102.

**Taxation at market value.**—A discrimination against national banks, and in favor of state banks and other moneyed corporations, forbidden by this section, results from the taxation of shares of stock of national banks under a state statute at their market value, while the construction given by the highest state court to the provisions for the taxation of the "property" of state banks and other moneyed corporations does not require, although property is defined by the state constitution as including "franchises," that the assessing officers shall include in the assessment all the intangible elements of value which form part of the market and selling value of shares of stock. *San Francisco Nat. Bank v. Dodge*, (1905) 197 U. S. 70, 25 S. Ct. 384, 49 U. S. (L. ed.) 669.

**Methods of assessment.**—Assessing officers who levied an assessment *in solido* against a national bank as agent of its stockholders did not thereby discriminate against the bank merely because they failed to assess the shares of stock in the same manner in which shares of stock in other like institutions were assessed. *Batesville First Nat. Bank v. Board of Equalization*, (1909) 92 Ark. 335, 122 S. W. 988.

The retroactive features of the Kentucky Act of March 21, 1900, making it the duty of certain officers of each national bank to list its shares of stock for taxation, and requiring the bank to pay the tax and a penalty for delinquency, subject to a deduction on account of taxes paid by the bank under other legislation, do not, so far as the shares of resident shareholders are concerned, operate to discriminate against the bank, contrary to this section, nor to deny due process of law, although the shareholders and the number of shares may not be the same as when the liability to taxation arose, where such statute is construed by the state courts as not imposing any new liability upon domestic shareholders or the bank, but as simply providing another method for the assessment of shares which have escaped assessment because not listed for taxation. *Citizens' Nat. Bank v. Kentucky*, (1910) 217 U. S. 443, 30 S. Ct. 532, 54 U. S. (L. ed.) 832.

But the retroactive provision of the above Act, relating solely to national banks, by which such banks are charged with a liability for taxes for past years on their capital stock, whether held within or without the state, and are subjected to a penalty in addition for delinquency, operates as a discrimination against such banks, prohibited by this section, where, until the passage of that Act, national banks were not required to return for taxation shares of their capital stock held outside of the state. *Covington v. Covington First Nat. Bank*, (1905) 198 U. S. 100, 25 S. Ct. 562, 49 U. S. (L. ed.) 963.

**The intention to discriminate must appear.**—The fact that a special system of taxation of national banks may not be as favorable as the general system of taxation in an isolated case does not render the system unlawful as discriminating against those institutions, so long as there is no intentional discrimination and no equality in the effect upon their stock-

holders. *People v. Feitner*, (1908) 191 N. Y. 88, 83 N. E. 592. See also *Estherville First Nat. Bank v. Estherville*, (1907) 136 Ia. 203, 112 N. W. 829.

### III. EXEMPTIONS AND DEDUCTIONS.

**Municipal, state, and federal bonds.**—See *Marion Nat. Bank v. Burton*, (1906) 121 Ky. 876, 90 S. W. 944.

**Deduction of indebtedness.**—Before a state statute denying right in taxation to deduct debts from stock in national banks assessed with taxes, but allowing such deduction from other investments, can be held as in violation of this section, it must appear that other moneyed capital exists and in such amount as to operate as a discrimination against such banks, and that it is of such character as to come in competition with national banks. *West Virginia Nat. Bank v. Dunkle*, (1909) 65 W. Va. 210, 64 S. E. 531.

While a provision of a state revenue statute that stockholders in national banks shall not be entitled to any deduction from the assessed valuation of their shares because of debts owed by them, while owners of other "money, credits, or investments" are allowed such deduction, is invalid as applied to a stockholder who owes debts and who has not sufficient other money, credits, or investments from which such debts may be deducted, as subjecting him to taxation "at a greater rate than is assessed on other moneyed capital in the hands of individual citizens" of the state in violation of R. S. sec. 5219, it is not so invalid as to a stockholder who is not actually affected by it to his detriment, and a bill filed by a bank to enjoin the collection of taxes imposed on its stockholders because of such provision must allege facts showing the portion of the tax so rendered illegal, and that the valid portion has been paid or tendered, in order to entitle the complainant to equitable relief. *Charleston Nat. Bank v. Melton*, (1909) 171 Fed. 743.

The New York statute (Tax Law, Laws 1896, p. 805, ch. 908, sec. 23, and amended by Laws 1901, p. 1349, ch. 550) provides that the fiscal officer of every bank shall report to the assessor the amount of its authorized capital stock, number of shares, and their par value, the amount of stock paid in, amount

of surplus and undivided profits, and a list of stockholders and their respective holdings. Laws 1896, p. 806, ch. 908, sec. 24, as amended by Laws 1901, p. 1350, ch. 550, provides that the rate of tax on the bank stock shall be one per cent. on the value thereof, ascertained by adding together the amount of the capital stock, surplus, and undivided profits, and dividing the result by the number of shares outstanding, provided that the rate shall not be greater than that assessed upon other moneyed capital in the hands of individual citizens, and that the owners of the stock shall be entitled to no deduction from the taxable value thereof because of their personal indebtedness. It has been held that an assessment based upon sections 23 and 24 was not void as being a discrimination against national bank stock, within R. S. sec. 5219, because no deduction of debts was allowed, as is permitted in the case of other corporations and individuals. *People v. Feitner*, (1908) 191 N. Y. 88, 83 N. E. 592.

**Exemption of shares of state and savings banks.**—Under this section an assessment on shares of stock in a national bank, where, under a state law, shares of stock in state and savings banks are not taxable, is an invalid discrimination against national banks. *Estherville First Nat. Bank v. Estherville*, (Ia. 1911) 129 N. W. 475.

### IV. REMEDIES IN CASE OF UNLAWFUL TAX.

**When suit lies to restrain collection.**—Equity will not enjoin a reassessment of a tax on the stock and real property of a national bank because of the apprehension that this section will be violated by the assessing officer in making the assessment. *Albuquerque First Nat. Bank v. Albright*, (1908) 208 U. S. 549, 28 S. Ct. 349, 52 U. S. (L. ed.) 614.

**Federal jurisdiction.**—A national bank or stockholder therein has the right to go into a federal court of equity to test the validity, under this section, of a tax levied by state authority on the stock of the bank, where there is no adequate remedy at law in such court, notwithstanding a remedy provided by the state statute. *Charleston Nat. Bank v. Melton*, (1909) 171 Fed. 743.

### Vol. V, p. 166, sec. 5220.

**Effect of proceedings.**—To the same effect as the second paragraph of the original note, *Farmers' Nat. Bank v. Suther*, (Okla. 1911) 116 Pac. 173.

Where a national bank went into voluntary liquidation, it thereby ceased to do business as a going concern, and was not thereafter required to register a subsequent transfer of its stock and to issue new stock to the transferee. *Muir v. Citizens' Nat. Bank*, (1905) 39 Wash. 57, 80 Pac. 1007.

**Rights of creditors.**—The tangible assets and the liability of stockholders of an insolvent national bank in process of voluntary liquidation in the hands of the liquidating agent constitute a trust fund for the primary

benefit of creditors. *George v. Wallace*, (1904) 135 Fed. 286, 68 C. C. A. 40.

**The good will of the business.**—Minority stockholders of a solvent national bank cannot obtain relief from the majority stockholders for injuries resulting from the destruction of the good will of the bank, by a liquidation thereof by a vote of the owners of two-thirds of the stock thereof, the act of liquidation destroying the value of such good will, as a value separate from the value of tangible assets, and the loss falling proportionately on all the stockholders. *Green v. Bennett*, (Tex. 1908) 110 S. W. 108.

**Nature of holding of liquidating agent.**—Where the insolvency of a national bank was

accompanied by a conveyance of its assets to a trustee, and a pledge thereof for the benefit of creditors, and this was followed by affirmative proceedings in liquidation, authorized by law, and the selection by the shareholders of the same trustee as their liquidating agent, such agent held the assets under an express trust for the benefit of creditors. *Green v. Wallace*, (1904) 135 Fed. 286, 68 C. C. A. 40.

**Right of majority stockholders who are also officers.**—The owners of two-thirds of the stock of a national bank may vote to liquidate the bank, though they are the directors and the executive officers thereof, since they, as directors and officers, owe no duty to dissenting minority stockholders to continue the bank, where they do not desire so to do. *Green v. Bennett*, (Tex. 1908) 110 S. W. 108.

**Necessity for insolvency.**—This section is not limited to insolvent banks, nor to cases where the interest of all of the shareholders, including the minority, may be best subserved thereby. *Green v. Bennett*, (Tex. 1908) 110 S. W. 108.

**Disposition of assets.**—The owners of two-thirds of the stock of a national bank, who are its directors and executive officers, must, on voting to liquidate the bank, make such disposition of the assets as will be to the best interests of all the stockholders, including minority dissenting stockholders, and this

may be done by the directors or by means of a liquidating committee. *Green v. Bennett*, (Tex. 1908) 110 S. W. 108.

**Liability of liquidating committee.**—In *Green v. Bennett*, (Tex. 1908) 110 S. W. 108, it appeared that the owners of two-thirds of the stock of a national bank voted to liquidate it. They were the officers of the bank, and became the liquidating committee. It was held that dissenting minority stockholders had a remedy against the liquidating committee for injuries resulting from the failure of the committee to properly dispose of the assets of the bank.

**Sale to bank organized by the liquidating committee.**—A sale of the assets of a national bank in process of liquidation, by the liquidating committee, composed of the directors of the bank owning two-thirds of its stock, to a bank organized by themselves is not void, but only subject to the closest scrutiny on the part of a court of equity, and subject to be set aside on its being shown that it was not conducted with the utmost fairness, to the end that full value, and the best price obtainable, was realized. Such a transaction does not amount to a consolidation of the two banks, and the minority stockholders are not entitled to a proportionate share of the stock of the new bank. *Green v. Bennett*, (Tex. 1908) 110 S. W. 108.

## Vol. V, p. 170, sec. 5234.

**Appointment of receiver by state court.**—A stockholder of a national bank whose charter has expired, suing also as *cestui que trust* of a special fund in the hands of those in control, is entitled, on proper allegation and proof, to have a receiver appointed by a state court, without violating R. S. secs. 5141, 5191, 5201, 5205, 5208, 5234, 5 Fed. Stat. Annot. 101, 124, 140, 143, 144, 170, or Act June 30, 1876, ch. 156, 19 Stat. L. 63, 5 Fed. Stat. Annot. 183, relating to winding up proceedings in case of insolvency of such associations, and making special provision by means of a receiver appointed under authority of the United States. *Cogswell v. Norwich Second Nat. Bank*, (1903) 76 Conn. 252, 56 Atl. 574.

**Suits by receiver.**—The receiver of a national bank has the legal title to the property covered by his appointment, entitling him to maintain an action at law in his own name in the state courts. *Fish v. Olin*, (1903) 70 Vt. 120, 56 Atl. 533.

**Collections after insolvency.**—Where the proceeds of a draft sent to a national bank for collection and remittance were paid to the receiver of the bank on its insolvency, the owner of the draft was entitled to recover the amount thereof. *American Can Co. v. Williams*, (1908) 176 Fed. 816.

**Effect on rights of shareholders against directors.**—The provisions of this Act for the

administration of the affairs of an insolvent national bank by a receiver appointed by the Comptroller of the Currency does not prevent depositors of an insolvent bank from maintaining a suit against its directors for negligently permitting its officers to loan the bank's assets in violation of such Act, constituting a breach of the bank's implied contract with such depositors, inherent in the contract of deposit, that the bank would use such deposits and its other assets in conformity with the safeguards provided by law. *Boyd v. Schneider*, (1904) 131 Fed. 223, 65 C. C. A. 209.

**Information regarding collateral.**—Where a receiver, on taking possession of the assets of a national bank, found its affairs in confusion and found stock pledged to it as collateral with no definite and certain agreement as to the particulars of the pledge, it was his duty to ascertain and assert fully the obligations and liabilities of the pledgor to the bank and the purpose and extent of the pledge. *Wise v. Williams*, (1908) 162 Fed. 161.

**Right to question authority of receiver.**—A debtor of a national bank in the hands of a receiver cannot question the authority of such receiver. *Jacobson v. Berry*, (1907) 135 Ill. App. 415.

## Vol. V, p. 176, sec. 5236.

**Public funds.**—The fact alone that a deposit of public funds in a national bank by a public officer was wrongful, and known to be

so by the bank, does not entitle a claim therefor to priority of payment over those of general creditors on the insolvency of the bank.



Lucas County v. Jamison, (1908) 170 Fed. 338.

Trust funds coming into the hands of a receiver of a national bank which are not identifiable as belonging specifically to a particular person are held by him as assets of the bank, and must be ratably apportioned among all the bank's creditors, as expressly provided by this section. *Emigh v. Earling*, (1908) 134 Wis. 565, 115 N. W. 128.

In all cases where an insolvent national bank holds funds as trustee, to entitle a claim therefor to a preference over those of general creditors in the distribution of the bank's assets it must be shown that such funds have not been dissipated, but that they remain in the estate and can be identified, not by earmarks, but by being traced into the estate and there now found, to its augmentation. *Lucas County v. Jamison*, (1908) 170 Fed. 338.

In an action against a receiver of a national bank to recover as a trust fund the amount of a draft collected by the bank, the burden of proof is on the owners of the draft to trace its proceeds into the common assets. *American Can Co. v. Williams*, (1908) 176 Fed. 816.

Attorney's fee on unmatured promissory notes.—A provision of a promissory note that, if not paid at maturity, the makers and indorsers shall be liable for all costs of collecting or attempting to collect the same, including an attorney's fee, cannot be enforced

beyond the allowance of statutory costs against the receiver of an insolvent national bank who took charge of its assets for the purpose of liquidation before the note matured. *Citizens' Bank, etc., Co. v. Thornton*, (C. C. A. 1909) 174 Fed. 752.

Who entitled to.—Those portions of the collections on account of sales of butter actually coming into the hands of the receiver of a national bank which had virtually acquired and operated through its officers an insolvent creamery company doing business under an arrangement by which the proceeds of sales, less a stated compensation, were to be divided *pro rata* among those furnishing the milk, may be recovered by the latter, even though the transaction may have been beyond the powers of the bank, and they are further entitled to participate *pro rata* as general creditors to the extent that the proceeds of such sales had been diverted and appropriated by the bank. *Rankin v. Emigh*, (1910) 218 U. S. 27, 30 S. Ct. 672, 54 U. S. (L. ed.) 916, *affirming* (1908) 134 Wis. 565, 115 N. W. 128.

Lien for indebtedness.—A national bank can acquire no equitable lien as against an indebted stockholder on his distributive share of the assets on a liquidation of the bank's affairs. *Bridges v. National Bank*, (1906) 185 N. Y. 146, 77 N. E. 1005, *affirming* (1905) 106 App. Div. 616, 94 N. Y. S. 1140.

## Vol. V, p. 180, sec. 5239.

Who liable generally.—Under this section providing that if the directors of a national bank knowingly violate, or permit an officer of the bank to violate, a provision of the title relating to national banks, they shall be liable for damages sustained by any person in consequence of such violation, they having attested to be correct an official report of the bank's condition, which included, at their full face, as part of the bank's resources, assets which they had been informed by the Comptroller of the Currency were doubtful, and for the collection, or removal from the bank, of which immediate steps should be taken, they are liable to one who, on the strength of the report, bought stock of the bank, for the depreciation thereof by reason of the shrinkage in the value of the specific assets, but not for its depreciation from impairment, then unknown to the directors, of other assets. *Taylor v. Thomas*, (1908) 124 App. Div. 53, 108 N. Y. S. 454, *reversing* (1907) 55 Misc. 411, 106 N. Y. S. 538.

Where a bank director was not acting as a director in obtaining discount of certain notes belonging to his father by the bank, it was held that he could not be held liable because he induced or permitted the bank to extend credit to his father in excess of the legal limit fixed by R. S. sec. 5200, 5 Fed. Stat. Annot. 139. *Hicks v. Steel*, (1905) 142 Mich. 292, 105 N. W. 767.

Jurisdiction of state courts.—State courts may enforce, against directors of a national bank who have made false representations as

to the bank's financial condition in the official report to the Comptroller of the Currency, the civil liability prescribed by this section, which provides for the forfeiture of the charter of a national bank as the result of violations of the National Bank Act by the directors, such violations to be determined only by the federal courts, and makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof. *Yates v. Jones Nat. Bank*, (1907) 206 U. S. 158, 27 S. Ct. 638, 51 U. S. (L. ed.) 1002.

Participation essential.—The directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency, made and published conformably to R. S. sec. 5211, 5 Fed. Stat. Annot. 152, cannot be held civilly liable to any one deceived to his injury by such report, since the exclusive test of such liability is furnished by this section, which makes a knowing violation of the provisions of the title relating to national banks a prerequisite to such liability. *Yates v. Jones Nat. Bank*, (1907) 206 U. S. 158, 27 S. Ct. 638, 51 U. S. (L. ed.) 1002.

Absence of director.—The mere fact that a director of a national bank does not attend to his duties by reason of continued ill health or other business engagements does not necessarily relieve him from liability for losses sus-

tained by the bank through the failure of the directors to exercise proper care and supervision over its affairs. *Rankin v. Cooper*, (1907) 149 Fed. 1010.

The directors are not insurers.—To the same effect as the original note. *Rankin v. Cooper*, (1907) 149 Fed. 1010.

Who may sue.—Damages to a national bank from the misfeasance or mismanagement of its officers are assets of the bank, recoverable only in an action by the bank or for the benefit of all the stockholders and creditors. *Yates v. Jones Nat. Bank*, (1905) 74 Neb. 734, 105 N. W. 287.

A receiver of a national bank may maintain a suit against the directors in behalf of creditors and stockholders to recover sums alleged to have been lost to the bank through the misconduct or negligence of defendants, and it is not a necessary condition precedent that violations of the Banking Act should have been previously adjudged in a suit brought by the comptroller. *Allen v. Luke*, (1906) 141 Fed. 694.

Form of remedy.—Where a stockholder's agent of a national bank sought to recover from directors losses sustained by stock speculations of the president and vice-president with the directors' knowledge and participation, it was held that a bill in equity for an accounting was sustainable, though a recovery at law could be had as to some of the transactions pleaded. *McKinnon v. Morse*, (1910) 177 Fed. 576.

Where several depositors of a national bank had claims against a number of the bank's directors, arising out of their failure to take steps to prevent the bank's assets being improperly loaned, and none of such depositors could, by separate suits at law, recover that to which he was entitled, it was held that such depositors were entitled to maintain a single suit against such directors in equity. *Boyd v. Schneider*, (C. C. A. 1904) 131 Fed. 223.

Where a national bank suffered losses through the continued negligence of its directors, which was unknown to its creditors, and such directors remained in control until the appointment of a receiver on the bank's insolvency, it was held that a court of equity would entertain a suit to charge them with personal liability, notwithstanding the fact that an action at law to recover for their wrongful acts would be barred by limitation under the laws of the state. *Rankin v. Cooper*, (1907) 149 Fed. 1010.

Limitation of action.—Directors of a national bank, while implied trustees, are not technical trustees, and hence directors who have ceased to be such, prior to the failure of a bank, are entitled to plead limitations as a defense to a suit by a receiver of the bank, to recover losses sustained by their malfeasance or gross negligence. *Emerson v. Gaither*, (1906) 103 Md. 564, 64 Atl. 26.

Bill or complaint.—In a suit against the directors of a national bank it is not necessary that the bill allege the exact amount of the loss arising from each transaction set out, where it is not yet known; but it should set out with particularity the acts of defend-

ants relied on to constitute negligence or misconduct, and the details of the several transactions should be given with such fulness as can be done by complainant. *Allen v. Luke*, (1906) 141 Fed. 694.

A bill by a stockholder's agent of an insolvent bank against directors to recover moneys lost by *ultra vires* transactions of the president and vice-president, in which defendants participated, alleging that at a stockholders' meeting held pursuant to law the plaintiff was elected as shareholders' agent to wind up the affairs of the bank in place of a receiver, and that he gave bond, as required by law, and is the duly qualified agent of the shareholders to act in the place of the receiver, was held to sufficiently show the complainant's capacity to sue. *McKinnon v. Morse*, (1910) 177 Fed. 576.

In a bill charging the making of illegal loans by the defendants as directors, it is not necessary to allege a formal vote of the defendants authorizing or approving such loans. *Allen v. Luke*, (1908) 163 Fed. 1018.

Amendment.—Where several depositors of an insolvent national bank filed a bill against its directors for a breach of their implied contract to see that the bank's assets were used according to law, but the bill failed to allege the time when complainants' deposits were made, complainants were entitled to leave to amend in that respect. *Boyd v. Schneider*, (1904) 131 Fed. 223, 65 C. C. A. 209.

Duties as to management.—It is the duty of directors of a national bank to exercise reasonable control and supervision over its affairs, and to use ordinary care and diligence in ascertaining the condition of its business, which is such care as an ordinarily prudent and diligent man would exercise in view of all the circumstances. They are not expected to watch the routine of every day's business, but they should have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally know of and give direction to its important and general affairs. *Rankin v. Cooper*, (1907) 149 Fed. 1010.

Examination of condition of resources.—It is incumbent upon the directors of a national bank in the exercise of ordinary prudence, and as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency. *Rankin v. Cooper*, (1907) 149 Fed. 1010.

Degree of care required.—If nothing has come to the knowledge of the directors of a national bank to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is all that is required of them, but if, on the other hand, they know, or by the exercise of ordinary care should know, any facts which should awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the danger to be avoided is required, and a failure to exercise such care makes them responsible. *Rankin v. Cooper*, (1907) 149 Fed. 1010.

**Necessity for injury or loss to bank.**—Directors of a national bank cannot be made to respond to damages or to pay excessive loans, unless some injury was done to the bank or loss sustained by reason thereof. *Emerson v. Gaither*, (1906) 103 Md. 564, 64 Atl. 26.

**Excessive loans.**—In an action by a national bank to recover damages sustained in consequence of excessive loans made by former directors in violation of this section, it was held that the issues to the jury were whether the loans were made when the borrower was already indebted to one-tenth of the capital actually paid in by the bank, whether such loans were knowingly made by such directors, and what portions of the moneys were so lost. *Mangum City Nat. Bank v. Crow*, (1910) 27 Okla. 107, 111 Pac. 210.

Where the directors of a national bank became aware, through the report of a committee of their number, and also by notices sent them individually by the Comptroller of the Currency, that the bank had been making excessive loans to its president and to other persons, firms, and corporations with which he was associated, but took no effective steps to reduce such loans, or to prevent their increase, which continued until the bank became insolvent, it was held that they were jointly and severally liable for all losses which the bank sustained through subsequent transactions and which could have been prevented by a proper discharge of their duties. *Rankin v. Cooper*, (1907) 149 Fed. 1010.

**Newly elected directors.**—While a director of a national bank ought not to be held responsible for the conduct of its business from the very day of his election, if he has not been a director before, he becomes responsible for acts or omissions from the time he acquires knowledge of the bank's condition and

begins to actively participate in its affairs. *Rankin v. Cooper*, (1907) 149 Fed. 1010.

**Violation of legal reserve requirement.**—A loss resulting to a national bank from bad loans, which were not repaid, cannot be said to have been caused by a violation of law by the directors in failing to keep on hand the legal reserve required by R. S. sec. 5191, 5 Fed. Stat. Annot. 124. *Allen v. Luke*, (1908) 163 Fed. 1018.

**Common-law liability.**—The provisions of the National Banking Act defining the duties of the directors of such banks do not relieve them from their common-law liability for a failure to diligently and honestly discharge their trust. *Allen v. Luke*, (1908) 163 Fed. 1018.

**Reporting doubtful assets at full face.**—Where the directors attested to be correct an official report of the bank's condition, which included, at their full face, as part of the bank's resources, assets which they had been informed by the Comptroller of the Currency were doubtful, and for the collection, or removal from the bank, of which immediate steps should be taken, it was held that they were liable to one who, on the strength of the report, bought stock of the bank, for the depreciation thereof by reason of the shrinkage in the value of the specific assets, but not for its depreciation from impairment, then unknown to the directors, of other assets. *Taylor v. Thomas*, (1909) 195 N. Y. 590, 89 N. E. 1113, *affirming* (1908) 124 App. Div. 83, 108 N. Y. S. 454, which modified and affirmed (1907) 55 Misc. 411, 106 N. Y. S. 538.

**Permitting stock speculation by officers.**—Where the directors of a national bank engaged in or knowingly permitted stock speculation by the president and vice-president with the bank's funds, it was held that they were liable for the losses sustained. *McKinnon v. Morse*, (1910) 177 Fed. 576.

## Vol. V, p. 183, sec. 1.

**Appointment of receiver by state court.**—See under this title, vol. 5, p. 170, sec. 5234.

## Vol. V, p. 184, sec. 3.

**Suits against agent.**—Where a shareholder's agent has been appointed to take charge of the assets of a national bank under this section, providing that such agent may sue and be sued in his own name or in the name of the association, suit was properly insti-

tuted against him by an alleged creditor of the bank to recover on a guaranty collateral to a sale to complainant of certain stock owned by the bank. *Barton v. McKinnon*, (1910) 179 Fed. 759.

## Vol. V, p. 187, sec. 5240.

**The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks**

in this section. *Guthrie v. Harkness*, (1905) 199 U. S. 148, 26 S. Ct. 4, 50 U. S. (L. ed.) 130, *affirming* (1904) 27 Utah 248, 75 Pac. 624.

## Vol. V, p. 188, sec. 5241.

**Application of stockholder to examine books.**—An application by a *bona fide* stockholder of a national bank to examine its

books, accounts, loans, etc., in order to determine the value of his stock, is not a visitation of the corporation, within this section,

so as to prevent the stockholder from obtaining such relief under a state statute declaring that all books of any corporation shall be subject to the inspection of any *bona fide* stockholder at all reasonable hours. *Harkness v. Guthrie*, (1904) 27 Utah 248, 75 Pac. 624.

Where a stockholder had sued for false representations made by directors of a national bank on which he had purchased shares of the bank's stock at a price in excess of its true value, that he discontinued such suit and recommenced it in the federal courts did not deprive him of the right to compel the bank's officers to permit an examination of its records to ascertain the true value of its assets and stock, the amount of its losses in certain specified dealings, and the existence of documents essential as primary evidence in the pending action. *Woodworth v. Old Second Nat. Bank*, (1908) 154 Mich. 459, 117 N. W. 893, 15 Detroit Leg. N. 773.

State courts have jurisdiction to compel officers of a national bank to permit a stockholder's examination of its records and documents for a proper purpose. *Woodworth v. Old Second Nat. Bank*, (1908) 154 Mich. 459, 117 N. W. 893, 15 Detroit Leg. N. 773.

Sufficiency of reasons for desiring inspection.—In *Woodworth v. Old Second Nat. Bank*, (1908) 154 Mich. 459, 117 N. W. 893,

15 Detroit Leg. N. 773, a national bank stockholder on Feb. 1, 1906, served on the directors written demand for an examination of its books and records, stating that he would renew the demand in person on Feb. 5, 1906, at three P. M. at the banking office, and that inspection was desired to commence at that time and continue at such hours as would not interfere with the bank's business. The notice cited a list of records to be inspected, and recited that it was to ascertain the true financial condition of the bank, the true value of its assets and capital stock, to ascertain the amount, nature, and date of the bank's losses through certain dealings with specified persons, and to investigate certain documents desired for use in a lawsuit commenced by relator. It was held that the relator's demand was made at the proper time and place, and that the notice disclosed a legitimate reason therefor.

The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks in this section. *Guthrie v. Harkness*, (1905) 199 U. S. 148, 26 S. Ct. 4, 50 U. S. (L. ed.) 130, *affirming* (1904) 27 Utah 248, 75 Pac. 624.

## Vol. V, p. 188, sec. 5242.

### I. TRANSFERS.

Actions by receiver to recover assets.—Where a national bank, after or in contemplation of an act of insolvency, made a transfer of notes to a creditor as a preference, which was void under this section, it was held that the receiver might at his election maintain an action at law against the creditor for their conversion. *Ball v. German Bank*, (C. C. A. 1911) 187 Fed. 750.

Settlement of lease of real estate.—The owner of real property leased to a national bank for building purposes is not liable to account to the bank's receiver for the bank building erected thereon, which the bank, while insolvent and in course of voluntary liquidation, turned over to him in consideration of a release from all further liability under the lease; the bank being at the time in arrears for rent and taxes, and the income from the property not exceeding the charges against it. *Brown v. Schleier*, (1904) 194 U. S. 18, 24 S. Ct. 558, 48 U. S. (L. ed.) 857, *affirming* (1902) 118 Fed. 981, 55 C. C. A. 475.

For another case under this section see *Ball v. German Bank*, (C. C. A. 1911) 187 Fed. 750.

### II. ATTACHMENTS, INJUNCTIONS, AND EXECUTIONS.

Effect of later acts.—To the same effect as the original note. *Van Reed v. People's Nat. Bank*, (1905) 198 U. S. 554, 25 S. Ct. 775, 49 U. S. (L. ed.) 1161, *affirming* (1903) 173 N. Y. 314, 66 N. E. 16, cited in the original note.

Attachment, etc., in state courts.—Jurisdiction over the person or property of a national bank is not acquired by the issue of an attachment out of a state court before judgment, which, by reason of this section, is beyond the power of the court. *Van Reed v. People's Nat. Bank*, (1905) 198 U. S. 554, 25 S. Ct. 775, 49 U. S. (L. ed.) 1161, *affirming* (1903) 173 N. Y. 314, 66 N. E. 16; *Merchants' Laclede Nat. Bank v. Troy Grocery Co.*, (1905) 144 Ala. 605, 39 So. 476; *Meyer v. Cœur d'Alene First Nat. Bank*, (1904) 10 Idaho 175, 77 Pac. 334; *McBride v. Illinois Nat. Bank*, (1908) 128 App. Div. 503, 112 N. Y. S. 794.

Waiver of exemption.—To the same effect as the first part of the original note. *Merchants' Laclede Nat. Bank v. Troy Grocery Co.*, (1907) 150 Ala. 128, 43 So. 208.

Necessity for insolvency.—A national bank, whether solvent or insolvent, is within the exemption from the issue of attachment before judgment, which this section affords in suits in the state courts. *Van Reed v. People's Nat. Bank*, (1905) 198 U. S. 554, 25 S. Ct. 775, 49 U. S. (L. ed.) 1161, *affirming* (1903) 173 N. Y. 314, 66 N. E. 16.

Appointment of permanent receiver by state court.—This section is not violated by the appointment of a permanent receiver on the application of a stockholder, made by a state court as part of the final judgment in the cause. *Cogswell v. Norwich Second Nat. Bank*, (1903) 76 Conn. 252, 56 Atl. 574.

Appointment of temporary receiver.—See *Cogswell v. Norwich Second Nat. Bank*, (1903) 76 Conn. 252, 56 Atl. 574.

## Vol. V, p. 193, sec. 4.

Since the passage of the section in the text. — The Act of July 12, 1882, ch. 290, sec. 4, 22 Stat. L. 163, which provides that jurisdiction for suits by or against national banks shall be the same as for suits by or against banks not national doing business in the same place, deprives the federal courts of jurisdiction of suits by or against national banks by reason of their national incorporation, leaving such jurisdiction dependent on diversity of citizenship alone, unless a federal question is otherwise involved; and under Act March 3, 1887, ch. 373, sec. 4, 24 Stat. L. 554, as amended by Act Aug. 13, 1888, ch. 866, 25 Stat. L. 436, which makes the citizenship of such banks for jurisdictional purposes dependent upon their location, a federal court in a state is without jurisdiction of a suit by a national bank of the District of Columbia against a citizen of such state on the ground of diversity of citizenship. *American Nat. Bank v. Tappan*, (1909) 174 Fed. 431.

**Mandamus by state courts.** — Any legal right which a stockholder of a national bank may have to obtain an inspection of its books may be enforced in the state courts by mandamus, in view of the provision of this section that, for actions against national banks at law or in equity, they shall be deemed citizens of the state in which they are located, and that in such cases the federal Circuit and District Courts shall have jurisdiction only as in cases between individual citizens of the same state. *Guthrie v. Harkness*, (1905) 199 U. S. 148, 26 S. Ct. 4, 50 U. S. (L. ed.) 130.

**Suits by receivers and agents.** — To the same effect as the original note. *Rankin v. Herod*, (1904) 130 Fed. 390; *Rankin v. Herod*, (1905) 140 Fed. 661.

**A federal question is not raised ipso facto in a suit by a national bank.** *Denison State Nat. Bank v. Eureka Springs Water Co.*, (1909) 174 Fed. 827.

## NATURALIZATION.

## Vol. V, p. 200, sec. 2165.

**Repeal.** — This section was expressly repealed by Act of June 29, 1906, ch. 3592, sec. 26, 34 Stat. L. 603, 1909 Supp. Fed. Stat. Annot. 375.

**Judgment.** — In a naturalization proceeding the court has power to admit to citizenship

or not, depending upon whether the essential facts are proved, and, in either event, the judgment should be recorded. *Rockland v. Hurricane Isle*, (1909) 106 Me. 169, 76 Atl. 286.

Vol. V, p. 201, sec. 2165. [*Declaration of intention.*]

**Authority of state court.** — Congress, in the exercise of its power under U. S. Const., art. 1, sec. 8, cl. 4, to establish a uniform rule of naturalization, may confer jurisdiction upon the courts of a state of naturalization proceedings involving admission to citizenship in the United States, and may constitutionally provide for the punishment of false swearing in such a proceeding. *Holmgren v. U. S.*, (1910) 217 U. S. 509, 30 S. Ct. 588, 54 U. S. (L. ed.) 861.

**The term "having common-law jurisdiction."** — To the same effect as the first paragraph of the original note. *U. S. v. Nechman*, (1910) 183 Fed. 788.

A "court of record having common-law jurisdiction," within the meaning of section 2165 is one having a judge, clerk, and seal, and whose powers are exercised according to the course of the common law; that is, a court wherein controversies are judicially determined after notice to the interested parties and opportunity given them to be heard. *State v. Weber*, (1905) 96 Minn. 422, 105 N. W. 490.

A court of common-law jurisdiction authorized by this section to admit aliens as citizens need not possess a general common-law

jurisdiction, but if any part of its jurisdiction answers that designation it is sufficient. Courts with this jurisdiction are those which have the power to punish offenses, enforce rights, or redress wrongs recognized by the common law, or which, in the determination of the causes they decide, are governed by the principles, rules, and usages of that law. The term "having common-law" is used to distinguish these courts from those which have no jurisdiction save in equity, admiralty, or in matters not involving offenses or rights under the common law. Within this meaning and under the decisions of the state of Tennessee the County Courts of that state are not "courts of common-law jurisdiction," having authority to admit aliens to citizenship. *In re Wolf*, (1911) 188 Fed. 519.

**Minor.** — Under this section it was held that a minor who had reached years of discretion could make a declaration of intention. *In re Polsson*, (1908) 159 Fed. 283; *In re Gross*, (1908) 160 Fed. 739; *U. S. v. George*, (1908) 164 Fed. 45, 90 C. C. A. 463; *In re Symanowaski*, (1909) 168 Fed. 978; *In re Shapiro*, (1911) 186 Fed. 606.

**Contra.** — *In re Spitzer*, (1908) 160 Fed. 137.

Vol. V, p. 202, sec. 2165. [*Oath to support, etc.*]

**Time of renunciation.**—This section did not require a renunciation of allegiance to the foreign sovereign, or the actual declaration of allegiance to the United States, at the time

of the applicant's declaration of intention to become a citizen. *In re Symanowski*, (1909) 168 Fed. 978.

[*Residence in United States, etc.*]

**Conclusiveness of record.**—To the same effect as the original note. *Rockland v. Hurricane Isle*, (1909) 106 Me. 169, 78 Atl. 286.

A naturalization record need not show jurisdiction, or that all the legal requisites have been complied with, nor contain the alien's previous declaration of intention to become a citizen, in order to import validity. *In re Symanowski*, (1909) 168 Fed. 978.

**Record need not show residence.**—Under this section, requiring a declaration of inten-

tion two years before admission to citizenship, an oath when application for admission is made, and a showing to the court of certain residence in the United States and the particular state, and of good moral character, etc., such prerequisites were matters of proof, and not of jurisdiction, and hence a record of naturalization did not need to show residence in the state for the required time. *Rockland v. Hurricane Isle*, (1909) 106 Me. 169, 78 Atl. 286.

## Vol. V, p. 205, sec. 2166.

This section was not repealed by the Naturalization Act of June 29, 1906, ch. 3592, 34 Stat. L. 596, 1909 Supp. Fed. Stat. Annot. 365, U. S. Comp. Stat. Supp. 1907, p. 419. *U. S. v. Meyer*, (1909) 170 Fed. 983.

**Proof "as now provided by law."**—This section requires that the court shall, in addition to such proof of residence and good moral character as "now" provided for by law, be satisfied by competent proof of the applicant having been honorably discharged from service of the United States. It has been held that the word "now" is limited to the laws existing at the enactment of the statute, and did not include subsequent enactments. *In re Loftus*, (1908) 165 Fed. 1002; *In re McNabb*, (1909) 175 Fed. 511.

**Proof of residence.**—On application by an honorably discharged soldier for naturalization, as authorized by this section, his proof

of residence within the United States for one year prior to his application may be made by depositions; Act Cong. June 29, 1906, ch. 3592, sec. 10, 34 Stat. L. 599, 1909 Supp. Fed. Stat. Annot. 371, authorizing the taking of depositions in naturalization proceedings, being sufficiently broad to permit depositions to be taken without the state whenever it is essential to prove residence beyond the state. *In re McNabb*, (1909) 175 Fed. 511.

**Japanese soldier.**—This section, as limited by section 2169, 5 Fed. Stat. Annot. 287, by providing that "the provisions of this title shall apply to aliens being free white persons and to aliens of African nativity, and to persons of African descent," does not extend the right of naturalization to a person of the Japanese race, although having an honorable discharge from the army of the United States. *In re Buntaro Kumagai*, (1908) 163 Fed. 922.

Vol. V, p. 206. [*Aliens honorably discharged from service in navy or marine corps.*]

**Posting of notice of petition.**—Act Cong. June 29, 1906, ch. 3592, 34 Stat. L. 596, 1909 Supp. Fed. Stat. Annot. 366, to provide for a uniform rule for the naturalization of aliens throughout the United States, declares, in section 4, that an alien may be admitted to become a citizen of the United States in the following manner, and "not otherwise." It has been held that the provision of such Act requiring notice of the petition to be posted for ninety days prior to hearing was applicable to an alien applying for citizenship under Act Cong. July 26, 1894, ch. 165, 28 Stat. L. 124, providing that service in the navy or marine corps for a specified term, and honorable discharge, shall be counted as residence, and shall entitle an alien having other necessary requisites to citizenship. *U. S. v. Peterson*, (C. C. A. 1910) 182 Fed. 289.

**Japanese sailors or marines.**—In view of the provision of the Naturalization Act of June 29, 1906, ch. 3592, sec. 26, 34 Stat. L. 603, 1909 Supp. Fed. Stat. Annot. 375, repealing related sections, but omitting from such repeal R. S. sec. 2169, as amended, 5 Fed. Stat. Annot. 207, which limits the privilege of naturalization to free white persons and persons of African nativity or descent, such section must be held to limit and control this Act, authorizing the naturalization of "any alien" twenty-one years or more of age who served in the United States navy or marine corps as therein provided, and therefore an alien of the Japanese race is not entitled to naturalization thereunder. *Bessho v. U. S.*, (C. C. A. 1910) 178 Fed. 245.

## Vol. V, p. 206, sec. 2167.

**Repeal.**—This section was expressly repealed by Act of June 29, 1906, ch. 3592, sec. 26, 34 Stat. L. 603, 1909 Supp. Fed. Stat. Annot. 375.

**Vol. V, p. 207, sec. 2168.**

**Repeal.**—This section was expressly repealed by Act of June 29, 1906, ch. 3592, sec. 26, 34 Stat. L. 603, 1909 Supp. Fed. Stat. Annot. 375.

**Vol. V, p. 207, sec. 2169.**

This section was not repealed by implication by Naturalization Act of June 29, 1906, ch. 3592, 34 Stat. L. 596, U. S. Comp. Stat. Supp. 1909, p. 97, 1909 Supp. Fed. Stat. Annot. 365. U. S. v. Balsara, (C. C. A. 1910) 180 Fed. 694.

**Armenians.**—The word "white" was used in this section to classify the inhabitants and to include all persons not otherwise classified, not as synonymous with "European," there being in fact no "European" or "white" race as a distinctive class, or "Asiatic" or "yellow" race including substantially all the people of Asia; and hence the term "free white persons" includes Armenians born in Asiatic Turkey and on the west side of the Bosphorus. *In re Halladjian*, (1909) 174 Fed. 834.

**Parsee.**—"Free white persons" includes members of the white or Caucasian race, as distinct from the black, red, yellow, and brown races; and hence a Parsee is entitled to admission to citizenship. *U. S. v. Balsara*, (C. C. A. 1910) 180 Fed. 694.

**Syrian.**—A Syrian from Mt. Lebanon, near Beirut, was held to be a free white person, within this section, providing for the naturalization of free white persons of other countries as citizens of the United States; such term being construed to refer to race rather than to color, and to include all members of

the Caucasian race. *In re Najour*, (1909) 174 Fed. 735.

Likewise a Syrian born in Damascus was held to be a "free white person," entitled to naturalization. *In re Mudarri*, (1910) 176 Fed. 465.

**Half-breeds.**—In *In re Knight*, (1909) 171 Fed. 299, it appeared that the petitioner was born on a British schooner in the Yellow Sea. His father was an Englishman, and his mother half Chinese and half Japanese, and their marriage occurred at Shanghai under the British flag. The petitioner enlisted in the United States navy off the coast of China in 1882, and first came to the United States Aug. 5, 1892. He had served honorably since his enlistment until his application for citizenship, when he was forty-three years old. It was held that petitioner was not a free "white person," and was therefore not entitled to naturalization under this section and Act Cong. May 6, 1882, ch. 126, sec. 14, 22 Stat. L. 81, 1 Fed. Stat. Annot. 784, prohibiting the admission of Chinese to citizenship.

**Japanese soldier.**—See under this title, vol. 5, p. 205, sec. 2166.

**Japanese sailors or marines.**—See under this title, vol. 5, p. 206, *Aliens honorably discharged from service in navy or marine corps.*

**Vol. V, p. 208, sec. 2170.**

**Proof of residence.**—While one's residence under this section, which requires an applicant for citizenship to have resided in the United States for five years next preceding his admission, depends largely on his intention, such intention is to be gathered from his acts rather than from his declaration. Thus an

alien who returned to and remained in his native country for more than four years, where his family always lived, he resuming his regular occupation there, cannot claim residence in the United States during that period. *U. S. v. Aakervik*, (1910) 180 Fed. 137.

**Vol. V, p. 209, sec. 2172.**

**Effect of immigration laws.**—An alien minor child who has never dwelt in the United States is not, when coming to join a naturalized parent, exempt from the provision of the Act of March 3, 1903, 10 Fed. Stat. Annot. 103, 23 Stat. L. 1213, ch. 1012, sec. 2, debarring aliens from landing if they are afflicted with a dangerous contagious disease, on the theory that she was invested

with citizenship by virtue of the declaration of this section that minor children of naturalized citizens shall, if "dwelling in the United States," be considered as citizens thereof. *Zartarian v. Billings*, (1907) 204 U. S. 170, 27 S. Ct. 182, 51 U. S. (L. ed.) 428; *U. S. v. Williams*, (1904) 132 Fed. 894. See also under this title, 1909 Supp., p. 366, sec. 4, *Proceedings*.

**Vol. V, p. 210, sec. 2173.**

**Repeal.**—This section was expressly repealed by Act of June 29, 1906, ch. 3592, sec. 26, 34 Stat. L. 603, 1909 Supp. Fed. Stat. Annot. 375.

**Vol. V, p. 210, sec. 5395.**

**Amendment.**—The Naturalization Act of June 29, 1906, ch. 3592, sec. 23, 34 Stat. L. 603, 1909 Supp. Fed. Stat. Annot. 375, provid-

ing a punishment for knowingly making a false affidavit as to any material fact required to be proved in a naturalization proceeding,

is to be regarded as an amendment of this section. *U. S. v. Dupont*, (1910) 176 Fed. 823.

**Elements of offense.**—On a trial of a defendant charged with a violation of this section, which denounces a penalty against one who “knowingly swears falsely” in making any oath under the law relating to naturalization, it is sufficient to warrant conviction if defendant knowingly and wilfully testified falsely, and it is not necessary that his act should also have been corrupt or malicious. *Holmgren v. U. S.*, (C. C. A. 1907) 156 Fed. 439.

**Perjuries committed in state court.**—A District Court of the United States has jurisdiction of a prosecution under this section for false swearing in a naturalization proceeding, notwithstanding the fact that such proceeding was in a state court. *Holmgren*

*v. U. S.*, (C. C. A. 1907) 156 Fed. 439. See also *Schmidt v. U. S.*, (C. C. A. 1904) 133 Fed. 257.

**Indictment — variance.**—An indictment charging that the defendant made a false affidavit before a notary public “in a proceeding for naturalization” then and there pending in a stated court “touching the matters in issue and material in said proceedings,” cannot be construed to charge the making of the affidavit “under or by virtue of any law relating to the naturalization of aliens,” within the first clause of said section, but clearly charges the offense under the second clause, and is not sustained by evidence showing that the affidavit was made before the proceeding was instituted. *Moore v. U. S.*, (C. C. A. 1906) 144 Fed. 962.

**Instructions.**—See *Holmgren v. U. S.*, (C. C. A. 1907) 156 Fed. 439.

## Vol. V, p. 211, sec. 5424.

**Construction.**—This section provides that every person applying to be admitted as a citizen, or appearing as a witness for any such person who knowingly personates any other person than himself or falsely appears in the name of a deceased person, or in any assumed or fictitious name, or falsely makes, forges, or counterfeits any oath, notice, affidavit, certificate, order, record, etc., shall be punished. It has been held that such provision should be construed as though it read “or any person who falsely makes, forges, or counterfeits,” etc., and as so construed pro-

hibited the felonious making of a certificate of naturalization by a person other than the “person applying to be admitted a citizen or appearing as a witness for any such person.” *U. S. v. Raisch*, (1906) 144 Fed. 487. Compare *U. S. v. York*, (1904) 131 Fed. 323.

**Jurisdiction.**—A conviction can be had in a federal court for false swearing in naturalization proceedings in a state court, under this section. *Holmgren v. U. S.*, (1910) 217 U. S. 509, 30 S. Ct. 588, 54 U. S. (L. ed.) 861.

## Vol. V, p. 212, sec. 5425.

**Necessity for actual use for unlawful purpose.**—To constitute an offense under the provision of this section that “every person . . . who without lawful excuse knowingly is possessed of any false, forged, antedated, or counterfeit certificate of citizenship . . . knowing such certificate to be false, forged, antedated, or counterfeit, with intent unlawfully to use the same,” shall be punished, etc., it is necessary that such false certificate be actually used for an unlawful purpose. *Green v. U. S.*, (C. C. A. 1907) 150 Fed. 560.

**Recitals of certificate.**—In this section, making it a criminal offense to knowingly use any false or forged certificate of citizenship “purporting to have been issued under the provisions of any law of the United States relating to naturalization,” the clause quoted refers to certificates which purport upon their face to have been issued after a compliance on the part of the alien named therein with the naturalization laws and as evidence of

that fact, and a certificate to sustain an indictment based on such statute need not recite that it is issued under a law of the United States, there being, in fact, no statute authorizing or requiring the issuance of such certificate. *Dolan v. U. S.*, (C. C. A. 1904) 133 Fed. 440.

**“Certificate of citizenship.”**—A certified copy of the record of a court showing the admission of an alien to citizenship constitutes a “certificate of citizenship,” within the meaning of R. S. secs. 5425, 5427, making it a crime to use or to aid and abet another in using false certificates of citizenship for purposes therein specified. *Dolan v. U. S.*, (C. C. A. 1904) 133 Fed. 440.

A “false” certificate of citizenship, within the meaning of R. S. secs. 5425, 5427, is not limited to one which is forged, but includes one which is false in its recital of facts. *Dolan v. U. S.*, (C. C. A. 1904) 133 Fed. 440.

## Vol. V, p. 213, sec. 5427.

**Construction of statute.**—This section provides that “every person who knowingly and intentionally aids or abets any person in the commission of any felony denounced in the three preceding sections” shall be punished, etc. In the original statute said four sections

were all embraced in one section, which expressly declared the offenses now contained in the three first sections to be felonies, and the part which now constitutes section 5427 read: “Any person who shall . . . aid and abet any person in the commission of any such



felony," etc. In the revision such express declaration was omitted, and it has since been settled by decision that the offenses described in the first three sections are not felonies, but misdemeanors, under the common-law rule of construction applied to federal statutes, although the punishment prescribed is imprisonment in a penitentiary at hard labor, which, by the general understanding in this country,

makes the offense a felony. It was held that such construction does not render section 5427 a nullity, but that the word "felony," as used therein, should be given its popular meaning, in order to give effect to the section in accordance with the manifest intention of Congress. *Dolan v. U. S.*, (C. C. A. 1904) 133 Fed. 440. See also *U. S. v. York*, (1904) 131 Fed. 323.

## Vol. V, p. 213, sec. 5428.

**False affidavit of citizenship before registration officer.** — An alien who knowingly makes a false affidavit that he has been duly naturalized as a citizen of the United States, before a registration officer, for the purpose

of procuring himself to be registered as a voter at an approaching election in a state, commits an offense in violation of this section. *Green v. U. S.*, (C. C. A. 1907) 150 Fed. 560.

## Vol. X, p. 238, sec. 39.

**Repeal.** — This section was expressly repealed by Act of June 29, 1906, ch. 3592, sec. 26, 34 Stat. L. 603, 1909 Supp. Fed. Stat. Annot. 375.

For a case under this section see *Schmidt v. U. S.*, (1904) 133 Fed. 257, 66 C. C. A. 389.

## 1909 Supp., p. 365, sec. 3.

**Jurisdiction of state courts.** — The courts of a state may, with the consent of the legislature, exercise the jurisdiction conferred by this Act, but the jurisdiction must be exercised under and in conformity with the federal statutes, not only in matters entering directly into the subject of naturalization, but also in matters of congressional legislation fairly incidental to the exercise of the constitutional power to deal with naturalization. *Hampden County v. Morris*, (1911) 207 Mass. 167, 93 N. E. 579.

The federal government in authorizing state courts to act in naturalization proceedings selects such courts and the clerks thereof as government agencies through whom the government is discharging a function of sovereignty; and, while Congress may confer power on the state courts to act in naturalization proceedings and the state courts may constitutionally exercise the same when authorized so to do, Congress may not make their acts in that regard a part of their duties as state courts, and the power conferred and the duties imposed by the Naturalization Act are not *ex officio* powers and duties belonging to and devolving on a state office as such. *Eldredge v. Salt Lake County*, (Utah 1910) 106 Pac. 939.

**Within respective jurisdiction districts.** — This section confers naturalization jurisdiction

on the courts of the various states extending to aliens resident within the respective judicial districts of such courts. The Washington constitution, art. 4, sec. 6, confers general jurisdiction on the Superior Courts of that state within their judicial districts, not limited to the counties composing the same, and by statute (Rem. & Ball. Code, sec. 9050), Klickitat and Clarke counties are in the same judicial districts, the courts of those counties being presided over by the same judge. It has been held that, where an alien resident of such district was naturalized by such Superior Court while sitting in Clarke county, it was not a fatal objection to the naturalization that the alien was a resident of Klickitat county. *U. S. v. Stoller*, (1910) 180 Fed. 910.

Under the provision in this section that "the naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts," it has been held that a District Court of the state of Kansas has jurisdiction to naturalize aliens resident in the county where it is sitting only, its territorial jurisdiction while so sitting being restricted to that county by state statute. (*Dassler's Gen. Stat. Kan.* 1905, sec. 2010.) *U. S. v. Johnson*, (1908) 181 Fed. 429.

## 1909 Supp., p. 366, sec. 4. [Proceedings.]

**Powers of Congress.** — Under Const. U. S., art. I., sec. 8, giving Congress power to establish a uniform rule of naturalization and to make all laws necessary and proper for carrying the power into execution, Congress has exclusive jurisdiction over the subject of naturalization. *Hampden County v. Morris*, (1911) 207 Mass. 167, 93 N. E. 579.

**A privilege, not a right.** — To become a

citizen of the United States by naturalization is not a right, but a privilege, which can be granted by the courts only under provision of laws enacted by Congress. *In re Buntaro Kumagai*, (1908) 163 Fed. 922.

**Alien wife of foreigner.** — An alien woman, married to an alien, although residing in this country and otherwise qualified, cannot become a citizen of the United States by natu-

ralization. *In re Rionda*, (1908) 164 Fed. 368; *U. S. v. Cohen*, (1910) 179 Fed. 834, 103 C. C. A. 28.

**Effect of immigration laws.**—Under Act March 2, 1907, ch. 2534, sec. 5, 34 Stat. L. 1229, 1909 Supp. Fed. Stat. Annot. 68, providing that a child born without the United States of alien parents shall be deemed a citizen by virtue of the naturalization of the parent, taking place during the minority of the child, provided that the citizenship of such child shall begin when he begins to reside permanently in the United States, until a minor child of a naturalized parent has begun to reside permanently in the United

States he is an alien, and he cannot begin to so reside if he belongs to a class of aliens debarred from entry, and the naturalization of a father will not permit his minor child born abroad, and remaining in the country of his nativity until after the naturalization, to come into the United States if prohibited from entering by Act Feb. 20, 1907, ch. 1134, 34 Stat. L. 898, 1909 Supp. Fed. Stat. Annot. 162, excluding from admission into the United States persons belonging to enumerated classes. *U. S. v. Rodgers*, (C. C. A. 1911) 185 Fed. 334. See also under this title, vol. 5, p. 209, sec. 2172.

### 1909 Supp., p. 366, sec. 4, cl. first.

**Nature of declaration.**—A declaration of intention to become a citizen is in no sense a complete and binding act, and carries no full rights of citizenship before the final act of admission. *In re Polsson*, (1908) 159 Fed. 283.

**Conclusiveness of finding of court.**—Where a decree of naturalization issued by a state court of original jurisdiction recited that the alien naturalized was then twenty-five years of age, and that it appeared to the court that he had made his declaration of intention to become a citizen of the United States according to law, it should be construed as finding that all other requirements necessary to sustain his application were found to exist; and hence the order could not be attacked on the ground that he had not declared his intention at least two years prior to his admission to citizenship, under the rule

that a judgment may not be impeached for any facts, whether involving fraud, collusion, or perjury, which were necessarily before the court entering the judgment and passed upon. *U. S. v. Nechman*, (1910) 183 Fed. 788.

**Evidence of qualification.**—The requirement of section 4 that an application for naturalization shall state in his petition the date of his arrival in the United States and the name of the vessel on which he came must be given practical effect, and where such statement is disproved *prima facie* by proof that the appellant's name does not appear among the passengers on the vessel named, the burden of proof is shifted to him to explain such fact to the satisfaction of the court, and his testimony that he came under a fictitious name which he cannot remember will not be accepted as satisfactory. *In re Kestelman*, (1908) 165 Fed. 265.

### 1909 Supp., p. 366, sec. 4, cl. second.

**Filing in duplicate.**—The provision of this section requiring a naturalization petition to be filed in duplicate is directory only, so that a failure to comply therewith will not render the proceedings void. *U. S. v. Stoller*, (1910) 180 Fed. 910.

**Contents of petition.**—Under this section, providing that a naturalization petition shall contain every fact material to the petitioner's naturalization required to be proved on the final hearing, and clause 4 declaring that that petition shall prove, among other things, that he has resided immediately preceding his application continuously within the state or territory where the court is at the time held, for one year at least, petitioner's prior residence within the state or territory for a year is a necessary allegation of a petition for naturalization, and hence perjury may be assigned on a false allegation thereof. *U. S. v. Dupont*, (1910) 176 Fed. 823.

**Verification.**—A petition which is not verified by at least two persons who are citizens is not merely voidable but void, and

cannot be amended. *U. S. v. Martorana*, (1909) 171 Fed. 397, 96 C. C. A. 353.

A petition for naturalization not verified by affidavits of two citizens will be dismissed, with costs, but without prejudice to the right of the petitioner to file a new application. *In re Wolf*, (1911) 188 Fed. 510.

**Proof of residence.**—While the verification provided for in this clause must show that petitioner has resided continuously in the country for at least five years, such showing need not be made by the same witnesses for the entire period, and so long as there are at least two credible witnesses testifying as to each fraction of the period, so as to cover the whole, the statutory requirement is satisfied. *In re Godlover*, (1910) 181 Fed. 731.

**Absence of a filing indorsement, or a calendar entry by a clerk concerning a naturalization petition actually filed, is immaterial if the fact of filing sufficiently appears.** *U. S. v. Erickson*, (1910) 188 Fed. 747.

**Signing in own handwriting.**—See *In re Martinovsky*, (1909) 171 Fed. 691.

### 1909 Supp., p. 368, sec. 4, cl. fourth.

**Good moral character.**—Where an alien applying for admission to citizenship has not behaved as a man of good moral character

while residing in the United States, the court, in the exercise of a sound discretion, will refuse his petition, though his behavior has

been good during the five years preceding the petition; and the court must determine, taking into account the whole conduct of the petitioner, whether he possesses the necessary qualifications for citizenship. *In re Ross*, (1911) 188 Fed. 685.

That the applicant for citizenship keeps his saloon open in violation of a state Sunday closing act does not show want of the good moral character essential under the Naturalization Act, where the law has never been enforced in his city on account of adverse public sentiment, and where he is willing to obey the law if insisted upon by the proper authorities. *In re Hopp*, (1910) 179 Fed. 561, wherein the court said: "What is meant by good moral character, as the terms are used in this Act? What standard does the statute contemplate? It is plain that it does not require the highest degree of moral excellence. A good moral character is one that measures up as good among the people of the community in which the party lives; that is, up to the standard of the average citizen. Ordinary care is the test of liability in every case of negligence. This standard is arrived at, not by the overcautious or the reckless man, but by the average man, representing the great mass of men. So here, where the law says a good moral character, it means such a reputation as will pass muster with the average man. It need not rise above the level of the common mass of people. Applying this test to the particular case, we find that the views and behavior of the applicant are in accord with the overwhelming majority of the people in this community. It is not contended that the applicant must be able to rise to such moral elevation that he may analyze, criticize, and reject the prevailing opinions and settled convictions of his fellow-men, and in the clear blue of righteousness choose for himself a course of action dictated by his quickened conscience. To meet such a test a man must be a philosopher, while the statute is satisfied with a citizen whose be-

havior is up to the level of the average citizen. There is nothing in the mental attitude of the applicant, as disclosed by his examination, which would brand him as a deliberate law-breaker. His willingness and desire to obey the law, if insisted upon by the constituted authority, distinguishes this case from the Illinois case (*U. S. v. Hasky*, (1909) 240 Ill. 560, 88 N. E. 1031, 130 Am. St. Rep. 288) which has been pressed upon our attention. In that case the front door of the saloon was closed, indicating a knowledge of the law and a pretended desire for its enforcement, while the open back door indicated stealth and a deliberate purpose to circumvent the law. This was coupled with a solemn determination on the part of the applicant to adhere to his lawless course at all hazards. It must be remembered that the act of keeping open one's saloon on the sabbath is unlawful, not in and of itself, but merely because it has been prohibited by an arbitrary Act of the legislature. Men of the highest moral character always have and always will differ as to the proper enforcement of sumptuary and police regulations. I cannot see that the applicant should be denied citizenship because he has fallen in with the general public sentiment of the community in which he lives. There is in the conduct and attitude of the applicant no moral turpitude, and nothing evincing a calloused conscience, and it would not, in my judgment, be a fair construction of the Act of Congress to require the applicant to rise above his environment and show by his behavior that his moral character was above the level of the average citizen."

An alien having pleaded guilty to murder in the second degree will not be admitted to citizenship, though before the offense, and for more than five years after the expiration of the term of imprisonment, his conduct reveals no cause for censure. *In re Ross*, (1911) 188 Fed. 685.

#### 1909 Supp., p. 369, sec. 4, cl. sixth.

**Stepchildren.**—In *In re Robertson*, (1910) 179 Fed. 131, it appeared that the applicant was born in England, where his father died, and his mother was again married to an alien, who emigrated to the United States when the applicant was about four years of age. When the applicant was about seventeen years old and residing with his stepfather as a member of his family, the stepfather made a declaration of intention, but died without having been naturalized. It was held that that applicant was entitled to naturalization on the strength of his stepfather's declaration.

**Widow of soldier.**—This clause does not entitle the widow of an alien who never declared his intention, to naturalization without previously making a declaration because the husband was an honorably discharged soldier of the United States and as such entitled to naturalization without making any

declaration, under R. S. sec. 2166, 5 Fed. Stat. Annot. 205. *U. S. v. Meyer*, (1909) 170 Fed. 983.

**Time of filing petition after death of father.**—Where an alien declared his intention to become a citizen July 31, 1889, and died March 6, 1892, without having been admitted to citizenship, it was held that his son, who came to the United States April 25, 1891, when between eight and nine years of age, and filed a petition for naturalization on April 22, 1909, three years after the passage of this Act, was not guilty of such laches as barred his right to citizenship, though he delayed his application for six years and five months after he became of age, and for nine years and five months after he became eighteen, when he could have first taken the required oaths. *U. S. v. Poslusny*, (C. C. A. 1910) 179 Fed. 836.

## 1909 Supp., p. 369, sec. 5.

**The witnesses.**—To the same effect as the first case cited in the original note, *In re Neugebauer*, (1909) 172 Fed. 943; *U. S. v. Doyle*, (C. C. A. 1910) 179 Fed. 687; *U. S. v. Ojala*, (C. C. A. 1910) 182 Fed. 51.

**Presumption as to posting.**—In the absence of a contrary showing, names of witnesses for an applicant for naturalization are presumed to have been posted for the time required by law. *U. S. v. Erickson*, (1910) 188 Fed. 747.

## 1909 Supp., p. 370, sec. 6.

The evident purpose of Congress in requiring that final action in naturalization cases shall be had only on stated days to be fixed by a rule of the court, and that in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting notice of such petition, was to prevent the granting of certificates of naturalization unless due notice is given to the United States and an opportunity afforded to oppose the application. (1908) 26 Op. Atty.-Gen. 611.

**Hearings within thirty days before election.**—The proviso to this section forbidding the issuing of any certificate of naturalization

by any court within thirty days preceding the holding of any general election within its jurisdiction does not forbid hearings on petitions for naturalization within such time, but merely forbids the issuing of such certificates within that time. (1908) 26 Op. Atty.-Gen. 611.

**Adjournments.**—Where the rule day is fixed by order of the court and the United States attorney has an opportunity to be present and be heard, the judge may, in his discretion, adjourn the hearing to such time as may suit his convenience, and the convenience of the parties to the case. (1908) 26 Op. Atty.-Gen. 611.

## 1909 Supp., p. 370, sec. 9.

**Conclusiveness of adjudication.**—An order admitting to citizenship, being a judgment with the ordinary attributes of a court of record importing verity, is as conclusive as such judgments. *U. S. v. Aakervik*, (1910) 180 Fed. 138; *U. S. v. Stoller*, (1910) 180 Fed. 910.

**Time when citizenship begins.**—An alien is not naturalized until the order divesting him of his former nationality and making him a citizen of the United States has been

signed by a judge of a court having jurisdiction of such cases. (1908) 26 Op. Atty.-Gen. 611.

**Review.**—The admission of an alien to citizenship is a political, and not a judicial, act, and, having been vested by Congress in the courts to be exercised on proof "to the satisfaction of the court," its exercise is discretionary and not reviewable. *U. S. v. Dolla*, (C. C. A. 1910) 177 Fed. 101.

## 1909 Supp., p. 371, sec. 10.

**Honorably discharged soldiers.**—The provision in this section that a naturalization petition shall be verified by the affidavits of at least two credible witnesses, who shall state that they have personally known the applicant to be a resident of the United States for at least five years continuously, and of the state in which the application is made for at least a year immediately preceding the date of filing the petition, is inap-

plicable to the petition of an honorably discharged soldier, applying for naturalization under R. S. sec. 2166, 5 Fed. Stat. Annot. 205, on proof of one year's residence only within the United States, without being required to make a previous declaration of intention or prove residence in the state in which he applies for naturalization for any specified time. *In re McNabb*, (1909) 175 Fed. 511.

## 1909 Supp., p. 371, sec. 11.

**Specification of objections by United States.**—The court will ordinarily admit a petitioner to citizenship in the absence of declared opposition by the United States, and hence

it is the duty of the United States attorney to specify his objections and to support the same by argument. *In re Mudarri*, (1910) 176 Fed. 465.

## 1909 Supp., p. 371, sec. 12.

An applicant for naturalization is not affected by any failure of the clerk to report to the Department of Commerce and Labor

any details which he ought to report. *U. S. v. Erickson*, (1910) 188 Fed. 747.

## 1909 Supp., p. 372, sec. 13.

**State laws regulating disposition of fees.**—Where state laws or ordinances provide specified salaries for clerks of courts and require them to pay into the treasury all moneys coming into their hands, it is the duty of the clerk to pay into the treasury the one-half of naturalization fees mentioned in this section as given to the clerks. *San Francisco v. Mulcrevy*, (1910) 15 Cal. App. 11, 113 Pac. 339; *Barron County v. Beckwith*, (1910) 142 Wis. 519, 124 N. W. 1031.

But in *Eldredge v. Salt Lake County*, (Utah 1910) 106 Pac. 939, the court reached the opposite conclusion and held that the duties which the clerk of a state District Court discharges and the services which he renders in naturalization proceedings under the Naturalization Act, are not duties imposed on nor services forming a part of the office, and the salary received as compensation therefor does not constitute compensation for extra official services, and he need not account therefor to his county, notwithstanding the provisions of the state constitution, art. 21,

secs. 1, 2, providing that officers shall be paid fixed salaries, and the state laws (Comp. Laws 1907, secs. 2057, 2062) fixing the salary of the clerk, which shall constitute full compensation; and that the principle that the incumbent of a public office must discharge duties imposed on the office for the compensation fixed by law, and, where additional duties are imposed without additional compensation, must discharge such duties for the compensation fixed by law, does not prevent the clerk of a state District Court who performs services in naturalization proceedings under the Naturalization Act from retaining the fees as provided by the Act. And in *Hampden County v. Morris*, (1911) 207 Mass. 167, 93 N. E. 579, it was held that a state law requiring that the fees received by the clerk in naturalization cases shall be paid over to the county treasurer, conflicts with this Act, and that a clerk of the state court need not pay over to the county treasurer fees received in naturalization cases.

## 1909 Supp., p. 373, sec. 15.

**Constitutional.**—This section is constitutional. *U. S. v. Spohrer*, (1910) 175 Fed. 440.

Since jurisdiction to naturalize aliens was originally bestowed by Congress on state courts, this section, providing for the vacation of a naturalization certificate obtained by fraud or illegal procurement in its inception is not unconstitutional because it gives one court power to pass on and annul the proceedings of another. *U. S. v. Mansour*, (1908) 170 Fed. 671; *U. S. v. Luria*, (1911) 184 Fed. 644.

This section is not unconditional because it declares that in such a proceeding evidence of the acquisition of a new domicile by the naturalized citizen within five years shall be *prima facie* evidence of fraud; such presumption being within the power of Congress to create as a rule of procedure. *U. S. v. Luria*, (1911) 184 Fed. 644.

This section is not void as depriving a naturalized citizen of a vested right, or imposing any penalty on him, since the Constitution contemplates that only those intending to become permanent residents shall be naturalized, or retain their citizenship, as indicated by the Fourteenth Amendment, declaring that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens thereof. *U. S. v. Ellis*, (1911) 185 Fed. 546.

**Jurisdiction.**—For the purpose of the naturalization Acts all courts having jurisdiction under the Acts are federal courts, and a federal court can vacate a judgment of a state court or *vice versa*. *U. S. v. Aakervik*, (1910) 180 Fed. 137. See also *U. S. v. Meyer*, (1909) 170 Fed. 983.

**Not retroactive.**—The time for vacating an order admitting to citizenship, for an error of law of the court having expired be-

fore this Act was passed, it was held that a suit did not lie to vacate it, though the Act authorizes suits to vacate certificates of citizenship. *U. S. v. Aakervik*, (1910) 180 Fed. 137.

**Jury trial.**—A suit for the cancellation of a certificate of naturalization, brought under this section, is not one in which defendant is entitled as of right to a jury trial. *U. S. v. Mansour*, (1908) 170 Fed. 671; *U. S. v. Luria*, (1911) 184 Fed. 645.

The defense of laches cannot be pleaded against the United States in a suit to cancel a naturalization certificate. *U. S. v. Spohrer*, (1910) 175 Fed. 440.

**Technical and formal defects.**—Naturalization proceedings, like ordinary judicial proceedings, are properly sustained if defects asserted are merely technical and formal though the defects cause annoyance to the supervising administrative department. *U. S. v. Erickson*, (1910) 188 Fed. 747.

**Fraud—false statements as to residence.**—Under this section the United States may maintain a suit in a federal court to cancel a certificate issued by a state court under either this or a former statute on the ground of fraud, in that the allegation and evidence that the applicant had resided in the United States for five years was untrue. *U. S. v. Mansour*, (1908) 170 Fed. 671; *U. S. v. Spohrer*, (1910) 175 Fed. 440.

**False testimony.**—A certificate of citizenship may be set aside for fraud or illegality in its procurement, comprehending false testimony under which the certificate was procured as well as error in rendering judgment on a given state of facts. *U. S. v. Aakervik*, (1910) 180 Fed. 137.

**No intention of becoming permanent citizen.**—Where one admitted to citizenship under R. S. sec. 2165, 5 Fed. Stat. Annot. 200, per-

mitting the naturalization of persons possessing the necessary qualifications and intending *bona fide* to become citizens, did not in good faith intend to become a permanent citizen, and made his oath with a mental reservation to that effect, he was guilty of fraud in procuring the decree, and this section subsequently enacted authorizes the cancellation of his certificate of citizenship on the ground of fraud. Thus where an alien was naturalized in August, 1899, and he arrived in a foreign country November 23d following, and engaged in business there, where he continuously resided until after the institution of a suit in March, 1910, to cancel his certificate of citizenship, as authorized by this section, and it appeared that he had stated that he could not tell when he could leave the foreign country and return to the United States, and that he was not engaged solely as a representative of American trade and commerce, and that his residence in the foreign country was not for reasons of health or education, a decree setting aside the judgment of naturalization and cancelling his certificate of citizenship was authorized. *U. S. v. Ellis*, (1911) 185 Fed. 546. See also *U. S. v. Mansour*, (1908) 170 Fed. 671.

**Service of notice.**—The notice provided for in this section must be given in the manner provided by the law of the state for service on absentees, and, where the law of a state provides for the appointment of an attorney at law as curator *ad hoc* to represent an absentee, service on him is sufficient. *U. S. v. Ellis*, (1911) 185 Fed. 546.

**Pleadings and procedure.**—A suit for the cancellation of a certificate of naturalization under this section is a special proceeding, and, while the proof must be of the kind and force required to set aside a judgment, the pleadings and procedure may be moulded in

any way best calculated to meet the ends of justice. *U. S. v. Mansour*, (1909) 170 Fed. 676.

A complaint by the United States to cancel an alien's naturalization certificate for fraud was insufficient where it failed to tender the material issue of fraud, alleging merely a change of residence, which by statute is only *prima facie* evidence on that issue. *U. S. v. Luria*, (1911) 184 Fed. 644.

**Evidence.**—In proceedings to cancel a naturalization certificate for fraud, statements of consular agents abroad that the defendant has established a permanent residence abroad, etc., are admissible. *U. S. v. Luria*, (1911) 184 Fed. 645.

**"Illegally procured."**—The words "illegally procured," as used in this section, mean procured by subornation or some other illegal means used to impose on the court, and not that the certificate was issued through error of law. *U. S. v. Luria*, (1911) 184 Fed. 643.

**Forfeiture.**—The provision in this section for the cancellation of a certificate of naturalization does not forfeit the naturalized alien's right to citizenship, but merely confers jurisdiction on the courts of naturalization to cancel a previous certificate for fraud or illegal procurement in its inception. *U. S. v. Luria*, (1911) 184 Fed. 643.

**Changing affidavit.**—A naturalization certificate should not be vacated as having been obtained illegally or through fraud, because, on ineligibility of one of two witnesses appearing, his name was erased from the witnesses' affidavit, and another name substituted, and the date of the affidavit changed to that when the new witness verified, though no duplicate of the affidavit as so changed was forwarded to the Department of Commerce and Labor. *U. S. v. Erickson*, (1910) 183 Fed. 747.

## 1909 Supp., p. 374, sec. 18.

**Construction.**—In *U. S. v. Stoller*, (1910) 180 Fed. 910, it was held that this section does not make it a felony to issue a naturalization certificate without final order under the hand of the court, but that the felony consists in issuing it contrary to the provisions of the Act, unless it be on a final order under the hand of the court.

**Validity of certificate issued before final judgment signed and entered.**—Where the

court in a naturalization proceeding has rendered judgment admitting the alien to citizenship, the fact that the clerk issued a naturalization certificate before the final judgment had been signed and entered did not render such proceeding void under this section, such requirement being directory only and subject to correction *nunc pro tunc*. *U. S. v. Stoller*, (1910) 180 Fed. 911.

## 1909 Supp., p. 375, sec. 23.

**Perjury.**—Perjury committed by a false allegation of fact in a naturalization petition is punishable under R. S. sec. 5392, 5 Fed. Stat. Annot. 701, punishing perjury generally, and applicable to all cases in which a false oath or false testimony is given in a matter required by law before any competent tribunal, officer, or person, regardless of whether such evidence is punishable under this section or not. *U. S. v. Dupont*, (1910) 178 Fed. 824.

**"Knowingly" giving false testimony.**—In *U. S. v. Janke*, (1910) 183 Fed. 277, it appeared that a state court granted naturalization to a woman who had been dead over four

years, and the certificate was issued by the clerk. No hearing was had nor evidence taken in open court, as required by section 9 of this Act, but affidavits in support of the petition were made out by the clerk, and subscribed and sworn to by defendants, the material statements in which were false. The defendants, however, did not understand the English language, and were not informed of the contents of the affidavits, but signed the same as directed by the clerk. It was held that they were not guilty of "knowingly" giving false testimony, made a crime by this section.

## 1909 Supp., p. 379, sec. 30.

**Native Filipinos.**—Section 30 provides for the naturalization of native Filipinos owing permanent allegiance to the United States, who are residents of one of the states or territories of the United States. Such person must make, or must have made since the passage of this Act, the declaration of his inten-

tion to become a citizen, required by this section, at least two years before his application for naturalization, and must have resided five years within one of the insular possessions of the United States. (1908) 27 Op. Atty.-Gen. 12.

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## NAVAL ACADEMY.

## Vol. V, p. 215, sec. 1514.

**Reinstatement of dismissed midshipman.**—The Secretary of the Navy has no authority to reinstate to the Naval Academy a midshipman whose appointment has been revoked be-

cause of accumulated demerits and the revocation thereof duly promulgated. (1906) 25 Op. Atty.-Gen. 579.

Vol. V, p. 223. [*Court-martial for cadets.*]

**Dismissal without court-martial.**—This Act does not prevent the President from dismissing cadets or midshipmen without trial

by court-martial. *Weller v. U. S.*, (1906) 41 Ct. Cl. 324.

Vol. V, p. 223. [*Hazing, how punished.*]

**Effect of Act of March 2, 1895.**—This Act, providing for the court-martialing of cadet midshipmen at the Naval Academy, is not repealed by the Act of March 3, 1895, 5 Fed. Stat. Annot. 223, 28 Stat. L. 838, which pro-

vides that sentences of suspension and dismissal approved by the superintendent "shall not be carried into effect until confirmed by the President." *Melvin v. U. S.*, (1910) 45 Ct. Cl. 213.

Vol. X, p. 239, sec. 1. [*Punishment for hazing.*]

**Hazing** has such a well-known meaning that it need not be defined by rules under the statute. *Melvin v. U. S.*, (1910) 45 Ct. Cl. 213.

**Summary dismissal of cadet for hazing.**—The statutes on the subject of hazing do not confer upon the superintendent of the Naval

Academy, or the Secretary of the Navy, or upon both conjointly, the power summarily to dismiss from the academy, without trial by court-martial, a midshipman guilty of that offense. (1905) 25 Op. Atty.-Gen. 543.

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## NAVY.

## Vol. V, p. 250, sec. 7.

**Effect of Act.**—The Navy Personnel Act abolished the grade of commodore and practically constituted, within the grade of rear-admiral, a new grade for pay purposes known as "the nine lower numbers," into which commodores were advanced without increase of

pay; but under the Act June 7, 1900, 5 Fed. Stat. Annot. 323, the old pay of rear-admirals extends to a rear-admiral in the nine lower numbers. *Terry v. U. S.*, (1904) 39 Ct. Cl. 353.

Vol. V, p. 251. [*Appointments from civil life in case of exigency.*]

**Extra pay for temporary officers after discharge.**—The two months' extra pay provided for by the Act of March 3, 1899, 30

Stat. L. 1214, ch. 427, in favor of "officers and enlisted men comprising the temporary force of the Navy during the war with Spain

who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged," should be computed, when awarded to a naval officer appointed under the Act of May 4, 1898, to serve only during the continuance of the exigency under which his services were re-

quired in the existing war, on the basis of the pay he was receiving when he was detached from duty, after the treaty of peace was signed, and was ordered home preliminary to his discharge. *U. S. v. Hite*, (1907) 204 U. S. 343, 27 S. Ct. 386, 51 U. S. (L. ed.) 514.

### Vol. V, p. 253. [*Acting assistant surgeons.*]

**Constructive service.**—An assistant surgeon appointed "for temporary service" in the Navy under this Act is not entitled to the five years constructive service given to those officers in the Navy appointed from civil life

by the Navy Personnel Act (Act of March 3, 1899, ch. 413, sec. 13, 5 Fed. Stat. Annot. 322). *Nelson v. U. S.*, (1906) 41 Ct. Cl. 157.

### Vol. V, p. 263, sec. 1404.

**Constructor detailed to inspect vessel.**—Where a naval constructor is detailed by the Secretary of the Navy to inspect a vessel, the fact that she is chartered by the War Depart-

ment as an army transport does not burden the officer with service not incident to his office. *Stocker v. U. S.*, (1904) 39 Ct. Cl. 300.

### Vol. V, p. 265, sec. 1409.

**Officer and enlisted man at same time.**—A person can, under the provisions of sections 1409 and 1410, R. S., be at the same time an officer of the Navy and an enlisted man, the

distinction being between commissioned officers and the enlisted force. (1907) 26 Op. Atty.-Gen. 433.

### Vol. V, p. 269. [*Bounty on enlistment of apprentices.*]

**Regulations requiring refund.**—The regulations of the Secretary of the Navy, issued July 1, 1901, pursuant to this Act, which provides a bounty to each person enlisting as an apprentice in the United States Navy, are inconsistent with law and void in so far

as they require a refund of the bounty, or any portion of it, in case an apprentice is discharged within a year after his enlistment for disability not incurred in the line of duty. (1904) 25 Op. Atty.-Gen. 270.

### Vol. V, p. 270, sec. 1419.

**Minors under eighteen.**—In *Ex p. Lisk*, (1906) 145 Fed. 860, it was held that a boy between fourteen and eighteen could not be enlisted under any circumstances without the consent of his parents or guardian.

But in *U. S. v. Pendleton*, (1909) 167 Fed. 690, it was held that this section is for the protection of the parent or guardian; and that an enlistment in violation thereof is valid as to the minor, and voidable only by the parent or guardian before the minor attains the age of eighteen years.

**Habeas corpus.**—In *U. S. v. Pendleton*, (1909) 167 Fed. 690, it was held that a minor enlisted in the Navy, although without the consent of his parent and in violation of the statute, is punishable for breach of discipline, and cannot be discharged on habeas corpus at suit of his parent while undergoing such punishment.

So in *Dillingham v. Booker*, (1908) 163 Fed. 696, 16 Ann. Cas. 127, 90 C. C. A. 280, it was held that the civil courts should not interfere by habeas corpus to discharge a minor under eighteen years of age who has been enlisted in either the military or naval

service without the consent of his parents or guardian, if at the time of the representation of the petition for the writ the minor is under arrest and held for trial by court-martial on a charge of desertion or fraudulent enlistment or other charge cognizable by a military or naval court.

But in *Ex p. Bakley*, (1906) 148 Fed. 56, affirmed (C. C. A. 1907) 152 Fed. 1022, the court held that the parents of a minor son under the age of eighteen years, who has enlisted in the Navy without their knowledge or consent, in violation of this section, are entitled to his discharge on habeas corpus, and their right cannot be denied because of contemplated or possible court-martial proceedings against the minor for fraudulent enlistment, especially where, between the time demand for his discharge was made by the parents and the procuring of the writ, several months elapsed, during which no proceedings were taken against him.

**Enlistment of person over age of eighteen years.**—To the same effect as the original note. *McCalla v. Facer*, (C. C. A. 1906) 144 Fed. 61.



**Vol. V, p. 271, sec. 1420.**

**Effect of pardon.**—A person who, having enlisted in the Navy, deserts therefrom and is convicted of desertion by a general court-martial and thereafter receives from the President a full and unconditional pardon

for such offense and restoration to civil rights, may be permitted to re-enlist in the Navy notwithstanding the provisions of this section. (1908) 26 Op. Atty-Gen. 617.

**Vol. V, p. 285. [*Active service for officers on retired list authorized.*]**

**Pay.**—The basis of longevity pay is the officer's capacity for duty and his performance of it. Longevity pay is for longevity in

actual service, and extends only to officers on the active list. *Faust v. U. S.*, (1907) 42 Ct. Cl. 94.

**Vol. V, p. 286, sec. 8.**

**Retirements under sections eight and nine.**—The voluntary retirement of officers of the Navy under this section, and the compulsory retirement of such officers under the following section, are to be made in the order of the rank of the applicants, regardless of the grade they are in. (1905) 25 Op. Atty-Gen. 452.

**Vacancies caused by voluntary retirement.**—Vacancies caused by the retirement of officers of the Navy upon their own application, after thirty years' service, in accordance with the provisions contained in the

Naval Appropriation Act of May 13, 1908, 1909 Supp. Fed. Stat. Annot. 390, 35 Stat. L. 128, should not be considered in determining the number of vacancies required above the several grades in the line of the Navy by this section. (1909) 27 Op. Atty-Gen. 410.

The vacancies caused by promotion to extra numbers, under the Act of March 3, 1901, 31 Stat. L. 1108, should not be counted in determining the average vacancies enumerated in this section. (1905) 25 Op. Atty-Gen. 452.

**Vol. V, p. 286, sec. 9.**

The word "causalties" in this section refers, as ordinarily understood, to death, resignation, or dismissal, and does not include promotion. (1905) 25 Op. Atty-Gen. 452.

**Vol. V, p. 287, sec. 11.**

The purpose of this section, when applied to mates, was not to retire them with three-fourths of the lowest sea pay given to a warrant officer, but to give them three-fourths of the varying sea pay of such officers, upon the same conditions, which conditions include length of previous service. (1908) 26 Op. Atty-Gen. 600.

**Necessity for actual service.**—It is not essential to the right of an officer to be retired on the next higher grade that he was actually ordered into active service during the civil war. *Moser v. U. S.*, (1907) 42 Ct. Cl. 86.

**Erroneous retirement under another Act.**—A mate who was erroneously retired under section 17 of the Navy Personnel Act, 5 Fed. Stat. Annot. 288, upon his own application and after thirty years' service, was entitled to retirement under section 11. (1908) 26 Op. Atty-Gen. 615.

**Midshipman at naval academy.**—By R. S.

sec. 1362, 5 Fed. Stat. Annot. 246, midshipmen are designated as officers of the Navy, being the ninth class; and a midshipman serving as an undergraduate in the Naval Academy is an officer in the Navy within the intent of the Navy Personnel Act, allowing him to retire with the rank and pay of the next higher grade. *Jasper v. U. S.*, (1904) 40 Ct. Cl. 76; *Moser v. U. S.*, (1907) 42 Ct. Cl. 86.

**Mates in the navy** are officers within the meaning of this section. (1908) 26 Op. Atty-Gen. 615.

The retired pay of a mate in the navy, whether retired under this section or under the Act of June 29, 1906, 1909 Supp. Fed. Stat. Annot. 386, 34 Stat. L. 554, is the retired pay of a warrant officer with the same length of previous service, which is three-fourths of the sea pay of such officer. (1908) 26 Op. Atty-Gen. 599.

**Vol. V, p. 287. [*Retirement of mates, etc.*]**

See (1909) 27 Op. Atty-Gen. 334.

**Vol. V, p. 288, sec. 1466.**

The expression "lineal rank being considered," in this section, means simply that it is not necessary to specify and fix relative

staff rank, since staff officers in both services possess assimilated lineal rank. (1906) 26 Op. Atty-Gen. 16.

**Vol. V, p. 289, sec. 1471.**

**Effect of Navy Personnel Act.**—The title of the heads of the existing staff bureaus of the Navy are positively fixed by this section and are unchanged by the Navy Personnel Act of 1899, 30 Stat. L. 1004, 5 Fed. Stat. Annot. 250, which confers the advanced rank and pay upon all bureau chiefs below the rank of rear admiral. Under those laws, construed in connection with the statutes relating to retirement and with past usage in the service, the designated titles of staff bureau chiefs carry over from the active to the retired list. (1904) 25 Op. Atty-Gen. 122.

**Retired rank.**—When the retirement of an officer occurs during service as the head of one of the staff bureaus, the retired officer is

entitled under the law to be borne upon the Navy register as a retired officer under that title permanently. A pay director of the Navy who by appointment has become a paymaster-general, and who while holding that office reaches the retiring age, has the right to bear the title of paymaster-general, not only after he has reached the retiring age but is still performing the duties of that office, and not only after he is actually retired and detached from the office and before his term of appointment as paymaster-general has expired, but also after the latter date, and permanently, upon the retired list. (1904) 25 Op. Atty-Gen. 294.

**Vol. V, p. 290, sec. 1475.**

**Pay.**—There is nothing in this section which suggests that paymasters in the Navy shall receive the pay of paymasters in the

Army. *Stevens v. U. S.*, (1906) 41 Ct. Cl. 455.

**Vol. V, p. 296, sec. 1500.**

**Appearance in person.**—Every officer of the Navy whose eligibility to promotion is to be acted upon by an examining board under the provisions of section 1496, 1498, 1503, and 1505, R. S., has the right to be present at his examination. He must be duly notified of the time and place of his examination, and unless he waives his right or expresses a lack

of desire to be present, he must be given leave of absence or permission to attend. No finding of the board adverse to his qualifications for promotion can be made without a personal examination of such officer unless he fails to appear after having been duly notified to do so. (1909) 27 Op. Atty-Gen. 251.

**Vol. V, p. 297, sec. 1505.**

**Section 13 of the Navy Personnel Act** (Act March 3, 1889, ch. 413, 5 Fed. Stat. Annot. 322) contains nothing to show that it was intended as a substitute for this section. *Elmer v. U. S.*, (1910) 45 Ct. Cl. 90.

**One year pay.**—The provision in the Navy Personnel Act (Act March 2, 1889, 5 Fed. Stat. Annot. 322), that officers of the Navy "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the Army," extends only

"to their general pay" and not to the one year's pay under Act of Oct. 1, 1890, 7 Fed. Stat. Annot. 998, 26 Stat. L. 562, which provides that if an army officer shall fail to pass his examination for any other reason than physical disability contracted in the line of duty "he shall be suspended from promotion for one year, when he shall be re-examined, and in case of failure on such re-examination he shall be honorably discharged, with one year's pay." *Elmer v. U. S.*, (1910) 45 Ct. Cl. 90.

**Vol. V, p. 297, sec. 1506.**

**Consent of Senate necessary.**—A naval officer may be advanced in rank for eminent and conspicuous conduct in battle, but only with

the advice and consent of the Senate. *Peck v. U. S.*, (1904) 39 Ct. Cl. 125.

**Vol. V, p. 311, sec. 1556. [Rear-admirals.]**

**Effect of Navy Personnel Act.**—The Navy Personnel Act, as amended by the Act of June 7, 1900, is not incompatible with this section fixing the pay of a rear-admiral. The earlier

statute continues operative as regards the accepted class of officers in service when the Navy Personnel Act was enacted. *Cromwell v. U. S.*, (1907) 42 Ct. Cl. 433.

**Vol. V, p. 316, sec. 1556. [Warrant officers.]**

The sea pay of a warrant officer under this section is a variable quantity, ranging in varying sums from \$1,200 to \$1,800 per annum, according to length of service, any one

of which may, in a sense, be said to be the sea pay of a warrant officer. (1908) 26 Op. Atty-Gen. 600.

## Vol. V, p. 322, sec. 13.

**The normal pay.**—To the same effect as the original note. *Mahan v. U. S.*, (1904) 40 Ct. Cl. 36.

**Pay while on leave of absence.**—Since this Act was passed duty pay cannot be allowed where a leave of absence is granted at an officer's own request and presumably for his own benefit if it does, in fact, relieve him from duty and from responsibility. *Roberts v. U. S.*, (1909) 44 Ct. Cl. 411.

**Shore duty beyond the seas.**—The primary question in the case of a naval officer "detailed for special duty on shore" is one of fact; and the court cannot determine the character of the duty on shore or the right of the officer to sea pay or shore duty pay without knowing what were the services rendered on shore and how far they detached him in fact from his vessel. It is well settled that where the naval officer detailed for shore duty is not called upon to perform services ashore incompatible with the performance of his duty on his ship, and the shore services are temporary and not so different in character as to detach him in fact from his vessel, his paramount duty is sea service. *Leach v. U. S.*, (1909) 44 Ct. Cl. 132.

In *Furlong v. U. S.*, (1910) 45 Ct. Cl. 493, it was held that where an officer in the Navy was assigned by proper authority to sea duty on a vessel he could not be considered as "detailed for shore duty beyond seas," within the intent of this section, because the naval governor of Guam by a verbal order directed him to do duty in the town of Agana in caring for the health and sanitary condition of the natives.

**Equalization of army and navy pay.**—The allowances of increased pay to Army officers serving in certain insular possessions of the United States and in Alaska, and to such officers serving beyond the limits of the United States, which are given respectively by the Army appropriation bills of May 26, 1900, 31 Stat. L. 211, ch. 596, and March 2, 1901, 31 Stat. L. 903, ch. 803, do not inure to naval officers discharging their ordinary sea duties, by reason of this section, equalizing the pay of Army and Navy officers, since to hold otherwise would render meaningless the proviso of this section that naval officers when "detailed for shore duty beyond seas" shall receive the same pay as Army officers detailed for the same duties. *U. S. v. Thomas*, (1904) 195 U. S. 418, 25 S. Ct. 102, 49 U. S. (L. ed.) 259.

**Reason for additional compensation.**—The additional compensation intended by Congress was awarded because of the nature of the services to be performed and not because of the rank or class of the officers performing the same. It does not attach exclusively to the officer, but comprehensively to the service. *Prindle v. U. S.*, (1905) 41 Ct. Cl. 8.

**The second proviso of this section includes "all naval officers."** Its benefits are not limited to officers of the line, the medical, and the pay corps. *Prindle v. U. S.*, (1905) 41 Ct. Cl. 8.

**It is not similar duties but corresponding**

rank which determines the rate of pay under this section. *Stevens v. U. S.*, (1906) 41 Ct. Cl. 455.

**Officers retired for misconduct.**—This Act provides that officers of the Navy shall receive the same pay and allowances which are provided by law for officers of corresponding rank in the Army. But this refers to officers of the Navy on the active list and does not extend to officers who are retired because of their own misconduct. *Hannum v. U. S.*, (1908) 43 Ct. Cl. 320.

**Officers on receiving ships.**—Officers of the Navy may perform duty on a receiving ship, which will entitle them to sea pay, but only where they wear their uniform when on duty, live and mess on board the vessel, and are subject to all the restrictions and regulations applicable to vessels at sea. But an officer also having shore duty, living and messing on shore in quarters furnished to him by the government, and presumably receiving the allowances to which Army officers are entitled, is entitled only to the shore duty pay prescribed by this section. *Mahan v. U. S.*, (1904) 40 Ct. Cl. 36.

**Pay of professors in naval academy.**—This section provides that commissioned officers of the Navy shall receive the pay and allowances provided by law "for the officers of corresponding rank in the Army," and R. S. sec. 1336 provides that professors of the military academy "shall have the pay and allowances of "colonel," of "lieutenant-colonel," and of "major." But these provisions do not entitle a naval officer detailed to serve as professor in the naval academy to the pay specifically provided for professors in the military academy. This Act does not secure similarity of pay, though both persons perform similar duties. *Huse v. U. S.*, (1907) 43 Ct. Cl. 19.

**Pay of passed assistant surgeon.**—A passed assistant surgeon in the Navy, with the rank of lieutenant, is entitled to the pay of a captain in the Army, mounted, in view of the respective provisions of R. S. sec. 1466, assimilating in rank lieutenants in the Navy with captains in the Army; of this section, entitling commissioned officers of the line of the Navy to the same pay and allowance as officers of corresponding rank in the Army; and of the Act of June 7, 1909, 31 Stat. L. 675, ch. 3591, 5 Fed. Stat. Annot. 25, declaring that assistant surgeons shall rank with assistant surgeons in the Army, who are mounted—since Congress must have used the words "assistant surgeons" as descriptive of the whole class of assistant surgeons, passed as well as those not passed. *U. S. v. Farenholt*, (1907) 206 U. S. 226, 27 S. Ct. 629, 51 U. S. (L. ed.) 1036, affirming (1906) 41 Ct. Cl. 517.

**Pay of aid to rear admiral.**—An aid to a rear admiral is entitled, in addition to the regular pay of his rank, to the same compensation for the additional service as is allowed an aid to a major-general, in view of the provision of this section that officers of the Navy shall receive the same pay and allow-

ances, except for forage, as are, or may be, provided by law for officers of the Army of corresponding rank. *U. S. v. Crosley*, (1905) 196 U. S. 327, 25 S. Ct. 261, 49 U. S. (L. ed.) 497, *affirming and modifying* (1903) 38 Ct. Cl. 82.

**Flag lieutenant.**—A naval officer assigned to duty on the personal staff of the commander-in-chief as flag lieutenant, and by no other designation, is an aid and entitled to the additional pay of \$200 given to the aid of a major-general in the Army by R. S. sec. 1261, 7 Fed. Stat. Annot. 1035. *Miller v. U. S.*, (1906) 41 Ct. Cl. 400, *affirmed* (1908) 208 U. S. 32, 28 S. Ct. 199, 52 U. S. (L. ed.) 376.

**Mounted pay** cannot be given to an aid to rear admiral, although this section equalizes his compensation with that of an aid to a major-general, who is entitled to mounted pay under Army regulations of 1895, sec. 1301, since this section and the two following, when read in the light of R. S. sec. 1270, 7 Fed. Stat. Annot. 1041, giving to Army officers the pay of cavalry officers of the same grade when assigned to duty which requires them to be mounted, indicate a general purpose to give mounted pay to Army officers only when their duties are such as may require them to be actually mounted, or are such as may at any time subject them to the necessity of rendering mounted service, which obviously could not be required of an aid to a rear admiral. *U. S. v. Crosley*, (1905) 196 U. S. 327, 25 S. Ct. 261, 49 U. S. (L. ed.) 497, *modifying and affirming* (1903) 38 Ct. Cl. 82.

**Engineers appointed from civil life.**—The Act of March 3, 1903, 32 Stat. L. 1197, 10 Fed. Stat. Annot. 242, provides that additional civil engineers and assistant engineers shall receive \$1,500 during the first five years after date of appointment, \$1,800 during the second five years after such date, etc. This section provides that "all officers who have been or may be appointed from civil life shall, on the date of appointment, be credited, for computing their pay, with five years' service." An assistant civil engineer in the Navy appointed after the circular promulgated by the Navy Department April 20, 1903, assuring persons seeking the appointment of civil engineer that they shall be entitled to be credited with five years' service, granted by this section, is entitled to the benefit of the credit for constructive service and to the assurance held out by Navy Department, though the question of statutory construction is not free from doubt. *Thurber v. U. S.*, (1905) 40 Ct. Cl. 489.

This decision does not extend to an officer who enters the Navy merely for temporary service. *Nelson v. U. S.*, (1906) 41 Ct. Cl. 157.

**Officer ordered to hospital.**—Where a naval officer is attached to a vessel when ordered to a hospital for treatment he is entitled to sea pay while in the hospital. But if, when ordered to the hospital, he is awaiting the arrival of the vessel to which he has been ordered, he is not then attached and will not be entitled to sea pay while in the hospital. *Ackley v. U. S.*, (1905) 40 Ct. Cl. 216.

### Vol. V, p. 323. [*Pay of officers not reduced.*]

The purpose of the Act of 1900. Of similar effect to the original note. *Terry v. U. S.*, (1904) 39 Ct. Cl. 353.

The pay of officers in the service at the time of the passage of the Navy Personnel Act and

this amendatory Act might be increased by the terms of those statutes but was not to be diminished. *Cromwell v. U. S.*, (1907) 42 Ct. Cl. 433.

### Vol. V, p. 328. [*Mileage or actual expenses, when allowed.*]

**"Under orders."**—In *Duncan v. U. S.*, (1905) 40 Ct. Cl. 235, it was held that where an officer in Boston was ordered by competent authority to proceed to Mare Island, he was traveling under orders and entitled to mile-

age, and that it was no defense that the Navy Department intended that the officer should accompany a draft of men from Boston, if he failed to do so because the order was not transmitted to him in time.

### Vol. V, p. 330, sec. 1571.

The Act of March 3, 1899, sec. 13, did not repeal or in any way modify this section. *U. S. v. Thomas*, (1904) 195 U. S. 418, 25 S. Ct. 102, 49 U. S. (L. ed.) 259.

**What does not constitute service at sea.**—A naval officer is not entitled to sea pay

while occupied in traveling on duty partly on a merchant steamer and partly on land, and in reporting to the Navy Department, since this is not sea service within the meaning of this section. *U. S. v. Thomas*, (1904) 195 U. S. 418, 25 S. Ct. 102, 49 U. S. (L. ed.) 259.

### Vol. V, p. 338, sec. 1588.

**Prior service.**—A retired mate in the Navy may be credited with his prior service in the Navy at the date of his retirement in deter-

mining his classification for pay. (1908) 26 Op. Atty.-Gen. 600.

## Vol. V, p. 342, sec. 20.

**Examination of officers for promotion.**—Examinations for promotion of officers in the marine corps should be held anterior to the date upon which a vacancy is expected to occur. Where an officer entitled to promotion upon examination is required to be absent from any place where an examining board can be convened, as provided by section 32 of the Act of Feb. 2, 1901 (31 Stat. L. 756), the President may promote the officer subject to future examination. Should such officer upon examination be found disqualified, he should be treated in the same manner as if he had been examined prior to promotion. An officer who fails to pass his examination should be suspended from promotion for one year from the date of the approval of the proceedings of the examining board by the Secretary of the Navy, during which period he is ineligible for re-examination. If, however, a vacancy occurs during such period of suspension for which, owing to death, resignation, or other cause, there should be no senior officer eligible, then the suspended officer must, of necessity, take the vacancy. The Secretary of the Navy may make the date of such sus-

pension coincident with the date of the vacancy, by delaying the approval until the vacancy occurs. Where an examination is held before the vacancy occurs, and the officer fails in such examination for other than physical cause, he cannot be re-examined until one year from the date of the approval of the proceedings of the examining board. Should the examination be held after the date of the vacancy, and the officer fail in such examination, he should be suspended from promotion for one year from the date of the vacancy to which he was promoted by the President subject to examination. The period of "loss of date" is not necessarily contemporaneous with the period of suspension, but it should correspond in length of time with the period of suspension. While the period of suspension from promotion begins to run from the date of the approval of the examining board, the period of "loss of date" begins to run from the date of the vacancy to which the suspended officer would have been promoted had he passed his examination. (1906) 25 Op. Atty.-Gen. 568.

## Vol. V, p. 345, sec. 1603.

**Relative rank with navy.**—There is no express provision of law which fixes the relative rank and precedence of officers of the marine corps and officers of the line of the Navy. By an unwritten law of the Army and Navy, officers of the Army and officers of the Navy take relative rank, as respects the two classes, according to their respective grades; and if of similar grade, then according to dates of commission. Officers of the marine corps, who are "in relation to rank on the same footing as officers of similar grades in the Army," take rank and precedence relatively to line officers in the Navy according to

grade; and if of similar grade, then according to dates of commission. (1905) 25 Op. Atty.-Gen. 517. See also (1906) 26 Op. Atty.-Gen. 16.

**Relative rank of graduates and nongraduates of Naval Academy.**—There is no law making any distinction as to relative rank and precedence between the officers of the marine corps who are, and those who are not, graduates of the United States Naval Academy, either as respects themselves or officers of the line of the Navy. (1905) 25 Op. Atty.-Gen. 517.

Vol. V, p. 347. [*Period of enlistment.*]

**Enlistment of minors.**—The Marine Corps of the United States is not a part of the Navy, and enlistments therein are not governed by the statutes relating to enlistments in the Navy, but by regulations prescribed by the Secretary of the Navy, under whose government and control such corps is primarily placed; and such officer, having prescribed in the published regulations of his department that "the regulations for the recruiting ser-

vice of the Army shall be applied to the recruiting service of the Marine Corps, as far as practicable," the enlistment of minors therein is governed by the statutory provisions relating to Army enlistments, and no person under the age of twenty-one years can lawfully enlist without the consent of his parents or guardians, as required by R. S. sec. 1117, 7 Fed. Stat. Annot. 960. *McCalla v. Facer*, (C. C. A. 1906) 144 Fed. 61.

## Vol. V, p. 351, sec. 1622.

**Civil war officers.**—In the matter of retirement, officers of the Marine Corps with creditable records who served during the civil war are governed entirely by the Act of April 27, 1904, 10 Fed. Stat. Annot. 246, 33 Stat. L. 324, 349, which provides that they

shall be retired "in like manner and under the same conditions as provided for officers of the Navy who served during the civil war." To this extent, that Act alters and amends this section. (1904) 25 Op. Atty.-Gen. 262.

**Vol. X, p. 242, sec. 1. [*Increase in certain grades, etc.*]**

The number of passed assistant and assistant paymasters in the navy to be appointed in each of the two grades under this Act, not being prescribed by this Act, is necessarily left to executive discretion, to be controlled by the general terms and regulations providing for the advancement of officers in the

naval service. Nor is it required that the relative proportion of officers in each of those two grades shall remain always the same, a change in the proportion being within the discretion of the executive, unless controlled by general laws or regulations. (1908) 26 Op. Atty-Gen. 511.

**1909 Supp., p. 386, sec. 1. [*Officers not above captain, etc.*]**

**Construction of proviso.**—The proviso to this Act, which reads, "That this Act shall not apply to any officer who received an advance of grade at or since the date of his retirement," was held not to extend to an officer who had not been retired in the next higher grade, though he was retired prior to the passage of the Act. *Jasper v. U. S.*, (1908) 43 Ct. Cl. 368.

The relative rank of a higher grade sometimes conferred upon officers on retirement is only an honorary distinction, serving merely to fix their places, in precedence, with fellow officers. Such officers do not bear the title of a higher grade, but retain the title actually held by them on retirement. (1906) 26 Op. Atty-Gen. 58.

**Retired pay same as under Act of March 3, 1899.**—Retirements under this Act and under section 11 of the Navy Personnel Act of March 3, 1899, 30 Stat. L. 1007, 5 Fed. Stat. Annot., 287, are in effect the same as regards amount of pay. Under the Act of 1899 an officer is retired with "three-fourths of the sea pay" of the next higher grade, and under the Act of 1906 he would be retired with the "retired pay" of the next higher grade, which, under the Act of March 3, 1873, 17 Stat. L. 547, is "seventy-five per centum" of the sea pay of such higher grade or rank. (1908) 26 Op. Atty-Gen. 599.

**Retirement under other laws.**—Where an officer of the Navy was retired under section 1454, R. S., 5 Fed. Stat. Annot. 283, for incapacity not originating in the line of duty, and upon a full review of the facts the Secretary of the Navy found that the causes of his incapacity were incident to the service, and he was accordingly transferred by the President, by and with the advice and consent of the Senate, to the fifty per centum retired pay list under section 1594 R. S., 5 Fed. Stat. Annot. 341, and later, by a private Act of

Congress, was transferred to the seventy-five per centum pay list of retired officers under section 1588 R. S., 5 Fed. Stat. Annot. 338, it was held that he could not thereafter be placed on the retired list with the retired pay of one grade above that actually held by him at the time of his retirement, under this Act, which authorizes such advancement to certain officers of the Navy who have been retired on account of wounds or disability incident to the service. (1909) 27 Op. Atty-Gen. 221.

**Mates who are borne on the retired list of officers of the Navy in accordance with the Act of Aug. 1, 1894, 5 Fed. Stat. Annot. 287,** are entitled in the discretion of the President, and by and with the advice and consent of the Senate, to the benefit of the advancement provided in the case of retired officers, under this section. While the effect of such advancement may not be to place them in a different grade, they obtain the rank and retired pay belonging to the next higher grade in that service, being that of the lowest grade of warrant officers. (1907) 26 Op. Atty-Gen. 434.

**Assistant engineers.**—Passed assistant engineers of the Navy entitled to advancement to the grade of chief engineers, and assistant engineers entitled to advancement to the grade of passed assistant engineers, under this Act, should be retired with a rank above that held by them respectively at the time of retirement, and with the pay of that rank. (1908) 26 Op. Atty-Gen. 487.

**A medical director in the navy who after forty years of service was retired with the relative rank of commodore, but with the retired pay of a medical director, did not thereby receive an advance of grade within the meaning of the proviso to this Act, and was therefore entitled to the increase of pay provided for by the Act.** (1906) 26 Op. Atty-Gen. 57.

**1909 Supp., p. 390, sec. 1. [*Pay of navy.*]**

**"Officers of the navy."**—Paymasters' clerks are "officers of the Navy" within the meaning of this Act, which provides for the retirement of officers of the Navy who have been in the service thirty years. (1909) 27 Op. Atty-Gen. 157.

The pay of an officer when on leave is just as much his pay as is his pay when on active duty, and a statute which provides that officers of the same rank and length of service shall receive the same pay necessarily means the same pay whether on leave or on active duty. (1909) 27 Op. Atty-Gen. 261.

**Leave pay of construction corps, professors of mathematics, and civil engineers.**—This Act places all commissioned officers of the Navy upon the same footing as to pay and allowances according to rank and length of service, whether on active duty or not, and gives to officers of the construction corps, professors of mathematics, and civil engineers, the same benefits of the law relating to the pay of Army officers when on leave of absence or on waiting orders that are conferred upon officers of the line of the Navy and of the medical and pay corps. (1909) 27 Op. Atty-Gen. 261.

1909 Supp., p. 392, sec. 1. [*Navy bands not to compete with civilian.*]

**Marine bands.**—The provisions of this Act which prohibit Navy bands or members thereof from receiving remuneration for furnishing music outside the limits of military posts,

when the furnishing of such music places them in competition with local musicians, do not apply to the Marine Band. (1908) 27 Op. Atty.-Gen. 90.

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## NEUTRALITY.

Vol. V, p. 358, sec. 5283.

**Intervention by United States.**—A libel instituted by an informer against a vessel for forfeiture thereof for violating this section, prohibiting the arming of vessels against people at peace with the United States, is criminal in its nature, and maintainable only in the name of the United States, either ex-

press or implied, being primarily for the use and benefit of the United States, and hence the Attorney-General may intervene and move to dismiss the libel, regardless of the rights of the informer. *The Venus*, (1910) 180 Fed. 635.

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## NOTARIES PUBLIC.

Vol. V, p. 378, sec. 1778.

**Commissioner of deeds.**—A bill for an injunction in a federal court, verified before a commissioner of deeds of the city of New

York, was held to be improperly verified. *Stationary Engineer Pub. Co. v. Comerford*, (1907) 155 Fed. 667.

Vol. V, p. 379. [*Taking depositions, etc.*]

**Bankruptcy proceedings.**—Under Bankruptcy Act July 1, 1898, ch. 541, sec. 20, 1 Fed. Stat. Annot. 587, 30 Stat. L. 551, 552, a notary public is authorized to administer the oath to a proof of claim, being an officer authorized to administer oaths in proceedings in the courts of the United States by Act Aug. 15, 1876, ch. 304, 19 Stat. L. 206, and such oath is sufficiently authenticated, *prima facie*, by what purports to be the notary's official signature and seal, although made in a different state from that in which the proceedings are pending, and without regard to the special requirements of the statutes of

either state. *In re Pancoast*, (1904) 129 Fed. 643.

**Notary public and justice of the peace.**—In *U. S. v. Hardison*, (1906) 135 Fed. 419, it was held that since a United States commissioner was authorized by this Act to take the oath of a proposed surety on a liquor distiller's bond, on which perjury might be assigned, an indictment for perjury in the taking of such oath was not defective on the ground that the officer administering it styled himself as "notary public and *ex officio* justice of the peace."

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## OBSTRUCTING JUSTICE.

Vol. V, p. 388, sec. 5399.

**"Due administration of justice."**—The words "due administration of justice" import a free and fair opportunity to every litigant in a pending cause in a federal court to learn what he may learn (if not obstructed or impeded) concerning material facts, and to exercise his option as to introducing testimony as to such facts, and an offense is com-

mitted under such statute if a person corruptly endeavors to induce other persons who have knowledge of facts which may be material to a party to a pending cause to conceal or deny their knowledge, so as to prevent such party from obtaining knowledge or procuring evidence of such facts. *Wilder v. U. S.*, (C. C. A. 1906) 143 Fed. 433.

# OFFICERS OF MERCHANT VESSELS.

## Vol. V, p. 395, sec. 4131.

"A vessel of the United States" means more than a vessel whose nationality is American. It means such a vessel as is de-

fined in this section and no other. *The Alta*, (C. C. A. 1905) 136 Fed. 513.

## Vol. V, p. 397, sec. 4401.

**State regulation.**—The federal statutes (R. S. secs. 3126, 4401, 4414) respectively authorize (section 3126, 2 Fed. Stat. Annot. 771) registered vessels of the United States to engage in the coastwise trade, with the privilege of touching at one or more foreign ports during the voyage; provide (section 4401) that all coastwise seagoing vessels shall be subject to the navigation laws of the United States, and every coastwise seagoing steam vessel subject to such laws "not sailing under register" shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats; and prohibit (section 4444, 5 Fed. Stat. Annot. 750) any state or municipal government from requiring pilots of steam vessels to procure a state or other license in addition to that issued by the United States, and from levying pilot charges upon any steamer piloted as provided therein, provided that "nothing in this title shall be construed to annul or affect any regulation established by the laws of any state

requiring vessels entering or leaving any port of such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state or of a state situate upon the waters of such state." It has been held that the exception in section 4401 from those vessels thereby made subject to the pilotage laws and regulations of the United States, of vessels "sailing under register" includes only such vessels engaged in foreign commerce, and that under such provisions, construed together, the state of California is without power to levy pilotage charges on registered vessels, entering or leaving the port of the San Francisco, which are engaged in making voyages between that port and Washington ports on Puget sound in charge of pilots licensed under the laws of the United States, although on each of such voyages they make a brief call at the port of Victoria, B. C., for passengers, freight, and mails. *The Queen*, (C. C. A. 1911) 186 Fed. 725.

## Vol. V, p. 398, sec. 4438.

**Amendment.**—This section was amended by Act of Jan. 25, 1907, sec. 398, 34 Stat. L. 864, 1909 Supp. Fed. Stat. Annot. 401, and by Act of May 28, 1908, ch. 212, 35 Stat. L. 424, 1909 Supp. Fed. Stat. Annot. 402.

**Presumption from violation of statute.**—Where the navigation of one of two vessels in collision was at the time in charge of an un-

licensed mate, in violation of the positive provisions of this section, it was held that there was a presumption that such fact caused or contributed to the collision, and that the vessel had the burden of showing that it could not have done so. *The Eagle Wing*, (1905) 135 Fed. 826.

## Vol. V, p. 400, sec. 4442.

**Jurisdiction of District Court to compel examination.**—The federal District Court has no jurisdiction of an application to compel local inspectors of steam vessels to examine an applicant for a pilot's license, as authorized by this section, without having complied with rule 5, section 46, of the board of super-

vising inspectors, making it a condition precedent to the applicant's right to examination that he shall have served a three years' apprenticeship in the deck department of a steamer, sailing vessel, or barge consort. *Williams v. Molther*, (C. C. A. 1910) 180 Fed. 709.

## Vol. V, p. 401, sec. 4446.

**Amendment.**—This section was amended by Act of Feb. 19, 1907, ch. 991, 34 Stat. L. 897, 1909 Supp. Fed. Stat. Annot. 401.



**Vol. V, p. 402, sec. 4449.**

**Amendment.**—This section was amended by Act of March 3, 1905, ch. 1457, sec. 5, 33 Stat. L. 1030, 10 Fed. Stat. Annot. 248.

**Vol. V, p. 403, sec. 4452.**

**Amendment.**—This section was amended by Act of March 3, 1905, ch. 1457, sec. 6, 33 Stat. L. 1030, 10 Fed. Stat. Annot. 248.

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## PATENTS.

**Vol. V, p. 413, sec. 483.**

**Validity of rules generally.**—The rules of practice of the Patent Office, when not inconsistent with the statutes relating to the patent system, have the force and effect of

law in all matters to which they relate, and are not to be declared invalid on any strained or doubtful construction. *U. S. v. Allen*, (1903) 22 App. Cas. (D. C.) 56.

**Vol. V, p. 417, sec. 4883.**

**Nature of patent.**—A patent is a contract made by the acceptance by the government of the proposition made by the inventor in his application. *O. H. Jewell Filter Co. v. Jackson*, (C. C. A. 1905) 140 Fed. 340.

The public policy declared by the patent laws is that it is for the benefit of the public to stimulate invention and that inventors shall publish their inventions, and to that end, and in consideration of such publication, to become effective at the end of seventeen years, they insure to a patentee in the meantime absolute protection in the right to exclude every one else from making, using, or vending the thing patented without his consent. *Rub-*

*ber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, (C. C. A. 1907) 154 Fed. 358, *reversing* (1906) 142 Fed. 531.

A "patent" is a monopoly created by law, and gives the right to exclude all others from making, using, and selling the invention or articles made in accordance therewith. *National Hollow Brake Beam Co. v. Bakewell*, (1909) 224 Mo. 203, 123 S. W. 561.

**Effect of state statutes.**—Rights acquired under the patent laws of the United States cannot be affected by a state statute. *U. S. Consolidated Seeded Raisin Co. v. Griffin, etc., Co.*, (C. C. A. 1903) 126 Fed. 364.

**Vol. V, p. 419, sec. 4884.**

**Claims affording basis for separate patents.**—A patent should not be held invalid because each of its claims might have been made the basis of a separate application, where all relate to improvements in a single instrument and may in a sense be considered elements of one construction. *Hohmann, etc., Mfg. Co. v. Charles J. Tagliabue Mfg. Co.*, (1909) 175 Fed. 87.

**Description of invention.**—It is enough that a patent so fully describes a process or a product that one reasonably skilled in the art may practice the process or manufacture the product, and that others may know with reasonable certainty whether or not they are infringing it. *Standard Paint Co. v. Bird*, (1910) 175 Fed. 346.

That a patent of a method for evacuating incandescent electric lamps by first introducing into a tubular elongation of the bulb suitable substances capable of being gasified by heat and combining with the gases generated by the filament when brought to incandescence to form solid or liquid precipitations, and then exhausting the bulb by means of a pump and sealing the elongation, then bringing the fla-

ment to intensive incandescence and simultaneously heating the substance in the elongation, and finally sealing off the elongation, in the specification and claim directs that, after the partial exhaustion of the bulb by the pump, the pump connection is to be sealed off, but does not mention specifically the ordinary "working" of the filament during the pump action, would not render the patent process inoperative. *Malignani v. Jasper Marsh Consol. Electric Lamp Co.*, (1910) 180 Fed. 442.

It is enough that a patent so fully describes a process or a product that one reasonably skilled in the art may practice the process or manufacture the product, and that others may know with reasonable certainty whether or not they are infringing it. *Standard Paint Co. v. Bird*, (1910) 175 Fed. 346, *affirmed* (C. C. A.) 182 Fed. 1023.

**Description of design.**—A design patent like a mechanical patent must describe the article in such full, clear, concise, and exact terms as to enable persons skilled in the art to make and use the invention. *James E. Tompkins Co. v. New York Woven Wire Mat-*

wress Co., (C. C. A. 1907) 159 Fed. 133, *reversing* 154 Fed. 669.

**Statement of causes producing result.**—When a patent contains a sufficient disclosure of the claimed invention, it will not be invalidated either by the failure of the patentee to state the causes which produce the result, or by a mistaken statement thereof. *Hemolin Co. v. Harway Dyewood, etc., Mfg. Co.*, (C. C. A. 1905) 138 Fed. 54, *affirming* (1904) 131 Fed. 483.

It is immaterial whether or not the means for accomplishing a result covered by a patent are illustrated therein, if they are sufficiently described in the specification. *Hillard v. Fisher Book Typewriter Co.*, (1907) 151 Fed. 34.

**Ingredients of chemical compositions.**—A patent for a chemical composition must not only give the names of the ingredients used in making the composition, but also the proportion of each, so that the invention may be practiced by those skilled in the art without further experimentation. *Panzl v. Battle Island Paper, etc., Co.*, (C. C. A. 1905) 138 Fed. 48, *modifying* (1904) 132 Fed. 607.

**Means or mechanism to accomplish particular results.**—A patent for a prescribed means or mechanism to accomplish a desired end must be limited to the particular means described in the specification, or their clear mechanical equivalents, and does not cover any other mechanical structure which is substantially different in its construction or in its operation. *Union Match Co. v. Diamond Match Co.*, (C. C. A. 1908) 162 Fed. 148.

**Drawings.**—The drawing filed with an application for a patent as required by law, with the specifications, constitutes a part of the patent when issued. *Phillips v. Sensenich*, (1908) 31 App. Cas. (D. C.) 159.

**Rights of public.**—On expiration of a patent, the right to manufacture the patented article passes to the public, the same as if no patent had been obtained. *Westcott Chuck Co. v. Oneida Nat. Chuck Co.*, (1910) 199 N. Y. 247, 92 N. E. 639, *reversing judgment* (1909) 133 App. Div. 937, 118 N. Y. S. 1149.

**Combination including separately patented element.**—On the expiration of a patent for a combination, the use of such combination becomes free to the public, notwithstanding the fact that it contains as one of its elements a device covered by another patent to the same patentee which has not expired. *Thomson-Houston Electric Co. v. Illinois Telephone Constr. Co.*, (1906) 143 Fed. 534.

**Estoppel to deny validity of patent and claim trademark in name.**—The owner of a patent who has had the benefit of its protection, and manufactured thereunder during its full life, cannot thereafter assert its invalidity in support of his claim to a trademark in the name by which he designated the patented article and by which it became generally known. *Rice-Stix Dry Goods Co. v. J. A. Scriven Co.*, (C. C. A. 1908) 165 Fed. 639.

**Construction of patent.**—In the construction of a generic process patent, every phenomenon observed during operation and every minute detail described in illustrating the

process in the specification is not to be read into the claims as a limitation, to avoid a charge of infringement. *Electric Smelting, etc., Co. v. Pittsburg Reduction Co.*, (1903) 125 Fed. 926, 60 C. C. A. 636, *modifying* (1901) 111 Fed. 742.

Undoubtedly a patent must be taken with all its limitations, and resort may be had to its course through the Patent Office to determine them; neither can rejected features be reasserted, nor a broad construction be insisted on, where a narrow one has been accepted by amendment to meet the objections of the examiner. But, subject to this, the patentee is entitled to have his patent taken as it reads, with due regard to the inventive idea embodied in it, without having it treated in such a way as virtually to destroy it. *Eck v. Kutz*, (1904) 132 Fed. 758.

The claims of a patent are to be fairly construed in the light of the specification and drawings, so as to cover, if possible, the invention, and thus save it, especially if it be a meritorious one. *Mossberg v. Nutter*, (1905) 135 Fed. 95, 68 C. C. A. 257, *affirming* (1904) 128 Fed. 55.

The rules for the interpretation of contracts govern the construction of a patent. *O. H. Jewell Filter Co. v. Jackson*, (C. C. A. 1905) 140 Fed. 340.

While it is settled law that a patentee who has acquiesced in the rejection of a broad claim by substituting a narrower one cannot insist on a construction of the latter to cover that which was rejected, yet such rule does not debar him from a liberal construction of the claim as granted, nor from the benefit of the doctrine of equivalents. *Heywood Bros., etc., Co. v. Syracuse Rapid Transit R. Co.*, (1907) 152 Fed. 453.

A patent for a four-part structure operating in a certain way cannot be construed to cover a three-part structure, in which one of said three parts is a combination of two of the parts of the patented structure, where an entirely different mode of operation is required, and where, when it is attempted to operate the patented device in the same way, it is wholly inoperative. *Ajax Forge Co. v. Jordan Frog, etc., Works*, (1907) 156 Fed. 591.

The claims of a patent which are not ambiguous are to be interpreted according to the meaning of their own terms, and are not controlled or limited by any argument or representation made by the patentee's attorney before the Patent Office as to the scope of the invention or the features in which it differs from the prior art, where no amendment of the claims was required or made. *Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co.*, (C. C. A. 1908) 166 Fed. 443.

A patent is a contract, and the rules for the construction of contracts generally control in its interpretation; and when its terms are plain, and the intention of the parties clearly manifest therefrom, they must prevail; but if its expressions are ambiguous, or its validity or any claim is doubtful, that construction will be given which will sustain rather than destroy the patent. *Denning Wire, etc., Co. v. American Steel, etc., Co.*,

(C. C. A. 1909) 160 Fed. 793, *affirming* (1908) 160 Fed. 108.

While the courts lean toward reading into the claims of a patent such limitations as will save the real invention as disclosed by the specification and the prior art, where claims employ broad and nebulous terms for the apparent purpose of enabling the patentee to monopolize an important industry, the claims will not be narrowed beyond the boundaries clearly warranted by the specification. *Beckwith v. Malleable Iron Range Co.*, (1910) 174 Fed. 1001.

**Nonuser as affecting construction.**—While the validity of a patent is not affected by its nonuser, such fact may have a bearing on its construction in requiring its limitation to the device plainly shown and distinctly described. *Kestner Evaporator Co. v. American Evaporator Co.*, (1910) 182 Fed. 844.

**Novelty and utility as affecting construction.**—Whether an invention be a pioneer, or, being of small importance, is ranked at the foot of the line, the rule is that it shall be judged on its own merits; that is to say, according to the advance it has made in novelty and utility beyond the former art. *Vrooman v. Penhollow*, (C. C. A. 1910) 179 Fed. 296.

**Matter omitted from one claim and included in another.**—Where an applicant for a patent in one claim makes no mention of an element, and in another includes it, the presumption is that he omitted it from the first on purpose. *Duncan v. Cincinnati Butchers' Supply Co.*, (C. C. A. 1909) 171 Fed. 656.

**Construction to avoid interference.**—Where a patentee limited his claims by the use of the word "corrugated" to describe the form of a part, he cannot be heard to say that it should be given a broader construction as "polygonal" or "noncircular," when there was pending in the Patent Office at the same time another application with which he would have been thrown into interference if he had used the broader term. *Ajax Forge Co. v. Morden Frog, etc., Works*, (1907) 156 Fed. 594.

**Patent not extended beyond its terms.**—A patent cannot be given a construction broader than its terms, in order to cover something which might have been claimed, but was not. *Universal Brush Co. v. Sonn*, (C. C. A. 1907) 154 Fed. 665, *reversing* (1906) 146 Fed. 517.

**Reference to prior art.**—The claims of a patent finally allowed and accepted by the patentee must be read in connection with the claims set forth in the original application and with the prior art, and cannot be construed to cover what was rejected or disclosed by prior devices. *Victor Talking Mach. Co. v. American Graphophone Co.*, (1906) 145 Fed. 189.

A patent must be read and construed with reference to the prior art and cannot be so construed as to cover what was disclosed by the prior art. *Williams Patent Crusher, etc., Co. v. Pennsylvania Crusher Co.*, (1910) 176 Fed. 576.

Where the language employed in a patent is indefinite or ambiguous it should be read in the light of the reader's knowledge of the

prior art. *Malignani v. Jasper Marsh Consol. Electric Lamp Co.*, (1910) 180 Fed. 442.

**Error in reference to prior art.**—If a patentee in his specification describes in appropriate language a real invention and properly sets forth his claim to that invention, he is not to be deprived of it merely because he has inadvertently erred in his reference to the prior art. *Babcock, etc., Co. v. North American Dredging Co.*, (1907) 151 Fed. 265.

**Reference to drawings.**—The drawings accompanying the specification of a patent and referred to in the descriptive parts thereof will be examined to ascertain the true meaning of the terms used in describing the invention. *Steiner, etc., Hardware Co. v. Tabor Sash Co.*, (1910) 178 Fed. 831.

**Reference to specifications.**—Where terms which are not technical terms of the art are used in the claims of a patent to differentiate between different tubes in the patented structure, the specification may be referred to for the purpose of ascertaining their meaning as so used. *Fowler, etc., Mfg. Co. v. National Radiator Co.*, (C. C. A. 1909) 172 Fed. 661.

**Reference to rejected claims.**—A patent must be read and construed with reference to the claims rejected and cannot be so construed as to cover what was rejected by the Patent Office. *Williams Patent Crusher, etc., Co. v. Pennsylvania Crusher Co.*, (1910) 176 Fed. 576.

**Particular words construed.**—The term "Chamotte," as used in the arts, has a broader meaning technically than ordinary fire brick crushed or fire clay, and means, when used to describe an element in a patented combination, a clay which has been burned to an extent which deprives it of further shrinkage on being again subjected to heat. *Panzl v. Battle Island Paper, etc., Co.*, (1904) 132 Fed. 607.

The word "simultaneously," used in a patent to describe the operation of the parts of a machine which in fact operate progressively to complete the article produced, must be construed to mean that the parts operate unitedly, harmoniously, and in concord, and not at the same instant of time. *E. J. Manville Mach. Co. v. Excelsior Needle Co.*, (C. C. A. 1909) 167 Fed. 538, *affirming* (1908) 162 Fed. 486.

The word "convex," used in the claims of a patent as applied to a surface, is to be given its generally accepted meaning, as indicating a surface of a more or less spherical form rather than cylindrical. *Beckwith v. Malleable Iron Range Co.*, (1910) 174 Fed. 1001.

The term "bell," used in a patent for a graphophone, means the amplifying horn used in sound-reproducing machinery. *Victor Talking Mach. Co. v. Duplex Phonograph Co.*, (C. C. A. 1910) 182 Fed. 822.

**Liberal construction.**—A strict construction of the claims of a patent should not be resorted to, if the result would be a limitation on the actual invention, unless it is required by the language of the claim. *Wagner Typewriter Co. v. Wyckoff*, (C. C. A. 1907) 151 Fed. 585, *modifying* (1905) 138 Fed. 108.

A patent for a process of making mica insulating sheets by combining "laminated ele-

mentary scales" of mica should not be construed to require that the scales must be split down to the last possibility of splitting, but only so far as is commercially practicable, especially where it is plain, from the description of the process in the specification, that such was the inventor's meaning. *Mica Insulator Co. v. Commercial Mica Co.*, (C. C. A. 1908) 166 Fed. 440, *reversing* (1907) 157 Fed. 90.

A statement in a patent for a process for bleaching nuts that acid is added to the solution "coincidentally" with the dipping of the nuts therein should be given a reasonable construction, and does not require that the acid should be added at the very instant of the dipping, but a successive dipping of different crates of nuts after the acid has been added and so long as it remains effective for the purpose used is fairly within the patented process. *Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co.*, (C. C. A. 1908) 166 Fed. 443.

Courts will go far to save a patent for a meritorious invention, but they cannot reconstruct claims and disregard their very terms, and add or substitute material words not found therein, but necessary if the true invention is to be covered. *Sharp v. Bellinger*, (1909) 168 Fed. 295.

Patents granted under the laws of the United States pursuant to Const., art. 1, sec. 8, are grants made in consideration of discoveries which "promote the progress of science and useful arts," and are to be construed liberally so as to effect their real intent. *Bossert Electric Constr. Co. v. Pratt Chuck Co.*, (C. C. A. 1910) 179 Fed. 385.

The construction placed on the patent statutes by the courts is favorable toward inventors having meritorious inventions, and they do not put on them harsh or technical interpretations, and are inclined to resolve all doubts as to whether more than one invention is embraced in one patent in favor of the patentee. *In re Briede*, (1906) 27 App. Cas. (D. C.) 298.

Such narrow limitations should not be imposed on the patent as will enable subsequent inventors to use the invention with impunity by appropriating the essential element of the device, i. e., the indispensable, functioning feature of it. *Société Anonyme des Anciens Etablissements Cail v. U. S.*, (1907) 43 Ct. Cl. 25.

**Strict construction.**—While the fact that a patented device has never gone into use does not defeat the patent, it warrants an inference against utility, the converse of that which arises from successful commercial use, and may justify a narrow construction of the patent. *National Malleable Castings Co. v. Buckeye Malleable Iron, etc., Co.*, (C. C. A. 1909) 171 Fed. 847.

While the fact that the device of a patent has never been put in use does not affect the validity of the patent, it is ground for giving it strict construction. *Westinghouse Electric, etc., Co. v. Toledo, etc., R. Co.*, (C. C. A. 1909) 172 Fed. 371.

**Strict construction as to mere improvements.**—If validity is given to a patent only

by an improvement of a narrow character, just sufficient to cross the line which divides mechanical improvement from patentable invention, the inventor will be protected only as to such improvement as is specifically described, and is but little aided by the doctrine of "equivalents," which term has a variable meaning and is measured by the character of the invention. *Rich v. Baldwin*, (1904) 133 Fed. 920, 66 C. C. A. 464.

A patent for mere improvement on prior devices must be limited to the precise devices and combinations shown and claimed. *Cumming v. Baker*, (C. C. A. 1906) 144 Fed. 395.

When the invention of a patent is not a pioneer invention, the inventor is held to a rigid construction of his claims, and is not entitled to any considerable range of equivalents; and when, in a patent for a mere improvement, which in view of the prior art is extremely narrow, he has limited his claims by specific words to a specific form of device or element, he is bound thereby. *Sharp v. Bellinger*, (1909) 168 Fed. 295.

The Schmertz reissue patent, No. 12,443 (original No. 791,216), for an apparatus and process for manufacturing wire glass, is for an improvement on the so-called "European" or two-sheet method of making wire glass, and consists in the simultaneity of laying the wire and rolling the first sheet and the close and progressive following of the second roll casting the second sheet on top thereof. This quickening of the whole operation produces a better welding of the two sheets and an improved result, but the claims, being for an improvement only in the respect stated, must be limited to the simultaneity of the particular method and the particular mechanical means for practicing it described in the specifications, and cannot be broadened to include other methods or means for accomplishing the same result. As so construed and limited, held not infringed. *Highland Glass Co. v. Schmertz Wire Glass Co.*, (C. C. A. 1910) 178 Fed. 944.

**Construction in connection with other patents or applications.**—A second patent applied for by and granted to a patentee for a device for the same purpose, but different in form from one shown in an earlier patent, may be taken into consideration in construing the earlier patent, as affording a presumption that it did not broadly cover other forms than the one described. *D'Arcy v. Staples, etc., Co.*, (C. C. A. 1908) 161 Fed. 733.

An invention covered by a patent is not necessarily to be cut down by the fact that, while the application for it was pending in the Patent Office, other applications were brought forward from time to time by the same inventor, representing different developments of the same idea; all being allowed and issued the same day. *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, (1905) 135 Fed. 785.

**Improvement on prior device of same inventor.**—A patent expressly for an improvement on the device of a prior patent to the same inventor should be read in connection with the first, and will not be declared void

because, standing alone, it does not describe an operative apparatus. *Los Alamitos Sugar Co. v. Carroll*, (C. C. A. 1909) 173 Fed. 280.

**Invention not put to practical use.**—The rule applied that in a suit for infringement of a patent for an alleged invention of which no practical use has ever been made, the patent is not entitled to the same breadth of construction which might be warranted by its proved usefulness. *Boston Woven Hose, etc., Co. v. Pennsylvania Rubber Co.*, (C. C. A. 1908) 164 Fed. 557, *affirming* (1907) 156 Fed. 787.

**Pioneer patent.**—A patent for improvements in transmitting electrical impulses and signals, and in apparatus therefor, while for a combination of elements, all of which were taken from the prior art, discloses the first practical wireless telegraphic system, and shows invention of a primary character, which entitles it to a broad construction and liberal range of equivalents. *Marconi Wireless Tel. Co. v. De Forest Wireless Tel. Co.*, (1905) 138 Fed. 657.

The liberal construction allowed to pioneer inventions cannot be invoked in favor of a patentee whose claim was limited to save it from anticipation by previous patents, so as to broaden the claim and practically make it cover what was rejected by the Patent Office. *Cotto-Waxo Chemical Co. v. Perolin Co.*, (C. C. A. 1911) 185 Fed. 267.

**Pioneer patent defined.**—A pioneer patent is one covering a function never before performed, a wholly novel device, or one of such novelty and importance as to make a distinct step in the progress of the art as distinguished from a mere improvement or perfection of what had gone before. *Autopiano Co. v. Amphion Piano Player Co.*, (C. C. A. 1911) 186 Fed. 159.

**Application of doctrine of equivalents.**—The claims of a patent of a pioneer invention are entitled to some liberality in the application of the doctrine of equivalents. *American Pneumatic Service Co. v. Snyder*, (C. C. A. 1910) 180 Fed. 712, *reversing* (1909) 174 Fed. 152.

**Construction claimed by patentee.**—Where claims of a patent were construed to include by implication an element not expressly claimed therein, but which was described and shown in the specification and drawings, and, as so construed, held anticipated, and, to avoid the effect of such decisions, the patentee applied for and was granted a reissue on a new specification, which expressly disclaimed such element, it should not be read into the claims of the new patent, although they are in terms substantially like those of the old, but the courts should, if possible, adopt the construction placed on them by the patentee and the Patent Office giving effect to the disclaimer. *Thomson-Houston Electric Co. v. Black River Traction Co.*, (1905) 135 Fed. 759, 68 C. C. A. 461, *reversing* (1903) 124 Fed. 495.

**Construction to sustain grant.**—If the wording of a claim of a patent is fairly capable of two constructions, one of which will sustain the claim and the other defeat it, that which will preserve the invention should

be adopted. *Universal Adding Mach. Co. v. Comptograph Co.*, (C. C. A. 1906) 146 Fed. 981, *reversing* 142 Fed. 539.

Under the rule that the language of a patent should be so construed as to save rather than destroy it, a claim in a patent of "rotatably mounted bars . . . substantially as described" as an element of a combination is not void because the specification and drawings show a rotatable and a fixed bar, there being no doubt as to the thing intended. *Maunula v. Sunell*, (1907) 155 Fed. 535.

Where the validity of a patent is in doubt because the claims are ambiguous, that construction is to be preferred which sustains the patent rather than that which would render it invalid. *Electric Candy Mach. Co. v. Morris*, (1905) 156 Fed. 972.

A patent is a contract, and the rules for the construction of contracts generally control in its interpretation, and when its terms are plain, and the intention of the parties clearly manifest therefrom, they must prevail, but if its expressions are ambiguous, or its validity or any claim is doubtful, that construction will be given which will sustain rather than destroy the patent. *American Steel, etc., Co. v. Denning Wire, etc., Co.*, (1908) 160 Fed. 108.

When two constructions of a patent are permissible, the court will adopt that which will give to an inventor the protection to which, under the law, he is entitled. *Malignani v. Jasper Marsh Consol. Electric Lamp Co.*, (1910) 180 Fed. 442.

The presumption is that an inventor intends to protect his invention broadly, and consequently the scope of a claim should not be restricted beyond the ordinary meaning of the words, save for the purpose of saving it; and in reading the claim for the purpose of construing it, heed must not only be paid to the specification proper and to the drawings, but also to the other claims of the patent. *Andrews v. Nilson*, (1906) 27 App. Cas. (D. C.) 451.

**Effect of foreign patent.**—The claim that a British patent covering an invention also patented in the United States was taken out by an intermeddler, and was unauthorized, and therefore that its expiration did not affect the term of the American patent, cannot be sustained, where the American patentees authorized the taking out of a patent in England, and under the other circumstances named in the opinion, did not repudiate the one in fact obtained until after its expiration. *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, (C. C. A. 1907) 155 Fed. 842, *affirming* (1906) 148 Fed. 31.

The amendment of section 4887, by Act March 3, 1897, did not affect patents previously issued, either as to their validity or length of term, and such a patent covering an invention previously patented in a foreign country remained, as to length of term, governed by the original section, and not by section 4834. *Sawyer Spindle Co. v. Carpenter*, (C. C. A. 1906) 143 Fed. 976, *affirming* (1904) 133 Fed. 238.

## Vol. V, p. 420, sec. 4885.

**Directory provision.**—The provision as to dating patents is directory merely, since the same section allows the applicant six months after notice in which to pay the final fee; and where, by reason of the accumulation of work in the office, the patent cannot be prepared and signed after such payment within the six months, and it is therefore reallowed and issued on the later date, it will not be held void for that reason, at least at the instance of a private party in a collateral proceeding. *Western Electric Co. v. North Electric Co.*, (1905) 135 Fed. 79, 87 C. C. A. 553.

**Priority of patents dated on same day.**—Where two patents are issued on the same

day by the Patent Office, and there is no other evidence of seniority between them than such as appears from their several numbers, the earlier in number must be regarded the senior and the earlier in publication. *Crown Cork, etc., Co. v. Standard Stopper Co.*, (1905) 136 Fed. 841, 69 C. C. A. 519.

**Acquiescence in delays of Patent Office.**—That an applicant for a patent acquiesces in delay in the Patent Office is immaterial to the courts, and does not affect his rights under his patent, so long as the statute law is not violated. *Electric Vehicle Co. v. Duerr*, (1909) 172 Fed. 923, *reversed* on another ground (C. C. A. 1911) 184 Fed. 893.

## Vol. V, p. 421, sec. 4886.

**Constitutionality of statute.**—This section is not unconstitutional because it provides that inventions or discoveries may be either arts, machines, manufactures, or compositions of matter, and that presumptively no two of these subjects are one invention. Inventions have been thus distinguished continuously since 1793, and the Supreme Court of the United States has frequently recognized the validity of this division. *In re Frasch*, (1906) 27 App. Cas. (D. C.) 25.

**State legislation as affecting patent rights.**—A state statute cannot interfere with the monopoly granted to a patentee and his assignees under the federal laws. *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, (C. C. A. 1907) 154 Fed. 358, *reversing* (1906) 142 Fed. 531.

## NOTES TO R. S. SEC. 4886.

- I. WHO MAY OBTAIN PATENTS, 1552.
- II. WHAT MAY BE PATENTED, 1556.
- III. INVENTION, 1558.
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- V. NOVELTY AND ANTICIPATION, 1570.
- VI. PRIOR USE OR SALE, 1583.
- VII. ABANDONMENT, 1586.
- VIII. DIVISION OF INVENTIONS, 1589.

## I. WHO MAY OBTAIN PATENTS.

**Right to patent in general.**—Courts generally have extended to inventors the protection of the patent laws when the real invention is susceptible of ascertainment and the inventor has contributed a new and useful invention to the art. *Société Anonyme Des Anciens Etablissements Cail v. U. S.*, (1907) 43 Ct. Cl. 25.

Where the record date of the application for a patent of one of the parties to an interference, and consequently his reduction to practice, preceded his rival's reduction to practice, the latter can only prevail, if he succeeds at all, by showing conception of the invention prior to the conception of his adversary. *Cobb v. Goebel*, (1904) 23 App. Cas. (D. C.) 75.

Where one of the parties to an interference is shown to have been the first to conceive and the first to reduce to practice the invention of some of the counts, and, though first to conceive and last to reduce to practice the invention of the remaining counts, was diligent in reducing that invention to practice, he is entitled to an award of priority of invention as to all of the counts. *Hillard v. Brooks*, (1904) 23 App. Cas. (D. C.) 526.

**Reducing inventions to practice.**—The general rule is that he who first reduces an invention to practice is ordinarily held to be the inventor as against another who claims to have previously conceived the idea which led to the invention, but made no practical application of it. *Killeen v. Buffalo Furnace Co.*, (1905) 140 Fed. 33; *Eastern Paper Bag Co. v. Continental Paper Bag Co.*, (1905) 142 Fed. 479; *Laas v. Scott*, (1908) 161 Fed. 122; *Hallwood v. Lalor*, (1903) 21 App. Cas. (D. C.) 61.

The inventor who first reduces to practice is prior in right, unless the inventor who is the first to conceive was using reasonable diligence at the time of the second conception and the first reduction to practice. *Parke v. Lewis*, (1906) 28 App. Cas. (D. C.) 1.

Where neither party shows actual reduction to practice, the senior party, being first to conceive, is entitled to an award of priority of invention. *Furman v. Dean*, (1904) 24 App. Cas. (D. C.) 277.

**Reduction to practice by third person.**—The reduction to practice of an invention by an original inventor cannot be taken as a reduction to practice by another merely because the ownership of the claims of both may afterwards become vested in the same person or persons. It is not enough to entitle an applicant to a patent that some one else, not his agent, has shown the practicability of the invention by reducing it to practice. *Robinson v. McCormick*, (1907) 29 App. Cas. (D. C.) 98.

**Delay in reducing invention to practice.**—A delay of three years in reduction to practice is fatal to an award of due diligence, where the applicant does not explain the delay, and

has during that period taken out several patents relating to the same art. *Parkes v. Lewis*, (1906) 28 App. Cas. (D. C.) 1.

**Dismantling experimental machine as negating reduction to practice.**—The dismantling of an experimental machine by a large and prosperous company has more weight as showing the lack of success of the trial than it would have if done by a poor inventor whose necessities compel him to utilize the parts for other purposes. *Robinson v. Thresher*, (1906) 28 App. Cas. (D. C.) 22.

**Allowable application as reduction to practice.**—The filing of an allowable application for a patent is equivalent to a reduction to practice. *Harris v. Stern*, (1903) 22 App. Cas. (D. C.) 164; *Davis v. Garrett*, (1906) 28 App. Cas. (D. C.) 9.

Although actual reduction to practice is preferable to constructive reduction to practice, as more to the interest of the public, and a reasonable indulgence ought to be extended to one attempting in good faith to actually reduce to practice, yet, when the construction of an experimental device involves so great cost and risk that an inventor, although possessed of sufficient means, may well hesitate to undertake the same entirely at his own expense, due diligence requires that he should then attempt to secure his rights and promote the public interests by filing an application for patent. *Seeberger v. Dodge*, (1905) 24 App. Cas. (D. C.) 476.

**Reduction to practice restricted to date of application.**—Where a party to an interference who conceived the invention of the issue some time prior to the filing of his application did not reduce the invention to practice, he is restricted to his filing date for the constructive reduction to practice. *Geltz v. Crozier*, (1909) 32 App. Cas. (D. C.) 324.

A party to an interference is not entitled to the date of an earlier application as a constructive reduction to practice, although such earlier application, as originally filed, disclosed the invention of the issue, where it was amended on objection by the primary examiner and without appeal so as to eliminate all claims for such invention, and then allowed, and went to patent four years before the second application was filed. *Wainwright v. Parker*, (1909) 32 App. Cas. (D. C.) 431.

**Theory of constructive reduction to practice.**—The theory underlying the doctrine of constructive reduction to practice is that the filing of a proper application constitutes a sufficient disclosure to enable one skilled in the art to practice the invention. *National Metallurgic Co. v. Whitman*, (1910) 35 App. Cas. (D. C.) 420.

**Delay in making invention public.**—While an inventor is under no obligation to give the public the benefit of his discovery, by failing to do so he runs the risk that some other inventor may do so, and thus in the eyes of the law become the prior inventor, and as such entitled to a patent. *Howard v. Bowes*, (1908) 31 App. Cas. (D. C.) 619.

**Demonstration of commercial success.**—In reducing an invention to practice, it is not necessary to prolong the test until its commercial value has been established, but, if it

accomplishes the end desired, it is a perfected invention, although it may prove of little or no commercial value. *Laas v. Scott*, (1908) 161 Fed. 122.

**Diligence in reducing invention to practice.**—If the first inventor of a device exercises reasonable diligence in reducing it to practice, he does not lose his right to a patent because a second and independent inventor of the same device may have first put it into actual use. *New England Motor Co. v. B. F. Sturtevant Co.*, (1905) 140 Fed. 866; *Continental Rubber Works v. Single Tube Automobile, etc.*, *Tire Co.*, (C. C. A. 1910) 178 Fed. 452, *affirming* (1909) 174 Fed. 50; *O'Connell v. Schmidt*, (1906) 27 App. Cas. (D. C.) 77; *Turnbull v. Curtis*, (1906) 27 App. Cas. (D. C.) 567.

An inventor who is the first to conceive and disclose is under no obligation of diligence in making application until just prior to the date when his rival enters the field. *O'Connell v. Schmidt*, (1906) 27 App. Cas. (D. C.) 77.

No invariable rule of diligence in the reduction to practice of an invention can be prescribed for the government of all cases, and whether it has been exercised in a particular case must depend on its special circumstances. *Hammond v. Basch*, (1905) 24 App. Cas. (D. C.) 469.

The party to an interference involving the invention of a snap hook of simple construction who was the first to conceive, and who did not know, when he filed his application, that the other party had entered the field, is not lacking in diligence, where he made a model demonstrating the utility of the invention, immediately had castings made for patterns, and five months afterwards made his first shipment, which four months afterwards was followed by the filing of his application, and where part of the time following the making of the castings he was away from home, and at other times only delayed the exploitation of the invention because of press of other work, and there is nothing to show any want of good faith on his part. *Schar-tow v. Schleicher*, (1910) 35 App. Cas. (D. C.) 347.

**What constitutes lack of due diligence.**—An inventor who was the first to conceive, but who, without adequate reason, delayed for a year to reduce to practice, and to file his application, which was not filed until six months after the issue of a patent to his rival, cannot be said to have exercised due diligence, and will not be awarded priority. *Anderson v. Wells*, (1906) 27 App. Cas. (D. C.) 115.

In an interference proceeding involving improvements in electrical motors, where the senior parties conceived in March, 1901, and constructively reduced to practice by filing their application April 30, 1901, the junior party, who claimed to have made a sketch and disclosure of the invention in July, 1899, and a device embodying the invention in August, 1899, but did nothing further until he filed his application, about a year and nine months afterwards, failed to show conception prior to the date of his application;

but even if it did so show, he was not diligent in reducing to practice before the arrival of his opponent on the field of invention. *Harris v. Stern*, (1903) 22 App. Cas. (D. C.) 164.

Failure for three years after conception, by the junior party to an interference, to reduce to practice the invention — a very simple device, namely, a clamp for holding glass plates — during which time the senior party entered the field and reduced to practice, is not excused by want of time and money, where it appears that during such period the junior party abandoned his calling as a salesman of plate glass and engaged in another and different business, to start which he borrowed \$3,000. *Feinberg v. Cowan*, (1907) 29 App. Cas. (D. C.) 80.

W. conceived an invention of an improvement in a machine, and made a drawing thereof which he exhibited to another in January, 1896. In January, 1897, he completed working drawings from which a machine was finished in the following April. In 1898 he filed an application on which a patent was granted in 1899. In the meantime, in December, 1898, T., an independent inventor, filed an application for a patent for the same machine, on which a patent was granted in 1904. It was held that W. did not use such reasonable diligence in perfecting and adapting his invention as to entitle him to carry the date of invention back to the time of its conception and disclosure, nor back of the date when he reduced it to practice by completing his machine; that the date of T.'s invention was the time of his application, and he was therefore the first and original inventor in the sense of the patent law, and his patent was valid. *Automatic Weighing Mach. Co. v. Pneumatic Scale Corp.*, (C. C. A. 1909) 166 Fed. 288, *reversing* (1908) 158 Fed. 415.

Lack of diligence is shown by a party to an interference where he took no steps to file his application for more than two years after a test which he claims was an actual reduction to practice, did not file his application until nine months thereafter, and then only after he had heard of a patent granted his adversary. *Lewis v. Cronmeyer*, (1907) 29 App. Cas. (D. C.) 174.

**Rules for determining priority.** — When two patents for the same invention have been issued to independent inventors, the dates of their respective inventions are determined by (1) the dates of the patents; (2) the dates of the application, provided the application sufficiently describes the invention; (3) the dates of actual reduction to practice; (4) the dates of conception, with this qualification: That if either patentee seeks to carry the date of his invention back to the date of his conception, he must show reasonable diligence in adapting and perfecting his invention, either by actual reduction to practice or by filing his application. *Automatic Weighing Mach. Co. v. Pneumatic Scale Corp.*, (C. C. A. 1909) 166 Fed. 288, *reversing* (1908) 158 Fed. 415.

**Delay by both parties.** — The fact that a patentee, after perfecting his invention, delayed for six years before applying for a patent therefor, does not estop him from

claiming priority for such patent over one subsequently issued to another, who had in the meantime conceived the same invention, but who took no steps to obtain a patent until after the first patentee had filed his application and had introduced his invention into public use. *Kellogg Switchboard, etc., Co. v. International Telephone Mfg. Co.*, (1907) 158 Fed. 104.

**Delay caused by fraud of rival.** — Where the junior party in interference proves that he was the first to conceive the invention; that he disclosed it to others, who fully understood it and could have reduced it to practice from his explanation; that he made accurate drawings; that this knowledge was imparted to the senior party's brother-in-law, who got possession of the drawings; and that his delay in applying for a patent was caused by the fraud of the senior party, the latter's brother-in-law, and others — such junior party is entitled to priority. *Shuman v. Beall*, (1906) 27 App. Cas. (D. C.) 324, 329.

**Making and exhibiting models.** — The fact that an inventor, who is the first to conceive, has made models, which, if tested, would constitute a reduction to practice, and has shown these models to those skilled in the art, thus fully disclosing the invention and its practicability, should have considerable weight in determining the question of diligence in making application. *O'Connell v. Schmidt*, (1906) 27 App. Cas. (D. C.) 77.

**Excuses for delay generally.** — Where the excuse given for the delay in filing an application for a patent was the impossibility of reaching an agreement with employers concerning the invention, it was held that the excuse was insufficient. *Paul v. Hess*, (1905) 24 App. Cas. (D. C.) 462.

A delay by an inventor in reducing his invention to practice and applying for a patent is not to be excused because of his supposition that prior patents in which he had an interest were sufficiently broad to include the invention. *Seeberger v. Dodge*, (1905) 24 App. Cas. (D. C.) 476.

**Delay to procure capital to manufacture device.** — One having the first complete conception of an invention cannot hold the field against all comers by diligent efforts merely to organize and procure sufficient capital to engage in the manufacture of his device or mechanism for commercial purposes. This is a different thing from diligence in actual reduction to practice. *Seeberger v. Dodge*, (1905) 24 App. Cas. (D. C.) 476.

**Inability to construct device.** — That no one could be found who was qualified to construct the device and willing to do the actual work is no excuse for inactivity for over eighteen months to reduce to practice, during which time a rival inventor conceived the invention and constructively reduced to practice, where it appears that the first inventor could have constructively reduced to practice by filing his application, especially where it appears that he filed several applications in the Patent Office for improvements in the art during that time. Nor is the fact that the inventor was a very busy man in other direc-



tions an excuse. *Robinson v. Copeland*, (1904) 24 App. Cas. (D. C.) 68.

**Priority in filing application.**—Where, in an interference case, it appears that neither party actually reduced to practice, but all that each did was to conceive the invention and to file an application, it was held that while weeks and months, and perhaps even years, might not count for much in the race of diligence between rival inventors when the time is to be applied to the actual reduction to practice of complicated inventions, the operativeness of which is required to be proved by laborious experiment, yet an unexplained delay of two months and a half in filing his application by the party first conceiving warranted the granting of the patent to his more diligent opponent. *Ritter v. Krakau*, (1904) 24 App. Cas. (D. C.) 271.

**Prior grant of patent to rival inventor.**—In an interference case, an application to counterclaim a patent already granted must be shown to have been made within a reasonable time from the date of reduction to practice, or from conception of the invention, with the exercise of reasonable diligence to reduce to practice, or otherwise the claim to the invention, as opposed to that covered by the patent, will be rejected. *Dashiell v. Tasker*, (1903) 21 App. Cas. (D. C.) 64.

A party to an interference is not relieved of the obligation to combat the effect of a patent issued to his adversary by the fact that he had, before the issue of such patent, filed an application for a patent for a device of the same general character as that involved in the interference, where such application did not disclose the issue of the interference. *Norden v. Spaulding*, (1904) 24 App. Cas. (D. C.) 286.

An applicant in interference, who files his application after the granting of the patent, has the burden of proving his prior right beyond a reasonable doubt; and this burden is not discharged by merely raising a doubt as to which party had the first conception of the invention. *French v. Halcomb*, (1905) 26 App. Cas. (D. C.) 307.

The burden of proof imposed on a junior applicant in interference proceedings is not increased by the granting of a patent to his opponents while his application is pending. *Laas v. Scott*, (1905) 26 App. Cas. (D. C.) 354.

**Knowledge of inventor.**—Where a patent discloses means by which a novel and successful result is secured, it is immaterial whether the patentee understands or correctly states the theory or philosophical principles of the mechanism which produces the new result. *Van Epps v. United Box Board, etc., Co.*, (C. C. A. 1906) 143 Fed. 869, *reversing* (1905) 137 Fed. 418.

A combination patent which has proved a great success may not be held devoid of invention because the inventor did not know all the forces which he had brought into operation. *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, (1911) 220 U. S. 428, 31 S. Ct. 444, 55 U. S. (L. ed.) 527, *affirming* (1908) 162 Fed. 892, 89 C. C. A. 582.

Where one of the parties to an interference

disclosed his conception of a device to the other, and employed him to construct one, the relation of employer and employee existed, and any improvement on the general idea made by the employee, especially where it did not involve invention, belongs to the employer. *Gallagher v. Hastings*, (1903) 21 App. Cas. (D. C.) 88.

**Conception of employer carried out by employees.**—The discoverer of a new principle does not lose his right to a patent because he employs another to put it in working shape, and such other suggests minor features or improvements. *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.*, (1908) 164 Fed. 47.

The right of one who conceives an invention to patent the same as the sole inventor is not lost because he lacks the mechanical skill to embody his invention in a machine, and employs another to construct such machine. *United Shirt, etc., Co. v. Beattie*, (1907) 149 Fed. 736, 79 C. C. A. 442, *affirming* (1905) 138 Fed. 136.

To claim the benefit of his employee's skill and achievement, it is not sufficient that an employer had in mind the desired result, and employed another to devise means for its accomplishment, but he must show that he had an idea of the means to accomplish the particular result, which he communicated to the employee in such detail as to enable the latter to embody the same in some practical form. *Robinson v. McCormick*, (1907) 29 App. Cas. (D. C.) 98; *Smith v. Phelps*, (1910) 35 App. Cas. (D. C.) 358.

While an inventor who employs another to embody his conception in practical form is entitled to any improvement thereon due to the mechanical skill of the employee, if, in doing the work, the employee goes further than mechanical skill enables him to do, and makes an actual invention, he is entitled to the benefit of his invention. *Robinson v. McCormick*, (1907) 29 App. Cas. (D. C.) 98; *McKeen v. Jerdone*, (1909) 34 App. Cas. (D. C.) 163.

Where a person has discovered an improved principle in a machine, manufacture, or composition of matter, and employs other persons to assist him in carrying out that principle, and they, in the course of experiments arising from that employment, make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the person who discovered the original improved principle, and may be embodied in his patent as a part of his invention. *Orcutt v. McDonald*, (1906) 27 App. Cas. (D. C.) 228.

**Hired inventor.**—In the absence of an express contract or agreement therefor, the relation of employer and employee, under whatever circumstances, at least short of a specific employment to make an invention, does not vest the employer with the entire property right in an invention of the employee, and to the patent monopoly thereof, or with anything more than the shop right or an irrevocable license to use the invention. *Pressed Steel Car. Co. v. Hansen*, (C. C. A. 1905) 137 Fed. 403, *affirming* (1904) 128 Fed. 444.

Defendant company, which was a manufacturer of carbons, employed complainant as a mechanical engineer on salary; a part of his duty being to devote his time and skill to the improvement and cheapening of the processes of such manufacture, an essential one of which was electroplating. While so employed, complainant invented a valuable process for electroplating, and a machine for carrying out the same, both of which he patented. Under his directions special buildings were made at defendant's works to accommodate seven of such machines, six of which were built and installed also under his direction, and a seventh was installed after his employment ended. It was held that while defendant did not become the owner of the patent, in the absence of an express agreement to that effect, it had an implied license to use the seven machines, and any replacement of them, together with the patented process, in the manufacture of carbons, so long as it continued in the business. *Barber v. National Carbon Co.*, (C. C. A. 1904) 129 Fed. 370.

Where a patent was applied for after the termination of an employment under a contract providing that the employee would execute any and all assignments in writing which might be deemed by the employer proper and necessary to transfer and vest in it the entire right, title, and interest to all inventions and discoveries made by the employee during the term of his employment, the patent vested in the employee, and the burden was on the employer to show by the weight of proof that the invention covered thereby was made by the employee during his employment. *Mississippi Glass Co. v. Franzen*, (1905) 138 Fed. 924.

Complainant was a corporation engaged in the manufacture of musical instruments, including organs, and defendant was its superintendent of factories and had made certain inventions relating to organs. A new contract was made between them by which, in consideration of an increased salary for a term of five years, it provided, in clause 2, that a one-half interest in all improvements or inventions made by defendant during the term "in or relative to organs, both keyed and automatic," should be assigned to complainant, and they should be patented at complainant's cost. By clause 4 it was provided that complainant should have the exclusive right to purchase and use improvements and inventions made by defendant during the term "in self-playing pianos or self-playing devices for playing pianos," on such terms as should be agreed upon. Defendant during the term made and patented certain inventions which were applicable alike to organs and self-playing pianos. It was held that such inventions were within the contract, and complainant was entitled to an assignment of a half interest therein, or a perpetual license to use the same without further payment, but only in so far as they related to organs, as expressed in the second clause of the contract. *Wright v. Vocalion Organ Co.*, (1906) 148 Fed. 209, 79 C. C. A. 183, *reversing* (1905) 137 Fed. 313.

The fact that a patentee, when he made the

invention of the patent, was general manager and a director of a corporation, does not give the corporation any right or interest in the patent, in the absence of an agreement therefor. *Johnson Furnace, etc., Co. v. Western Furnace Co.*, (C. C. A. 1910) 178 Fed. 819.

The property in letters patent, issued to an employee, on an invention, belongs to the employee to whom the patent issued, though it was the employee's duty to use his skill and inventive ability to further the interest of his employer by devising improvements generally in the appliances and machinery used in the employer's business. *American Circular Loom Co. v. Wilson*, (1908) 198 Mass. 182, 84 N. E. 133.

Where the inventor of a machine, after granting an exclusive license for the manufacture and sale thereof, was employed by the licensee to invent improvements, such improvements as were made while in the employ and at the expense of the licensee were the licensee's property. *Meisner v. Standard R. Equipment Co.*, (1908) 211 Mo. 112, 109 S. W. 730.

**Joint inventions.**—The fact that one of two joint patentees of a combination was the first to perceive the crude form of the elements and the possibility of their adaptation and composition to accomplish a useful result is not sufficient to overcome the presumption of joint invention arising from the granting of the patent. *Vrooman v. Penhollow*, (C. C. A. 1910) 179 Fed. 296.

**Separate parts by different inventors.**—The fact that another than the patentee contributed to the mechanism necessary to make the invention operative does not affect the validity of any claims of the patent which do not cover the mechanism so supplied, either as a whole or in combination. *Eastern Paper Bag Co. v. Continental Paper Bag Co.*, (1905) 142 Fed. 479.

When a claim covers a series of steps or a number of elements in a combination, the invention may well be joint, though some of the steps or some of the elements may have come as the thought of one. *Quincey Min. Co. v. Krause*, (C. C. A. 1907) 151 Fed. 1012.

**Distinct improvements by different inventors.**—Two persons cannot obtain a valid joint patent for different improvements on the same machine, invented by each separately, without the participation and knowledge of the other. *De Laval Separator Co. v. Vermont Farm Mach. Co.*, (1903) 126 Fed. 536.

**Combinations, etc., by different inventors.**—Where an art is crowded so that no pioneer patent exists, and many inventors construct machines, combinations, and improvements therein, each inventor is entitled to his own machine and improvements, so long as it differs from those of his competitors. *Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co.*, (C. C. A. 1909) 168 Fed. 271, *affirming* (1908) 157 Fed. 559.

## II. WHAT MAY BE PATENTED.

**Modification of patented device.**—A modification of the device of a patent to adapt it to different situations and wider use may be

made the subject of a second patent, where it involves invention, although both inventions may have been made at the same time. *Thomson-Houston Electric Co. v. Ohio Brass Co.*, (1904) 130 Fed. 542.

**Necessity of complete operative structure.**—A claim of a patent is not void because the element therein claimed does not by itself constitute a complete operative structure, where those familiar with the art would understand its use, and especially where the claim refers to the specification, which in such case may be looked to for the purpose of ascertaining the connection in which the device is used, and the other parts necessary to complete the structure and render it operative, although such parts cannot be imported into the claim. *Canda v. Michigan Malleable Iron Co.*, (C. C. A. 1903) 124 Fed. 486, *modifying* (1902) 123 Fed. 95.

**System of transacting business.**—A system of transacting business, disconnected from the means for carrying out the system, is not, within the most liberal interpretation of the term, an "art," and unless the means used are novel and disclose invention, such system is not patentable. *Hotel Security Checking Co. v. Lorraine Co.*, (C. C. A. 1908) 160 Fed. 467, *affirming* (1907) 155 Fed. 298.

**Art—form of contract.**—A form of proposed contract to be entered into with individuals desiring the benefit of burial insurance or guaranty, with blanks attached and readily separable therefrom, which, in addition to the ordinary draft for payment, show the several certificates required in order to provide, as far as practicable, against the perpetration of frauds on the insurer or guarantor, is not patentable as an art. *In re Moeser*, (1906) 27 App. Cas. (D. C.) 307.

**Process.**—It is when the term "process" is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means not nature's which are not effected by mechanism or mechanical combinations. *Cameron Septic Tank Co. v. Saratoga Springs*, (1907) 151 Fed. 242.

Where a metallurgical process consists, not simply in making use of certain natural properties of a deoxidizing agent such as aluminum, but in making use of them at a certain time, in certain quantities, and in a certain way, it cannot be objected, to a patent for such process, that it seeks to monopolize properties which are inherent and well known. *U. S. Mitis Co. v. Midvale Steel Co.*, (1904) 135 Fed. 103.

**Process or means of manufacture.**—The validity of a patent for a product or structure is not affected by the process or means by which it is made or whether it is made by hand or by machinery. *American Steel, etc., Co. v. Denning Wire, etc., Co.*, (C. C. A. 1909) 169 Fed. 413, *affirming* (1908) 160 Fed. 125.

**Process performed by machinery.**—Where an applicant has been allowed a patent for an apparatus or means for coaling ships at sea, and then claims a patent for the process of effecting the same purpose, but the alleged process cannot be conceived as independent of such apparatus, and calls for the apparatus

as the only means for carrying it into effect, and the process cannot be described without reference to the apparatus, the alleged process is not a true process, but is merely the function of the apparatus previously allowed for patent, is sufficiently covered by that allowance, and is not patentable. *In re Cunningham*, (1902) 21 App. Cas. (D. C.) 29.

**Tangible product of process.**—To support a process or method patent there must be a tangible product, or a change in character or quality brought about, and not simply a principle or result underlying or involved in certain mechanical or electrical means or steps. *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, (1905) 135 Fed. 785, *distinguishing* *Telephone Cases*, (1888) 126 U. S. 1, 8 S. Ct. 778, 31 U. S. (L. ed.) 863.

**Process and apparatus as single invention.**—A process and an apparatus, while presumptively independent inventions when considered in the light of this section, may be so connected in their design and operation as to constitute unitary invention. *In re Frasch*, (1906) 27 App. Cas. (D. C.) 25.

**Process involving mechanical operations.**—The patentability of process is not restricted to those involving chemical or other similar elemental action, but an invention or discovery of a process or method involving mechanical operations and producing a new and useful result is within the scope of this section. *Expanded Metal Co. v. Bradford*, (1909) 214 U. S. 366, 29 S. Ct. 652, 53 U. S. (L. ed.) 103, *reversing* (1906) 146 Fed. 984, 77 C. C. A. 230, and *affirming* (C. C. A. 1908) 164 Fed. 849.

**Undescribed "mechanism" to produce specified result.**—Where an inventor does not confine himself to any particular form of device, such as is shown in the specifications and drawings, but claims generally "mechanism" (without describing it) suitable for giving a certain simple mechanical movement, it amounts to a monopoly of every means for doing so which is not patentable. *Diamond Match Co. v. Ruby Match Co.*, (1904) 127 Fed. 341.

Where no concrete conception can be worked out of a claim for a mechanical patent, nothing, indeed, but an ill-defined principle of construction, the only key to which is the abstract result to be attained, it cannot be sustained. *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, (1905) 135 Fed. 785.

**Parts of machine patented as a whole.**—If the structure described in a patent be a complete and an operative one, composed of several coacting parts, and it is described and claimed and patented as a whole, especially when each part is separately described and claimed, no other valid patent can be issued to the inventor for one of those parts. *Thomson-Houston Electric Co. v. Black River Traction Co.*, (1903) 124 Fed. 495.

**Device not complete operative structure.**—A claim of a patent is not void because the element therein claimed does not by itself constitute a complete operative structure, where those familiar with the art would understand its use, and especially where the claim refers to the specification, which in such

case may be looked to for the purpose of ascertaining the connection in which the device is used, and the other parts necessary to complete the structure and render it operative, although such parts cannot be imported into the claim. *Canda v. Michigan Malleable Iron Co.*, (C. C. A. 1903) 124 Fed. 486, *modifying* (1902) 123 Fed. 95.

**Manufactures — advertising device.** — An advertising device made of cardboard is a manufacture, and patentable as such, if novel and involving invention. *Mitchell v. International Tailoring Co.*, (1909) 170 Fed. 91.

**Form of construction of room in house.** — A house, or a room in a house, is not a "manufacture," and therefore a particular form of construction of a room, or portion of a room, in a house, is not patentable. *American Disappearing Bed Co. v. Arnaelsteen*, (C. C. A. 1910) 182 Fed. 324.

**Different improvements as separate inventions.** — When the advance in an art is gradual, and many inventors form different combinations, or make different improvements, materially aiding the desired result, each is entitled to his own improvement, so long as it differs from those of his competitors and does not include theirs. *Mallon v. Gregg*, (1905) 137 Fed. 68, 69 C. C. A. 48, *affirming* (1903) 126 Fed. 377.

Although the various parts of a railroad car, such as the roof, the doors, the floor, the side construction, the draft rigging, etc., are related and co-operative to a certain extent, they are susceptible of improvement separately, and such improvements in these parts may constitute independent inventions and be patented accordingly. *McKeen v. Jerdone*, (1909) 34 App. Cas. (D. C.) 163.

**Principle, idea, etc.** — A principle is not patentable, and while there may be a valid patent for means or methods of putting principles into operation so as to produce useful results, there cannot be for nature's means and methods. *Cameron Septic Tank Co. v. Saratoga Springs*, (1907) 151 Fed. 242; *Expanded Metal Co. v. General Fireproofing Co.*, (1907) 157 Fed. 564; *American Steel, etc., Co. v. Denning Wire, etc., Co.*, (1908) 160 Fed. 108; *McKeen v. Jerdone*, (1909) 34 App. Cas. (D. C.) 163.

A mere operative idea or principle cannot be patented, and a mechanical device designed to accomplish certain practical results in the packing of explosive gelatin is therefore confined to the specific means employed for doing so. *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.*, (1908) 164 Fed. 47.

**Patent for function, etc.** — The mere function or operation of a machine or other device, as distinguished from the machine or device itself, is not patentable. The fact that the principle of a machine is required to be set out in the application does not make it the subject of a patent. *Denning Wire, etc., Co. v. American Steel, etc., Co.*, (C. C. A. 1909) 169 Fed. 793, *affirming* (1908) 160 Fed. 108. See also *In re White*, (1908) 31 App. Cas. (D. C.) 607.

**"Functions of a machine" defined.** — The phrase "functions of a machine," as used in the patent law, defined as that power or

property of the machine of acting in the specific manner designed or intended by its construction; in other words, that which the machine is designed to do, as distinguished from the machine itself, and from the product of its action on something external to itself. *Denning Wire, etc., Co. v. American Steel, etc., Co.*, (C. C. A. 1909) 169 Fed. 793, *affirming* (1908) 160 Fed. 108.

**Means of producing results generally.** — A patent cannot cover generally any and every means or method for producing a given result. *Denning Wire, etc., Co. v. American Steel, etc., Co.*, (C. C. A. 1909) 169 Fed. 793, *affirming* (1908) 160 Fed. 108.

**Function or result of operation of machine.** — A patent cannot properly issue for a result sought to be accomplished by the inventor of a machine, but only for the mechanical means or instrumentalities by which that result is to be obtained. *In re Gardner*, (1908) 32 App. Cas. (D. C.) 249.

**Product of old process.** — If a process is old and well known, the product of such process must likewise be considered as old in a patentable sense, and is not patentable as a separate and distinct invention. *Victor Talking Mach. Co. v. American Graphophone Co.*, (1906) 145 Fed. 189.

**Movement of machine.** — The movement of a machine irrespective of the mechanism which causes it is not patentable. *American Crayon Co. v. Sexton*, (C. C. A. 1905) 139 Fed. 564.

**New function for old machine.** — Where a party obtains a patent on an apparatus, he is entitled to all the analogous uses of which his apparatus is capable; and the discovery of a new and analogous function for an old machine is not patentable. *In re McNeil*, (1906) 28 App. Cas. (D. C.) 461.

### III. INVENTION.

**New mechanical forms.** — Inventors are not held to new mechanical forms or physical principles, but only to the new adaptation and application of those which are already at hand, but this adaptation is not shown by evidence that with the new light possessed old devices might possibly be made over to do the same thing. *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.*, (1908) 164 Fed. 47.

**Product as affected by method of manufacture.** — The validity of a patent for a product or structure is not affected by the process or means by which it is made, or whether it is made by hand or by machinery. *American Steel, etc., Co. v. Denning Wire, etc., Co.*, (1908) 160 Fed. 125.

**Invention in the sense of the patent law.** — Inventive discovery, under the patent law, involves the intelligent apprehension of relations not before recognized by others, although actually existing, followed by the conception of how they can be practically utilized. *Eck v. Kutz*, (1904) 132 Fed. 758.

**Necessity of invention.** — While it is the policy of the patent law to deal liberally with inventors, the courts will not grant a monopoly unless convinced that invention is in-

volved. *In re* Milans, (1908) 31 App. Cas. (D. C.) 269.

While in a close case involving the question of patentability utility may be given some consideration, the real question is whether there is such originality shown as to call for the exercise of the inventive faculty. *In re* Sherman, (1910) 35 App. Cas. (D. C.) 100.

Even though the point is not made in the proofs that the device does not disclose patentable invention, it is not to be disregarded when it is plain. *Wills v. Scranton Cold Storage Co.*, (1906) 147 Fed. 525, *affirmed* (C. C. A. 1907) 153 Fed. 181.

**Utility or evidence of invention.**—The utility of a device is not in itself evidence of patentable invention, although it is entitled to weight when that question is doubtful. *Union Biscuit Co. v. Peters*, (1903) 125 Fed. 601, 60 C. C. A. 337, *reversing* 120 Fed. 679.

The utility of a patented device is not necessarily a proof of invention. *Wills v. Scranton Cold Storage Co.*, (1906) 147 Fed. 525, *affirmed* (C. C. A. 1907) 153 Fed. 181.

**Correction of defects or rearrangement of parts.**—The result of the application of the common skill and experience of a mechanic, which comes from the habitual and intelligent practice of his calling, to the correction of some slight defect in a machine or combination, or to a new arrangement or grouping of its parts, tending to make it more effective for the accomplishment of the object for which it was designed, not involving a substantial discovery, nor constituting an addition to our knowledge of the art, is not within the protection of the patent laws. *Sloan Filter Co. v. Portland Gold Min. Co.*, (C. C. A. 1905) 139 Fed. 23.

**Beyond ordinary mechanical skill.**—Where only mechanical skill and experience are required to devise an improvement in a machine, such improvement is not patentable. *Gates Iron Works v. Overland Gold Min. Co.*, (1906) 147 Fed. 700, 78 C. C. A. 88; *In re Seabury*, (1904) 23 App. Cas. (D. C.) 377.

In view of the state of the art relating to combined funnels and valves, and in view of a former patent which shows a reversible funnel in combination with a valve, the using of the neck of a funnel as part of a plug valve to be opened by turning the funnel involves nothing more than the work of a skilled mechanic, and does not amount to invention. *In re Baker*, (1905) 26 App. Cas. (D. C.) 363.

Claims for a photographic film roll for daylight loading of a camera are void for lack of patentable invention in view of the prior art where merely ordinary mechanical skill is employed to adopt well-known devices and means to the accomplishment of a desired result, which had before been accomplished in substantially the same manner, by substantially the same means, though not in precisely the same combination. *Eastman Kodak Co. v. Anthony, etc., Co.*, (1905) 139 Fed. 36.

**Conception without mechanical embodiment.**—A conception alone, although first in time, is not patentable, but must be accompanied by mechanical embodiment, which, to make the invention patentable, must itself be unantic-

pated. *Voightmann v. Perkinson*, (C. C. A. 1905) 138 Fed. 56, *affirming* (1904) 133 Fed. 934.

**Conception obtained from another machine.**—A patent for a machine is not invalid because of the fact that the patentee obtained the general conception of the machine from another, but without disclosure of any means for carrying the same into effect, which means the patentee himself devised, and which constituted the only invention described and claimed in the patent. *Lincoln Iron Works v. W. H. McWhirter Co.*, (C. C. A. 1905) 142 Fed. 967, *affirming* (1904) 131 Fed. 860.

**Mere improvement.**—An improvement, to be patentable, must be shown to be the result of an act of invention, as distinguished from an act of applied skill, by those familiar with the state of the art. *In re Klemm*, (1903) 21 App. Cas. (D. C.) 186.

An improvement of guaranty credit books by adding to the arrangement of similar books for which former patents had been granted other columns for the purpose of keeping an account of items not provided for in such previously patented forms, does not involve invention. *In re Taylor*, (1908) 31 App. Cas. (D. C.) 529.

**Improvement overcoming previous difficulties.**—Where a patent has been granted to an inventor for an improvement on a familiar article of simple mechanism, and such improvement, although it afterwards seems simple and unimportant, overcomes difficulties and objections, however slight, that have been endured by the public for a long time, and that others have made numerous efforts to overcome, without complete success, while the patented article has gone into immediate use, the patent will, as a rule, be upheld by the courts as disclosing invention. *Albright v. Langfeld*, (1904) 131 Fed. 473.

**Superiority or excellence of workmanship.**—Granulated coffee is not patentable as an article of manufacture merely because the process used may produce granules which are more uniform and attractive in appearance than those otherwise produced. *Baker v. F. A. Duncombe Mfg. Co.*, (1906) 146 Fed. 744, 77 C. C. A. 234.

**Economy of manufacture.**—An improvement in a mechanical process which results in increased rapidity of manufacture, and consequent cheapening in cost of the article, does not for that reason alone disclose invention, where the steps in the process remain the same; the only difference being in the relative extent to which certain of such steps are carried. *Kahn v. Starrells*, (1904) 131 Fed. 464.

**Mere mechanical adjustment.**—“Means for holding in and out of operative position” a part of a machine are so common in the arts that there can be no invention in such means, except in the details thereof, unless under exceptional circumstances. *U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co.*, (C. C. A. 1903) 125 Fed. 378, *affirming* 122 Fed. 470.

**New application of prior knowledge.**—A patent will not be issued for an improvement which is merely a new application of knowledge already possessed by those skilled

in the art. *In re Klemm*, (1903) 21 App. Cas. (D. C.) 186.

**Application of device to different phases of art.**—Photography and blue printing are simply different phases of the art of light printing, and the mere transfer of a device used in one to the other does not involve patentable invention. *Elliott v. Youngstown Car Mfg. Co.*, (C. C. A. 1910) 181 Fed. 345, *reversing* (1909) 173 Fed. 315.

**Particular application of old device or process.**—It being old to glaze fixed metal sash with wire glass and to use fusible links in places where any weight, such as a door, a valve, wires, shutters, or any other thing is to be kept suspended, until, on the breaking out of a fire, the same is closed by the action of heat, there was no invention in so glazing a pivoted sash, nor in using a fusible link to hold in an open position an automatically closing sash, more especially when it was old to hold such a sash open by means of a cord described in the patent to be the equivalent of a fusible link. *Voightmann v. Weis, etc.*, Cornice Co., (1904) 133 Fed. 298.

It being old to vulcanize a rubber sole to the outer leather sole of a shoe, and old to vulcanize a rubber sole to the inner sole, there is no invention in vulcanizing a rubber sole directly to the inner sole of a particular kind provided with a welt. *In re Butterfield*, (1904) 23 App. Cas. (D. C.) 84.

**Good selection from known materials.**—The mere selection of one substance from among a number as the active agent in a chemical process may involve patentable invention. *Naylor v. Alsop Process Co.*, (C. C. A. 1909) 168 Fed. 911.

**Material for particular use capable of other uses.**—Where a patent for a material to be used for a stated purpose involved invention, it is not necessarily rendered invalid by the fact that the patentee also suggests its use for a different purpose, for which alone it would not be patentable. *Forsyth v. Garlock*, (1906) 142 Fed. 461, 73 C. C. A. 577.

**New metallurgical process.**—The fact that a large number of processes for the separation of aluminum from its ores were patented, in all of which external heat was used to fuse the ore, and maintain it in a fused state, some of the applications having been made after that of Bradley, on which patent No. 468,148 was issued, for a process, now exclusively used, in which both fusion and electrolysis were produced by the same electric current, is persuasive evidence that it involved invention. *Electric Smelting, etc., Co. v. Pittsburg Reduction Co.*, (C. C. A. 1903) 125 Fed. 926, *modifying* (1901) 111 Fed. 742.

**Degree of inventive skill.**—Where a patent discloses invention in some degree, the courts are not called upon to measure it by an exacting standard. *Valvona v. D'Adamo*, (1905) 135 Fed. 544.

**Simplicity or obviousness of device or process.**—The patentability of a process is to be determined by its effect. However simple, it may disclose invention if it produces an improved result. *U. S. Mitis Co. v. Midvale Steel Co.*, (1904) 135 Fed. 103; *Hancock v. Boyd*, (1909) 170 Fed. 600; *Beryle v. San*

*Francisco Cornice Co.*, (1910) 181 Fed. 692; *Kellogg Switchboard, etc., Co. v. Dean Electric Co.*, (C. C. A. 1910) 182 Fed. 991, *affirming* (1908) 168 Fed. 549; *Doble v. Pelton Water Wheel Co.*, (1910) 186 Fed. 526.

Claims for a patent for a device for regulating both the quality of the mixture of air and gas in a gas engine, and the quantity of the mixture supplied to the engine, which would otherwise be void for anticipation, are not saved by including in the combination some one of the old forms of automatic governor to actuate the quantity regulating valve, which is too obvious a step in the art to involve invention, such valves having been long in use for the same purpose on steam engines. *Press Pub. Co. v. Westinghouse Mach. Co.*, (1905) 135 Fed. 767, 68 C. C. A. 469, *reversing* (1904) 127 Fed. 822.

*Seem*, that, where several persons contemporaneously apply for patents for the same device, the fact that they caught the idea at the same time goes to show that it was simple and obvious, and that it did not require inventive genius to produce it. *Elliott v. Youngstown Car Mfg. Co.*, (C. C. A. 1910) 181 Fed. 345, *reversing* (1909) 173 Fed. 315.

That an improvement on a patented device, made by its inventor, may have seemed simple or obvious to him, and may to others after it was made, does not necessarily show that it involved only mechanical skill nor deprive him of the right to a patent therefor; the test of mechanical skill not being measured by the skill of the original inventor, but by that of mechanics who stand in the ordinary relation to the invention. *National Malleable Casting Co. v. American Steel Foundries*, (1910) 182 Fed. 626.

An alleged improvement in the process of forming pill mass into pills, consisting of feeding the pill mass to an old rolling machine in a different manner—that is, by cutting the pipe into uniform parts before feeding them to the rolling machine, so as to reduce the supply—is not patentable. *In re Colton*, (1902) 21 App. Cas. (D. C.) 17.

A device for protecting low-tension circuits, such as telegraph, telephone, and fire alarm, from injurious effects of unduly strong currents such as those carried by power and lighting circuits, belongs to the class of simple devices. *Rolfe v. Hoffman*, (1905) 26 App. Cas. (D. C.) 336.

**Similarity to other devices.**—Resemblances here and there between the means employed in a patented device and those of prior patents do not negative invention in the later combination. *National Malleable Casting Co. v. American Steel Foundries*, (1910) 182 Fed. 626.

**Change of size or proportion.**—A mere increase in the size, weight, or strength of a device so as to adapt it to an analogous use, although in a different art, is not invention. *Fitzgerald Meat Tree Co. v. Morris*, (1906) 142 Fed. 763.

An increase in the size of an existing device more completely to fulfil its purpose does not constitute patentable invention.

*Streit v. Kaiper*, (C. C. A. 1906) 143 Fed. 981.

The Schweichler patent, No. 615,500, for a coat pad, is void for lack of invention; the only feature of the device which the patentee is entitled to claim as original, in view of his acquiescence in the rejection of prior claims by the patent office, being a shoulder extension integral with the pad, which does not constitute a true combination in connection with the old part, but merely its enlargement or the uniting in one of two parts which had previously been sewed together. *Schweichler v. Levinson*, (1906) 147 Fed. 704, 78 C. C. A. 92.

The fact that an applicant for a patent for a process for making formic aldehyde has in his possession an apparatus suitable for the production of formic aldehyde in the manner set forth in his specification, in larger quantities than any apparatus set forth in existing patents, has no bearing on the patentability of his process, so long as the process and the results obtained are the same in each instance. *In re Blackmore*, (1909) 33 App. Cas. (D. C.) 434.

**Changes in degree, proportion, or symmetry** in a machine, where it does the same thing in the same way and by substantially the same means, although it may produce better results, do not amount to patentable invention. *Torrey v. Hancock*, (C. C. A. 1910) 184 Fed. 61, *reversing* (1909) 170 Fed. 600.

**Varying proportions of constituents of alloy.**—A mere difference in the proportions of the constituents of an alloy, however useful the result may be, does not entitle the originator to the monopoly of a patent, where such result was reached gradually by continued experimentation by the patentees and by others, all leading toward the same proportions, and the final product differs from those of the prior art only in degree. *Brady Brass Co. v. Ajax Metal Co.*, (C. C. A. 1908) 160 Fed. 84, *reversing* (1907) 155 Fed. 409.

**Old idea carried forward.**—The mere carrying forward or extended application of an old idea or thought is not invention, even though it results in improvement in degree. *Voightmann v. Weis, etc.*, *Cornice Co.*, (1904) 133 Fed. 298; *Sloan Filter Co. v. Portland Gold Min. Co.*, (C. C. A. 1905) 139 Fed. 23; *Yost Electric Mfg. Co. v. Perkins Electric Switch Mfg. Co.*, (C. C. A. 1910) 179 Fed. 511; *Neureuther v. Mineral Point Zinc Co.*, (C. C. A. 1910) 179 Fed. 850; *In re Klemm*, (1903) 21 App. Cas. (D. C.) 186; *In re Faber*, (1908) 31 App. Cas. (D. C.) 531.

**Improvements defined.**—"Invention," in the nature of improvements, is the double mental act of discerning, in existing machines, processes, or articles, some deficiency, and pointing out the means of overcoming it. *General Electric Co. v. Sangamo Electric Co.*, (C. C. A. 1909) 174 Fed. 246.

**Improvement marking advance in art.**—A patent for improvements in turning lathes shows intention where the applicant had produced a much lighter and simpler device, dispensing with the guide bar of the old construction, and had embodied an idea never

before given form and marking an advance in the art. *In re Sheldon*, (1908) 31 App. Cas. (D. C.) 201.

**Mere mechanical additions.**—Where, in an interference proceeding involving an improvement in racks for supporting fire hose, the idea of a telescoping arm which would receive the links as the hose was pulled from the rack constituted the invention, and it appeared that the original device constructed by one of the parties was not provided with means for preventing such arm from being completely drawn out of its socket, and that an unusual or very sudden pull of the hose from the rack would disconnect the arm and defeat the real purpose of the invention, and to remedy this defect the inventor put a headless set screw or pin in the arm to hold the latch permanently in place, it was held that the set screw was a mere mechanical addition to the device and obvious to any one skilled in the art, and that its absence did not prevent the original test from constituting a reduction to practice. *Howard v. Bowes*, (1908) 31 App. Cas. (D. C.) 619.

**Change of form, etc.**—It is not patentable invention to improve an article merely by changing the form, proportion, or degree. *Rumford Chemical Works v. New York Baking Powder Co.*, (1903) 125 Fed. 231; *General Electric Co. v. Yost Electric Mfg. Co.*, (1904) 131 Fed. 874; *Sloan Filter Co. v. Portland Gold Min. Co.*, (C. C. A. 1905) 139 Fed. 23; *Van Epps v. United Box Board, etc., Co.*, (C. C. A. 1906) 143 Fed. 869, *reversing* (1905) 137 Fed. 418; *In re Heinz*, (1909) 34 App. Cas. (D. C.) 187.

A patent for a metal piling made in interlocking sections cannot be sustained alone because the form of the sections and interlocking parts is such that they can be rolled from steel, whereas those of the prior art, while similar in principle of operation, could not be so made, where the patent does not claim such advantage nor mention the material or method of making and the device has never been manufactured or entered into commercial use. *Harder v. U. S. Steel Piling Co.*, (1906) 149 Fed. 434.

Making one of two coacting parts stationary and the other movable, where before the first had been movable and the second stationary, does not amount to invention. *Duner Co. v. Grand Rapids R. Co.*, (C. C. A. 1909) 171 Fed. 863.

**Mere modifications.**—A patent should not be granted where the alleged invention is a mere modification of the principles involved in former inventions or discoveries. *In re Faber*, (1908) 31 App. Cas. (D. C.) 531.

**Changing form with new result.**—The Brill patent, No. 627,898, for a pivotal truck for electric street cars, the essential purpose of the invention being to provide an improved flexible spring connection between the truck frame and the car bolster, designed to relieve the car body from shock or jar, covers a true combination, in which the several elements, though old, separately considered, co-operate to produce a new and useful result, and discloses patentable invention. *Brill v. North Jersey St. R. Co.*, (1903) 124 Fed. 778.

**Change in location and arrangement of parts.**—A patent for an improvement in a machine which is a combination of mechanical elements adapted to the production of a mechanical result cannot be sustained on the ground alone that because of the changes made in the arrangement of the parts the machine may be more cheaply made. *Greist Mfg. Co. v. Parsons*, (C. C. A. 1903) 125 Fed. 116.

**Rearrangement of parts.**—Where a change in the relative location of the various elements of an apparatus is nothing more than would suggest itself to a skilled mechanic having in view the conditions and conveniences of the different places in which the construction and use of the apparatus may be desired, an application for a patent will be rejected. *In re Garrett*, (1906) 27 App. Cas. (D. C.) 19.

**Merely adjustment of parts.**—Merely making the parts of a machine adjustable with respect to each other does not constitute invention, but is within the ordinary ingenuity of a skilled mechanic. *Smyth Mfg. Co. v. Sheridan*, (1906) 149 Fed. 208, 79 C. C. A. 166.

**Invention by substituting material.**—The mere simplification of a mechanical device, when of a substantial character, by the elimination of parts which have long been in use, and are expensive and burdensome in character, may amount to invention. *Dececo Co. v. George E. Gilchrist Co.*, (1903) 125 Fed. 293, 60 C. C. A. 207.

The mere substitution for one material of another known to possess the same qualities, though not in the same degree, is not patentable, even though better results are secured; and this is the case, although what preceded rests alone in public knowledge, and not upon patent. *Sloan Filter Co. v. Portland Gold Min. Co.*, (C. C. A. 1905) 139 Fed. 23; *American Acetylene Burner Co. v. Kirchner*, (C. C. A. 1905) 142 Fed. 745, *affirming* (1904) 131 Fed. 94, *judgment affirmed on rehearing* (C. C. A. 1906) 147 Fed. 253; *Cover v. American Thermo-Ware Co.*, (1911) 188 Fed. 670.

The Hogan patent, No. 752,903, for a dredge for salt or pepper, having the cap made of celluloid, is void on its face for lack of patentable invention; there being no invention in the substitution of celluloid, the qualities of which were well known, for other materials previously used for making such caps. *Hogan v. Westmoreland Specialty Co.*, (1906) 145 Fed. 199.

It is not invention to substitute rubber for an unyielding material in the construction of interlocking tiles for floors, walls, or the decks of ships, to enable the covering to respond to strains more quickly, readily, and safely; such result being due solely to the elasticity and resiliency of the material, which is a well-known quality of rubber. *New York Belting, etc., Co. v. Sierer*, (1907) 149 Fed. 756.

While the substitution of one material for another is not as a rule patentable, there may be invention in substituting a different metal in one member of a device where both were

previously made of the same, when by the union of the two metals certain hitherto imperfectly attained results are accomplished. *Western Tube Co. v. Rainear*, (1907) 156 Fed. 49.

The Hogan patent, No. 752,903, for a dredge for salt or pepper, having a celluloid cap, was not anticipated and discloses invention, as applied to a dredge for salt, although the only new feature of the device is the substitution of celluloid for other materials previously used in making the cap; it being shown that celluloid possesses a property which prevents the salt from absorbing moisture and becoming caked. *Hogan v. Westmoreland Specialty Co.*, (1908) 163 Fed. 289.

**Simplicity by omitting element.**—The mere simplification of a mechanical device, when of a substantial character, by the elimination of parts which have long been in use, and are expensive and burdensome in character, may amount to invention. *Dececo Co. v. George E. Gilchrist Co.*, (C. C. A. 1903) 125 Fed. 293.

Merely making in one piece what was before made in two does not constitute patentable invention, nor does it because of the fact alone that the one-piece device is cheaper or more durable, when such results are merely such ordinary consequences of dispensing with joints as would naturally be anticipated by a workman. *General Electric Co. v. Yost Electric Mfg. Co.*, (C. C. A. 1905) 139 Fed. 568.

Where a prior patent shows a rubber sole vulcanized to the inner sole, with an interposed layer of rubber-coated cloth, the omission of the cloth does not involve invention but mere mechanical skill. *In re Butterfield*, (1904) 23 App. Cas. (D. C.) 84.

**Omitting both parts and functions.**—Even though a prior machine was capable of being made to operate in the same way as that of the complainant by discarding certain devices, but it was not arranged to do so, it cannot be said that the difference between the two consists merely in the rejection of useless and functionless parts, which involves no invention; the devices dispensed with having a specific function as employed, and being rendered unnecessary only by the substitution of that by which they were made so, and it having remained to the complainant to perceive and develop this possibility, which was not recognized by the author of the prior machine, although a skilful inventor. *Eck v. Kutz*, (1904) 132 Fed. 758.

**Substantial equivalents.**—A device in one mechanism, to be the equivalent of the device in another, must perform the same function and perform it in substantially the same manner. *American Can Co. v. Hickmott Asparagus Canning Co.*, (1905) 137 Fed. 86.

**One element performing functions of three.**—Where three separate elements in a patented device, each performing an individual function, are supplanted in another device by a single element which itself performs the functions of all three, the threefold capacity of the single element is not the equivalent of the three separate elements. *Lambert Hoisting Engine Co. v. Lidgerwood Mfg. Co.*, (C. C. A. 1907) 154 Fed. 372, *modifying* 150 Fed. 364.



The test of equivalency with respect to a substituted element in a patented combination is whether it operates in substantially the same way to produce substantially the same result in the combination. *Palmer v. Jordan Mach. Co.*, (1911) 186 Fed. 496.

**Substitution of equivalents.**—The doctrine of equivalents may be invoked for other than pioneer patents, the range of equivalents depending on and varying with the degree of invention. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, (1908) 210 U. S. 405, 28 S. Ct. 748, 52 U. S. (L. ed.) 1122, *affirming* (1906) 150 Fed. 741.

The substitution in a machine of a common drive shaft for other methods of driving is too familiar in the mechanical arts to constitute invention, under ordinary circumstances. *U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co.*, (1903) 125 Fed. 378, 60 C. C. A. 244, *affirming* 122 Fed. 470.

Invention may exist in substituting a new and different operating part in a machine, notwithstanding it does not constitute such an advance in the art as to lead the owner of the patent to discard old machines and use those of the patent. It may be enough that the substitution addresses itself to any considerable portion of the community and creates an opportunity for electing between different methods. *Eastern Paper Bag Co. v. Continental Paper Bag Co.*, (1905) 142 Fed. 479.

The Force patent, No. 705,228, for a handle for a type block, consisting of a metallic handle with two flanges at the lower end having gripping edges, between which is held a rubber type block, the claimed invention being in the use of the flanges, instead of glue or cement, to fasten the rubber block to the handle, is void on its face for lack of invention. *Kuhn v. Lock Stub Check Co.*, (1907) 157 Fed. 235.

The Wiggins patent, No. 623,933, for a bowling alley having a concave side trough or gutter, discloses novelty, but is void for lack of invention, being merely the substitution of one common form of construction for another, the function remaining the same, and the substituted form having previously been similarly and suggestively used in other structures, and without any extraordinary, even if of a fair, degree of merit. *Brunswick-Balke-Collender Co. v. Rosatto*, (1908) 159 Fed. 729.

The substitution of a cam for a toggle joint in a patented mechanical combination does not avoid infringement, where the two have the same purpose in the combination and effect it in substantially the same manner. *Westinghouse Electric, etc., Co. v. Cutter Electric, etc., Co.*, (C. C. A. 1909) 169 Fed. 634.

The use in a patented device of a screw to fasten together two parts instead of a rivet used in prior devices, for the purpose of making them more readily detachable, is but the substitution of a well-known mechanical equivalent and does not amount to invention. *Boss Mfg. Co. v. Thomas*, (C. C. A. 1910) 182 Fed. 811.

Where, in a rock crusher, the combination

of a crusher shaft, a core portion removably secured thereto, and a mantle portion removably secured to the core portion, is concededly unpatentable, the attachment of a pin and slot-fastening device of a former patent, to retain the mantle on the core, is mere double use, and also an obvious substitution of substantial equivalents. *In re Thurston*, (1905) 26 App. Cas. (D. C.) 315.

The substitution for an old element, in a combination, of an element performing a similar function, but constructed in a different way, does not render the combination itself patentable where there is no resultant change in the operation. In such a case, although the substituted element may be superior, the invention lies in the element, and not in the combination. *In re Hawley*, (1905) 26 App. Cas. (D. C.) 324.

A mere carrying forward of new or more extended application of the original thought; a change only in form, proportions, or degree; the substitution of equivalents; doing substantially the same thing in the same way, by substantially the same means, with better results—is not such invention as will sustain a patent. *In re Hodges*, (1907) 28 App. Cas. (D. C.) 525.

In a pitless wagon scale, the substitution of commercially rolled channels having separable brackets—that is, brackets fastened by bolts—for the cast-iron channels with integral cast brackets of a previously granted patent, does not involve patentable invention, although the change enhances the utility of the device. *In re Orcutt*, (1909) 32 App. Cas. (D. C.) 345.

In an improved sink or shelf bracket having its brace bar pivoted so that it can be swung out of the way of tools used in putting the bracket in place, a mere change from the manner called for by a previously granted patent of securing the brace to accomplish the same result does not involve invention, but mere mechanical skill. *In re Berger*, (1909) 32 App. Cas. (D. C.) 358.

Attaching a pipe leading from a vacuum cleaner to the conduit supplying air, to the air and fuel mixing means of an internal combustion engine, or, in other words, substituting the pump of the engine for the separate air pump of the cleaner, is not invention, although the substitution is ingenious. No different function is performed. *In re Noyes*, (1910) 35 App. Cas. (D. C.) 107.

**Mechanical equivalent defined.**—The term "mechanical equivalent" has a narrow and restricted meaning in the construction of a patent for a slight improvement, and in the interpretation of patents which fall between a pioneer patent and a slight improvement its meaning is proportioned to the advance which the invention under consideration evidences. *Mallon v. Gregg*, (1905) 137 Fed. 68, 69 C. C. A. 48, *affirming* (1903) 126 Fed. 377.

The term "mechanical equivalent," as used in the law of patents, means that each of the ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function, if that was well known as a proper

substitute for the one described in the specification at the time of the patent. *American Steel, etc., Co. v. Denning Wire, etc., Co.*, (1908) 160 Fed. 108.

**Equivalent for combination.**—The doctrine of equivalents applies to patents for a combination, although the measure of its effect in the particular case depends on the position of the patent in the art to which it relates. *Sloan Filter Co. v. Portland Gold Min. Co.*, (C. C. A. 1905) 139 Fed. 23.

**Reasonable range of equivalents.**—A patent for an invention which is neither primary nor a slight improvement on the prior art, but possesses substantial patentable novelty, covers a reasonable range of equivalents. *Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co.*, (C. C. A. 1908) 163 Fed. 950.

**Combination patent limited by use of old elements.**—Where a patent covers a combination of old elements, and none of the prior inventors exhibits or suggests any co-operation of the elements on the principle adopted by the later patent, or on any principle adapted to serve the same purpose, the use of the old elements may limit, but cannot defeat, the patent. *Imperial Bottle Cap, etc., Co. v. Crown Cork, etc., Co.*, (C. C. A. 1905) 139 Fed. 312, *reversing* (1903) 123 Fed. 669.

**Necessity of co-operation.**—Where a device described in a claim of a patent as an element of a combination in a machine does not co-operate mechanically with the other parts, but acts separately—as a mechanism operated by a hand lever to lift another part out of position when the machine is stopped—the claim is for a mere aggregation, and not a patentable combination. *Diamond Match Co. v. Ruby Match Co.*, (1904) 127 Fed. 341.

It is not necessary to a valid combination that all the parts should co-operate all the time, but it is enough that in the normal and progressive use of the machine they do so some of the time. *Sanders v. Hancock*, (C. C. A. 1904) 128 Fed. 424.

To constitute a patentable combination of old elements, they must co-operatively perform a different function from what they did before, unless it is shown that, in the combination as applied to a machine or device in its entirety, a new and useful result is produced. *Elliott-Fisher Co. v. Donning*, (1909) 171 Fed. 96.

**Sufficient co-operation.**—The Brill patent, No. 627,898, for a pivotal truck for electric street cars, the essential purpose of the invention being to provide an improved flexible spring connection between the truck frame and the car bolster, designed to relieve the car body from shock or jar, covers a true combination, in which the several elements, though old, separately considered, co-operate to produce a new and useful result, and discloses patentable invention. *Brill v. North Jersey St. R. Co.*, (1903) 124 Fed. 778.

**Test of patentable combination.**—The test as to whether a device is a patentable combination or a mere aggregation of parts having no combined action is whether there is a new unitary result to the production of which the different elements co-act; and where this appears it is immaterial that there are different

steps in the operation to which the different parts are successively addressed. It is not necessary that the article manufactured shall be produced at a single stroke, in which all the elements are involved. *Novelty Glass Mfg. Co. v. Brookfield*, (C. C. A. 1909) 170 Fed. 946, *affirming* (1908) 170 Fed. 830.

**Combination.**—Where the elements in a new organization co-operate to produce a single practical and useful result, it constitutes a combination, whether they act simultaneously or successively. *National Tube Co. v. Aiken*, (C. C. A. 1908) 163 Fed. 254, *affirming* (1907) 157 Fed. 691.

**Combination of old processes.**—The Cameron, Commin, and Martin patent, No. 634,423, for a process of and apparatus for treating sewage, is void for lack of invention, in view of the prior art. The process claims for liquefying sewage by anaerobic action are for an aggregation of three separate and successive processes, two of which were old, and the other a process of nature not patentable, and which had, moreover, been previously discovered and utilized by others. The apparatus claims, which cover a settling tank, a septic tank, and an aerator, disclose nothing which was not known and used in the prior art, except, perhaps, an improvement in the outlet of the septic tank, which involved no invention. *Cameron Septic Tank Co. v. Saratoga Springs*, (1907) 151 Fed. 242.

**New combination producing new result.**—A new combination of old elements, so made as to produce a new result, and to accomplish a purpose long sought to be accomplished, but in which all others have failed, by making a completed structure which is useful and valuable and superior to all those of the prior art, constitutes invention. *Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co.*, (1903) 124 Fed. 514; *Lowrie v. H. A. Meldrum Co.*, (1903) 124 Fed. 761; *Thomson-Houston Electric Co. v. Ohio Brass Co.*, (1904) 129 Fed. 378; *Louden Machinery Co. v. Janesville Hay Tool Co.*, (1905) 141 Fed. 975; *American Steel, etc., Co. v. Denning Wire, etc., Co.*, (1908) 160 Fed. 108, *affirmed* (C. C. A. 1909) 169 Fed. 793; *In re Klemm*, (1903) 21 App. Cas. (D. C.) 186; *In re Hill*, (1905) 26 App. Cas. (D. C.) 318.

If a new combination and arrangement of known elements produces a new and beneficial result never attained before, it is evidence of invention, and such result need not be new and useful in a primary sense, but only approximately so. *Beryle v. San Francisco Cornice Co.*, (1910) 181 Fed. 692.

A patent for improvements in counter stools, used in stores, consisting chiefly of the use of a spring which automatically throws the seat over toward and under the counter when not in use, and a rest for the stool arm when in use, although combining old elements, produces a new and improved result, and discloses invention and novelty. *A. R. Milner Seating Co. v. Yesbera*, (1904) 133 Fed. 916, 67 C. C. A. 210.

While the mere assembling in a new organization of parts of old structures to perform the same functions in their new place that they did in the old is not invention, yet

where they are so taken, and are organized in a new and useful manner, so as to produce a more beneficial result, there may be invention; and where the combination displays the exercise of intuitive skill and genius beyond that possessed and exercised by those well skilled in the practice of the art, and the discovery is of something new and useful, invention should be recognized. *Western Electric Co. v. North Electric Co.*, (1905) 135 Fed. 79, 67 C. C. A. 553.

While the skull-cracking or metal-breaking art and the art of transporting finished iron products are somewhat analogous, the combination of a skull or metal cracking weight with a lifting magnet and a traveling crane is new, and the inventor of a device involving such a combination is entitled to a patent, where it appears that it is of great practical utility, and that, although there are patents from ten to twenty-three years old covering the use of magnets for lifting articles and lifting cranes for metal-breaking devices, no one ever combined the two. *In re Eastwood*, (1909) 33 App. Cas. (D. C.) 291.

**Prior device suggestive of new combination.**—A new combination of old elements is entitled to the protection of a patent, where it produces a new and useful result, although each old element as seen in a prior device may have been suggestive of the use which could be made of it in the new. *Steiner, etc., Hardware Co. v. Tabor Sash Co.*, (1910) 178 Fed. 831.

If ordinary mechanical skill is adequate to make the selection of elements from machines in the prior art and their union or combination in a new machine, operating in the old way and accomplishing the same result, although it may be an improved result, and no new idea is involved in the process, there is no patentable invention, however great the improvement. *American Laundry Machinery Mfg. Co. v. Troy Laundry Machinery Co.*, (1909) 171 Fed. 870.

**Patented device as element of combination.**—A prior patent for a device does not defeat a patent for a combination of which such device forms one of the elements. *Keystone Lantern Co. v. Spear*, (C. C. A. 1905) 136 Fed. 595, *reversing* (1904) 131 Fed. 879.

**New structure by readjustment of materials.**—Invention may be found in a new structure, involving a readjustment of materials in use, by which new beneficial results are brought about. *Edison Electric Light Co. v. Novelty Incandescent Lamp Co.*, (C. C. A. 1909) 167 Fed. 977, *reversing* (1908) 161 Fed. 549.

**New combination to accomplish old result.**—One who selects and combines elements from the inventions of others into a new structure adapted to accomplish the old result is entitled to a patent only for his own particular form of adaptation. *Loew Supply, etc., Co. v. Fred Miller Brewing Co.*, (C. C. A. 1905) 138 Fed. 886.

**New and useful result necessary.**—While it may not be possible to formulate a definition of a patentable combination of old elements which will in all cases distinguish it from a mere aggregation of the results of

the several elements of which it is constituted, it may be said that the effect produced by the combination must be new and useful, and not such as would suggest itself to the mind of an ordinarily intelligent person, experienced in the art to which the supposed invention relates. *L. A. Thompson Scenic R. Co. v. Chestnut Hill Casino Co.*, (C. C. A. 1904) 127 Fed. 698, *dismissing appeal* (1902) 119 Fed. 359; *Voightman v. Perkinson*, (1904) 133 Fed. 934; *Jacobs Mfg. Co. v. T. R. Almond Mfg. Co.*, (1909) 169 Fed. 134; *Gaines v. Alabama Consol. Coal, etc., Co.*, (1909) 173 Fed. 303; *Anton v. Grier Bros. Co.*, (C. C. A. 1911) 185 Fed. 796; *Fellows v. Borden's Condensed Milk Co.*, (C. C. A. 1911) 187 Fed. 1005, *affirming* (1910) 180 Fed. 421; *In re Davenport*, (1904) 23 App. Cas. (D. C.) 370; *In re Hill*, (1905) 26 App. Cas. (D. C.) 318.

The use of a ball and socket joint to accomplish the same purpose for which it had previously been used in the same art, in a different but old combination, does not constitute invention. *Bradley v. Eccles*, (C. C. A. 1906) 143 Fed. 521, *reversing* (1905) 138 Fed. 916.

**Merely bringing together old devices in a combination in which each performs its old function, without producing any new result by reason of the combination, is not invention.** *Self-Sealing Can Co. v. Hocker*, (1905) 136 Fed. 418; *D'Arcy v. Staples, etc., Co.*, (C. C. A. 1908) 161 Fed. 733; *Yost Electric Mfg. Co. v. Perkins Electric Switch Mfg. Co.*, (C. C. A. 1910) 179 Fed. 511; *Warner Instrument Co. v. Stewart, etc., Mfg. Co.*, (C. C. A. 1911) 185 Fed. 507.

There is no invention in selecting and putting together the most desirable parts of different machines in the same art, making a new machine in which each part operates in the same way as it did in the old, and effects the same result. *Rich v. Baldwin*, (1904) 133 Fed. 920, 66 C. C. A. 464.

The Thomson & Rice patent, No. 413,293, for a system of electrical distribution especially adapted to lighting purposes, and having for its objects to run lamps or other translating devices in series and in multiple on one and the same system, and from one and the same source of supply, embodies a combination or aggregation of elements, all of which were old, and each of which performs only its old function, and in view of the prior art, and especially of the Edison municipal system, is void for lack of patentable invention. *Salem Electric Co. v. Thomson-Houston Electric Co.*, (C. C. A. 1906) 144 Fed. 974, *reversing* (1905) 140 Fed. 445.

The coupling, without modification, of a motor that will run any kind of a machine to a machine that will run with any kind of a motor, is not patentable invention. *National Regulator Co. v. Powers Regulator Co.*, (C. C. A. 1908) 160 Fed. 460, *reversing* (1907) 152 Fed. 984.

The Morrow patent, No. 504,401, for an armature for dynamo electric machines, claim 2, which covers an armature core comprising layers of segmental laminæ dovetailed to an internal supporting shell, in which the seg-

held that that was not sufficient to show actual reduction to practice. *Paul v. Hess*, (1905) 24 App. Cas. (D. C.) 462.

**Construction of operative device as reduction to practice.**—While the construction of a full-size operative device may sometimes be regarded as reduction to practice, although it has been called a model, such a model, so called, must be quite different from the ordinary model, which, while it may show the invention, is incapable of operation to effect its purposes. *Hammond v. Basch*, (1905) 24 App. Cas. (D. C.) 469.

**Article made experimentally of inferior material.**—A lamp socket made of wood, which was successfully operated for the purpose for which it was constructed, is a reduction to practice, although the commercial article would be made of metal, or of some other substance more durable than wood; and it is immaterial that it was, during the interference proceeding, called a "model." *Norden v. Spaulding*, (1904) 24 App. Cas. (D. C.) 286.

**Want of perfect accuracy in voting machine.**—The primary and most essential requisite of a voting machine being that of unfailing accuracy, the building of such a machine that fails to register as often as once in one hundred times cannot be regarded as a successful reduction to practice, especially where it is not apparent that it was not due to some fundamental fault of the machine rather than to crude workmanship. *McKenzie v. Cummings*, (1904) 24 App. Cas. (D. C.) 137.

**The comparative crudeness of an original construction,** as contrasted with subsequent machines, is no ground for the refusal of the merit of operative success. *Smith v. Brooks*, (1904) 24 App. Cas. (D. C.) 75.

**Abandoned experiment.**—Where one of the parties, in an interference case, prior to the date of conception by his adversary, constructed a device of the nature of the issue, but threw it in the scrap heap, and afterwards made a larger device of the same kind, which he also discarded; and, although there was great demand for some such device, he did nothing to utilize his alleged conception, and only on reading the patent issued to his adversary did he recall having made some such device some years before; and thereupon, ten months after the issue of his rival's patent, he filed his application—his contrivance will be regarded as merely an unsuccessful, abandoned experiment. *Lemp v. Mudge*, (1904) 24 App. Cas. (D. C.) 282.

**Long delay in making use of an invention claimed to have been reduced to practice, or in applying for a patent,** tends to show that the alleged reduction to practice was nothing more than an unsatisfactory or abandoned experiment, especially where, in the meantime, the claimant has been engaged in prosecuting similar inventions. *Paul v. Hess*, (1905) 24 App. Cas. (D. C.) 462.

**Prior state of art.**—Where the field of invention has been narrowed by many prior devices in the same art, a patent for a new combination must be narrowly construed, and limited to the precise structure shown. *Ken-*

*ney Mfg. Co. v. J. L. Mott Iron Works*, (1905) 137 Fed. 431.

That a structure is within the terms of a patent does not establish infringement, but the scope of the patent must be determined from the state of the prior art. *Page Mach. Co. v. Dow*, (1908) 166 Fed. 473.

Where the question of invention is left to the jury in an action for infringement of a patent, no evidence tending to show the true state of the art at the date of the claimed invention should be excluded. *Holt Mfg. Co. v. Best Mfg. Co.*, (C. C. A. 1909) 172 Fed. 409.

In view of the state of the art of dyeing as disclosed by three patents referred to, it was held that applicants for a patent for a process of producing printed anilin-black designs on vegetable textile fabrics had done nothing more than to apply to two of the patented processes of printing the selection of a combination of the ingredients disclosed in the other patent, and that this did not amount to invention. *In re Chase*, (1908) 31 App. Cas. (D. C.) 154.

**Utility as evidence of invention.**—Where the utility of a machine which, by the combination of elements, accomplishes a new result, is not questioned, the invention is entitled to a much greater liberality of treatment than as if it dealt merely in specific improvements on an old machine. *Lecroix v. Tyberg*, (1909) 33 App. Cas. (D. C.) 586.

**Invention shown by new combination.**—Except in inventions of the most primary character new mechanical forms and appliances are not to be looked for, and there may be invention in making use of those which are known in the same or kindred arts by so adapting and combining them as to bring about new or improved results. *Cramer v. 1900 Washer Co.*, (1908) 163 Fed. 296.

**Reduction of cost.**—A machine need not produce an original result, but, if the new arrangement lessens the cost, there is evidence of invention. *National Tube Co. v. Aiken*, (C. C. A. 1908) 163 Fed. 254, *affirming* (1907) 157 Fed. 691.

**Increasing capacity of machine.**—*National Tube Co. v. Aiken*, (C. C. A. 1908) 163 Fed. 254, *affirming* (1907) 157 Fed. 691.

**Article made more attractive and salable.**—Obtaining a more attractive exterior, or securing a more salable article, does not prove originality of conception. *In re Hoey*, (1906) 28 App. Cas. (D. C.) 416.

**New application of old device to old art.**—The transfer of an old device to a new use in a different art may involve invention. *Hale, etc., Mfg. Co. v. Oneonta, etc., R. Co.*, (1903) 124 Fed. 514.

**Obtaining successful result.**—The fact that an invention constitutes an important and desirable improvement in an art, in the development of which many inventors have participated without making such improvement, affords persuasive evidence of patentability. *Brill v. North Jersey St. R. Co.*, (1903) 124 Fed. 778; *Revere Rubber Co. v. Consolidated Hoof Pad Co.*, (1905) 138 Fed. 899; *American Caramel Co. v. Mills*, (1906) 149 Fed. 743, 79 C. C. A. 449, *reversing* (1905) 138 Fed. 142;

O'Rourke Engineering Constr. Co. v. McMullen, (C. C. A. 1908) 160 Fed. 933, *reversing* (1907) 150 Fed. 338; Electric Controller, etc., Co. v. Westinghouse Electric, etc., Co., (C. C. A. 1909) 171 Fed. 83.

Where the question of invention is still left in doubt after the application of the usual negative tests to establish want of invention, such doubt may be resolved in favor of the patent by evidence of successful results where others had tried and failed, especially where such success is in both operative and commercial results. American Graphophone Co. v. Universal Talking Mach. Mfg. Co., (C. C. A. 1907) 151 Fed. 595, *reversing* (1906) 145 Fed. 636, 643; Novelty Glass Mfg. Co. v. Brookfield, (C. C. A. 1909) 170 Fed. 946, *affirming* (1908) 170 Fed. 830.

A machine for rolling prismatic glass previously made by molding, which contains the same elements and operates in precisely the same manner as prior machines for rolling corrugated glass, is not given patentability by the fact that it has been a commercial success and that its use has resulted in a better and cheaper product, where the only reason prism glass was not before so made was the general, but erroneous, belief among glass manufacturers that it would be worthless because it could neither be cut nor properly annealed. Daylight Glass Mfg. Co. v. American Prismatic Light Co., (C. C. A. 1905) 142 Fed. 454.

The conversion of an abandoned machine, which was a failure, into one which is operative and successful, by the introduction of new and ingenious features, however simple, constitutes invention, which may be protected by a patent. United Shirt, etc., Co. v. Beattie, (1907) 149 Fed. 736, 79 C. C. A. 442, *affirming* (1905) 138 Fed. 136.

The Bossert patent, No. 571,297, is for an improvement in electric wall boxes which are constructed with holes already made in the bottom and sides so as to accommodate the entrance of the conduits at any desired point; the holes being closed, however, in such manner that the workmen wiring the house can open such as are required without special tools, leaving the rest of the box imperforate. This had previously been done in various ways, as by partially cutting out the holes, leaving uncut connections, by weakening the part so it could be knocked out, or by covering the holes with stiff paper or fitting them with stoppers. The improvement of the patent consisted in cutting the holes with an ordinary punching die and forcing the cut-out portion back as a plug, where it is held by frictional contact, but may be readily punched out. Held that, although the punching process had been used for various other purposes, it had never before been applied to such boxes, and that, in view of the superior results attained by such construction, the improvement involved invention. Bossert Electric Constr. Co. v. Pratt Chuck Co., (C. C. A. 1910) 179 Fed. 385.

**General and extensive use.**—The fact that a patented device has come into general use because it can be made more cheaply than those previously in use is not sufficient to es-

tablish invention, unless in a limited class of cases, where that is otherwise doubtful. General Electric Co. v. Yost Electric Mfg. Co., (1904) 131 Fed. 874; Voightmann v. Weis, etc., Cornice Co., (1904) 133 Fed. 298.

The fact that the product of a machine made by a new combination of old elements goes into general use and displaces others is some evidence, of greater or less weight, that the new combination involved invention. Stafford v. Morris, (1908) 161 Fed. 113.

Apart from the presumption of novelty arising from the grant of a patent, where it is shown that the patented device has gone into general use and has superseded prior devices having the same purpose, it is sufficient evidence of invention in a doubtful case. Morton v. Llewellyn, (C. C. A. 1908) 164 Fed. 693; Boss Mfg. Co. v. Thomas, (C. C. A. 1910) 182 Fed. 811; *In re* Heinz, (1909) 34 App. Cas. (D. C.) 187.

The commercial success of a patented article can only be considered on the issue of invention, where such issue is in serious doubt. Diamond Rubber Co. v. Consolidated Rubber Tire Co., (1911) 220 U. S. 428, 31 S. Ct. 444, 55 U. S. (L. ed.) 527, *affirming* (1908) 162 Fed. 892, 89 C. C. A. 582; American Salesbook Co. v. Carter-Crume Co., (1903) 125 Fed. 499; Beckwith v. Malleable Iron Range Co., (1910) 174 Fed. 1001.

The utility, public acceptance, or magnitude of sales of a patented article can only be considered on the question of invention, when such question is otherwise doubtful. Voightmann v. Weis, etc., Cornice Co., (1906) 148 Fed. 848, 78 C. C. A. 538, *affirming* (1904) 133 Fed. 298.

The fact that a machine has met with instant favor and large sales may be sufficient to determine patentability in case of doubt thereof; but it cannot confer patentability on an unpatentable device. *In re* Thurston, (1905) 26 App. Cas. (D. C.) 315.

**Ability of mechanics.**—Simply raising a doubt as to whether a skilled mechanic, conversant with the art involved, would not have seen the means adopted in a patented device, does not rebut the presumption of invention arising from the grant of the patent. National Malleable Casting Co. v. American Steel Foundries, (1910) 182 Fed. 626.

**Rebutting presumption of invention.**—Where there is an actual and admitted improvement in a combination of old elements, and its utility is shown in a marked degree, there should be controlling reasons to rebut the presumption that there is a sufficiency of invention to support a patent. Imperial Bottle Cap, etc., Co. v. Crown Cork, etc., Co., (C. C. A. 1905) 139 Fed. 312, *reversing* (1903) 123 Fed. 669.

The fact that an expert, with a patent before him, might be able to build up the structure covered thereby, by selecting and adapting appliances theretofore known, does not overcome the presumption of invention arising from the granting of the patent, where neither the same combination in its entirety nor the same mode of operation had previously been described or known. McMichael, etc., Mfg. Co. v. Ruth, (1904) 128 Fed. 706,

63 C. C. A. 304, *reversing* (1903) 123 Fed. 888.

The fact that an invention was first operated by another than the patentee does not rebut the presumption of invention by him, arising from the granting of the patent, where both persons were present at the time of such operation and each claims to have been the originator of the experiment from which the invention sprang. *National Electric Signaling Co. v. De Forest Wireless Tel. Co.*, (1905) 140 Fed. 449.

Recognition of patent by public as evidence of invention. — *Elliott v. Youngstown Car Mfg. Co.*, (C. C. A. 1910) 181 Fed. 345, *reversing* (1909) 173 Fed. 315.

#### IV. UTILITY.

Utility essential to patentability. — *In re Klemm*, (1903) 21 App. Cas. (D. C.) 186.

Test of utility. — It is sufficient to sustain a patent for a valve against the objection of inoperativeness if the combination of parts shown forms a workable device when attached to a structure for which it was evidently intended. *Kenney Mfg. Co. v. J. L. Mott Iron Works*, (1905) 137 Fed. 431.

Demonstration of utility. — Where new devices are of an old type, and the novelty consists in specific construction, it may be that practical utility may be determined without use under conditions of industry; but, where the device is of a new type, there is need for demonstration of utility under the conditions of practical operation. *Paul v. Hess*, (1905) 24 App. Cas. (D. C.) 462.

Combination producing new result. — A new combination of two old elements, so as to make a new article, is patentable only when it results in producing a new and useful article, within the meaning of the patent law. *In re Klemm*, (1903) 21 App. Cas. (D. C.) 186.

Improved mechanism. — An improvement in mechanism for sawing stone, by which the saw is moved against the stone, which remains at rest during the operation instead of being fed to the saw, as in machines of the prior art, discloses patentable utility. *Diamond Stone Sawing Mach. Co. v. Brown*, (1904) 130 Fed. 896.

Capacity to produce result. — A patent for a device which states that a part is preferably made of a stated material is not rendered invalid by the fact that when such part is made of a certain other material the device is inoperative. *Kirchberger v. American Acetylene Burner Co.*, (1903) 124 Fed. 764, *affirmed* (C. C. A. 1904) 128 Fed. 599.

Better than other inventions. — A patented invention cannot be held in an infringement case to be patentable because commercially better than prior devices, especially in the absence of evidence to show that this has been recognized by the commercial world, or that the patented device has supplanted the prior device, or that it has gained any recognized position. *Computing Scale Co. v. Automatic Scale Co.*, (1905) 26 App. Cas. (D. C.)

235, *affirmed* (1907) 204 U. S. 609, 27 S. Ct. 307, 51 U. S. (L. ed.) 645.

Utility as evidence of invention. — The utility of a device is not in itself evidence of patentable invention, although it is entitled to weight when that question is doubtful. *Union Biscuit Co. v. Peters*, (C. C. A. 1903) 125 Fed. 601, *reversing* 120 Fed. 679.

Improving conditions of labor. — The contribution to an important industry of a device that is labor saving and effective, and relieves to a degree work under fierce heat conditions, is meritorious in the patent system, and rises to the plane of the humane. *J. L. Mott Iron Works v. Standard Sanitary Mfg. Co.*, (C. C. A. 1908) 159 Fed. 135.

Extensive sale or use. — On the question of the utility of a patented device or process, the fact that it was the first to achieve practical and commercial success is of weight. *Burdon Wire, etc., Co. v. Williams*, (1904) 128 Fed. 927.

The commercial success of a patented article can only be considered on the issue of invention, where such issue is in serious doubt. *American Salesbook Co. v. Carter-Crume Co.*, (1903) 125 Fed. 499.

Development of art. — The fact that an invention constitutes an important and desirable improvement in an art, in the development of which many inventors have participated without making such improvement, affords persuasive evidence of patentability. *Brill v. North Jersey St. R. Co.*, (1903) 124 Fed. 778.

Only slight evidence of utility required. — It requires only slight evidence of successful operation to avoid the defense of inoperativeness of a patented device. *Thayer v. Wold*, (1906) 142 Fed. 776, *affirmed* (C. C. A.) 148 Fed. 227.

Presumption as to operativeness of device. — It is a reasonable presumption, especially when corroborated by other evidence, that a person skilled in the manufacture of a product to the making of which his invention relates, before he filed an application for a process, made experiments to ascertain whether the desired results could be obtained. *Saunders v. Miller*, (1909) 33 App. Cas. (D. C.) 456.

Testing utility before applying for patent. — Caution in sufficiently testing the utility of an invention and establishing the value of a discovery before rushing into the Patent Office is to be commended rather than condemned. *Saunders v. Miller*, (1909) 33 App. Cas. (D. C.) 456.

Litigation as evidence of utility. — The utility of a patented device may be attested by the litigation over it. *Diamond Rubber Co. v. Consolidated Rubber Tire Co.*, (1911) 220 U. S. 428, 31 S. Ct. 444, 55 U. S. (L. ed.) 527, *affirming* (1908) 162 Fed. 892, 89 C. C. A. 582.

#### V. NOVELTY AND ANTICIPATION.

Novelty necessary. — *In re Klemm*, (1903) 21 App. Cas. (D. C.) 186.

A claim to a printing press is unpatentable, where it amounts to a mere duplication of

what is shown in the prior art and involves the production of no new result, save, perhaps, greater convenience. *In re Scott*, (1905) 25 App. Cas. (D. C.) 307.

**Pioneer patent.**—A pioneer patent is one which first discloses means to accomplish a certain result, and the term does not apply to a patent for new means to accomplish a result already attained in another way, although they may be an improvement on the old way. *National Dump Car Co. v. Ralston Steel Car Co.*, (C. C. A. 1909) 172 Fed. 393.

**Domestic and foreign patents.**—A United States patent will not be defeated by a prior foreign patent, unless it describes or shows the patented invention in such full, clear, and exact terms as to enable any person skilled in the art to practice it without the necessity of experimenting. *Valvona v. D'Adamo*, (1905) 135 Fed. 544.

**Accidental production.**—Anticipation is not avoided by the fact that the inventor of the anticipatory device, which he reduced to practice, did not realize its value, and so changed it before applying for a patent that the patented structure was not an anticipation. *Merrimac Mattress Mfg. Co. v. Feldman*, (1904) 133 Fed. 64.

Prior knowledge and use which will anticipate a later patent is not to be made out by a chance combination made without appreciation of the principle on which the patent is based. *Western Tube Co. v. Rainear*, (1907) 156 Fed. 49.

Although a new function appears in a machine made under a patent, if it was accidental, unrecognized by the patentee, and no disclosure thereof made to the public, it is not an anticipation of a subsequent patent. *Hillard v. Fisher Book Typewriter Co.*, (C. C. A. 1908) 159 Fed. 439, *affirming* (1907) 151 Fed. 34.

The fact that the method of a process patent had been previously used by another by chance, and without appreciating its merit or value, does not invalidate the patent. *Karfiol v. Rothner*, (1908) 165 Fed. 923.

A merely accidental occurrence, realizing the structure of a patent, not only not appreciated, but made the ground of rejection as an imperfection, is not an anticipation. *Edison Electric Light Co. v. Novelty Incandescent Lamp Co.*, (C. C. A. 1909) 167 Fed. 977, *reversing* (1908) 161 Fed. 549.

The mere accidental employment of a feature or element of a device, where its real value, for a purpose for which it is afterward put in use by another, is not recognized at the time of such accidental use, cannot be invoked to anticipate a patent for the later device. *Doble v. Pelton Water Wheel Co.*, (1910) 186 Fed. 526.

**Accidental discovery in working patented process.**—An expert cannot take a process patent, which has never been applied industrially, and work the process in his laboratory, and discover therefrom something which is not disclosed on the face of the patent, and then transfer that experience back to the time of the patent, and make it a part of the prior art, for the purpose of defeating a subsequent patent for a meri-

torious invention. *Naylor v. Alsop Process Co.*, (C. C. A. 1909) 168 Fed. 911.

**Unintended feature.**—A patent otherwise valid is not void for anticipation because a prior patent covers a device which might be so constructed as to be capable of the same use as that of the later patent, where the prior patent gives no sign that such use was contemplated, and no specific directions for such construction. *Canda v. Michigan Malleable Iron Co.*, (C. C. A. 1903) 124 Fed. 486, *modifying* (1902) 123 Fed. 95.

The accidental occurrence of an element or feature of a patented combination in prior structures, where its character and function as subsequently used were not recognized, does not constitute an anticipation. *Beckwith v. Malleable Iron Range Co.*, (1910) 174 Fed. 1001.

**Lost or forgotten invention.**—An invention which has been perfected by the construction of a machine, which was used in practical work for a number of years by the inventor and is still in his possession, and of which he had photographs taken, which he still preserves, does not lose its effect as an anticipation of a subsequent patent to another for substantially the same machine as one which has been finally abandoned and forgotten, although the inventor failed to realize the full value of the invention and after a time discontinued the use of the machine. *Buser v. Novelty Tufting Mach. Co.*, (C. C. A. 1907) 151 Fed. 478.

**Accessible to public.**—A prior use, in order to negative novelty in a later patented device, must be something more than an accidental or casual one, and must be so far understood and practiced or persisted in as to contribute to the sum of human knowledge and be accessible to the public, becoming an established fact in the art. *Anthracite Separator Co. v. Pollock*, (1909) 175 Fed. 108.

**Application as anticipation.**—An application for a patent filed prior to a patent in suit can have weight as an anticipation only if there has been some actual use of the invention, so that there are elements of publicity; the application itself not being sufficient to make the invention a part of the prior art. *Thomson-Houston Electric Co. v. Ohio Brass Co.*, (1904) 130 Fed. 542.

**Filing model as anticipation.**—While a model filed in the Patent Office will not, in itself, amount to an anticipation which will invalidate a subsequent patent to another, the word "model" as so used must be understood in its ordinary sense as meaning merely a pattern or representation, and not as meaning the actual machine or device of the invention. *American Writing Mach. Co. v. Wagner Typewriter Co.*, (C. C. A. 1907) 151 Fed. 576, *affirming* (1905) 138 Fed. 108.

**Sales in regular course of business.**—Where the inventor of a cigar pocket for more than two years before applying for a patent therefor made and sold such pockets in the regular course of his business, such articles were in "public use" and "on sale," although they were not kept by him in stock, but were made up only on orders received; it being the custom of the trade to take such orders by

sample. *Dittgen v. Racine Paper Goods Co.*, (1910) 181 Fed. 394. See also *McCreery Engineering Co. v. Massachusetts Fan Co.*, (1911) 186 Fed. 846.

**Concealed invention.**—Where a junior applicant concealed his invention for a short time, but soon gave it to the public in the way of the result of its operation, and showed it to his opponent early in the year following its reduction to practice by construction of an operative machine, such conduct is inconsistent with the theory of suppression of the invention, which will deprive him of his rights. *Meyer v. Sarfert*, (1902) 21 App. Cas. (D. C.) 26.

**Knowledge of inventor.**—Inventors must be charged with knowledge of devices disclosed in former patents, whether or not they have actual knowledge of such patents. *Millett v. Allen*, (1906) 27 App. Cas. (D. C.) 70.

A theory or mental conception of a new device is not "invention" within the patent law, and the date of an invention cannot be carried back of the time when it was embodied in a model or drawing, or some concrete form would enable those skilled in the art to construct the device. *Corrington v. Westinghouse Air Brake Co.*, (C. C. A. 1910) 178 Fed. 711, *reversing* (1909) 173 Fed. 69.

**Reduction to practice.**—In contemplation of law an invention does not exist until the inventor's ideas have been reduced to practical form, either as the basis for a patent or an anticipation of another's invention. *American Graphophone Co. v. Leeds, etc., Co.*, (C. C. A. 1909) 170 Fed. 327; *Gallagher v. Hien*, (1905) 25 App. Cas. (D. C.) 77; *Ocuppaugh v. Norton*, (1905) 25 App. Cas. (D. C.) 90.

The decisions involving the question of reduction to practice may be divided into three general classes, namely: (1) Those including devices so simple and of such obvious efficacy that a complete construction of one of a size and form intended for and capable of practical use is held sufficient without test in actual use. (2) Those where a machine embodying every essential element of the invention, having been tested and its practical utility for the intended purpose demonstrated to reasonable satisfaction, has been held to have been reduced to practice notwithstanding it may not be a mechanically perfect machine. (3) Those where the machine is of such a character that the particular use for which it is intended must be given special consideration and requires satisfactory operation in the actual execution of the object. In cases within the second and third classes, long delay in putting the machine in actual use for the intended purpose is a potent circumstance in determining whether the test was successful, or only an abandoned experiment. *Sydeinan v. Thoma*, (1909) 32 App. Cas. (D. C.) 362.

**Diligence in reduction to practice.**—The diligence required of an inventor is diligence rather in the reduction of his invention to practice, than in application to the Patent Office, or in manufacturing his device for public use. *Rolfe v. Hoffman*, (1905) 26

App. Cas. (D. C.) 336; *Laas v. Scott*, (1905) 26 App. Cas. (D. C.) 354.

There is no general rule as to what constitutes due diligence in reducing to practice, that being a question to be determined by all the facts and surrounding circumstances in the particular case. *O'Connell v. Schmidt*, (1906) 27 App. Cas. (D. C.) 77.

By due diligence in reduction to practice is meant reasonable diligence; and where a party to an interference has taken eleven months to accomplish a reduction to practice he cannot be heard to say that his adversary, who has taken only eight months, is guilty of laches. *Fowler v. McBerty*, (1906) 27 App. Cas. (D. C.) 41, 46.

Where one of the parties to an interference is the first to conceive the invention, but later than his rival in its reduction to practice, the controversy between them is reduced to the question of diligence on the part of the former. *Liberman v. Williams*, (1904) 23 App. Cas. (D. C.) 223.

**First reducer to practice entitled to patent.**

—In the sense of the patent statute, he is the first inventor who by his own thought makes an article or material, and first perfects and adapts his discovery to actual use, although some one may have previously made a similar article without putting it to practical use or giving his discovery to the public in any way. *Warren Bros. Co. v. Owosso*, (C. C. A. 1909) 166 Fed. 309.

The first to reduce an invention to practice, as shown by an actual construction produced in court, is usually held to be the inventor, as against another who merely says he had previously conceived the invention. *Merrimac Mattress Mfg. Co. v. Feldman*, (1904) 133 Fed. 64.

An inventor, who, although the first to conceive, is the last to reduce to practice, and who is not exercising diligence when his opponents enter the field, is not entitled to priority. *Laas v. Scott*, (1905) 26 App. Cas. (D. C.) 354.

Where the proof in an interference case showed that the senior party had the invention in controversy, and had reduced it to practice by the construction and operation of the device in December, 1896, or in the early part of 1897, while the junior party's reduction to practice was not shown to have taken place until October, 1897, priority of invention was properly awarded to the senior party. *Shaffer v. Dolan*, (1904) 23 App. Cas. (D. C.) 79.

A junior applicant in an interference case, who was the first to conceive and make disclosures of the invention, but the last to constructively reduce it to practice by filing his application, about five years after conception, and more than four years after the application of the senior party, held to be lacking in diligence and not entitled to an award of priority of invention. *Paul v. Johnson*, (1904) 23 App. Cas. (D. C.) 187.

**What constitutes reduction to practice generally.**—It is essential that a device, to constitute reduction to practice, must show that the work of the inventor is finished, physically as well as mentally. Nothing must be



left to the inventive genius of the public. *Sydeinan v. Thoma*, (1909) 32 App. Cas. (D. C.) 362.

**Insufficiently tested machine as reduction to practice.**—Where one of the parties to an interference involving the ejecting mechanism of a match machine was not a match manufacturer, but a manufacturer of machines, his failure to test his device with real matches, instead of dummy matches, and his failure to use his machine commercially, could not be taken as discrediting his claim that the machine was successfully reduced to practice. *Wyman v. Donnelly*, (1903) 21 App. Cas. (D. C.) 81.

**Construction of operative machine as reduction to practice.**—A full-sized operative structure fit for commercial use, except for the ornamentation and polish, held, in an interference case, to be a full and complete reduction to practice for the purpose of displaying the invention. *Hope v. Voight*, (1905) 25 App. Cas. (D. C.) 22.

**Reduction to practice not proved by either party.**—Where neither party to an interference proves actual reduction of the invention to practice, but the junior party was the first to conceive and made disclosure of it to the senior before the latter's application was filed, it was held that the junior party was entitled to an award of priority of invention. *Greenwood v. Dover*, (1904) 23 App. Cas. (D. C.) 251.

**Application as reduction to practice.**—When an application for a patent has been allowed and then abandoned, and subsequently or before the forfeiture has been completed another application is filed in which substantially the same invention is described and claimed, the applicant is entitled, in an interference case, to the filing date of his first application as that of his constructive reduction to practice. *Lotterhand v. Hanson*, (1904) 23 App. Cas. (D. C.) 372.

**Mere accidental practice does not constitute reduction to practice.** *Thompson v. Smith*, (1909) 33 App. Cas. (D. C.) 284.

**Reduction to practice by agent.**—Where a typewriter manufacturing company, after declining to purchase an invention and returning a model of the device to the inventor, adapted the invention to one of its typewriters, and constructed a machine embodying it, and then purchased the invention, and procured an assignment of it, the company cannot be said to have been the agent of the inventor in reducing the invention to practice, so as to make such reduction inure to his benefit, in an interference between him and another inventor of the same device. *Howell v. Hess*, (1907) 30 App. Cas. (D. C.) 194.

**The mere making of a model of a device will not amount to a reduction to practice of the invention embodied in it, where the model represents a device intended to be used as a part of a complicated machine, and the practical usefulness of which depends on a test in that machine.** *Howell v. Hess*, (1907) 30 App. Cas. (D. C.) 194.

Unless an invention belongs to that class of simple inventions which require no other

proof of their practicability than the construction of a model, the mere construction of a model does not constitute a reduction to practice, even if such model is clearly sufficient to disclose the invention, and to enable those skilled in the art to understand it thoroughly. *O'Connell v. Schmidt*, (1906) 27 App. Cas. (D. C.) 77.

**Requirements of operative device.**—In determining whether a device constitutes a reduction to practice, its size is not necessarily controlling, nor is mechanical perfection, or that there are "possibilities of greater excellence in shape, location, arrangement, material, or adjustment," essential; but it is essential that the device should show that the work of the inventor is finished physically as well as mentally, and nothing left for the inventive genius of the public. *Gallagher v. Hien*, (1905) 25 App. Cas. (D. C.) 77.

To constitute a reduction to practice, the device constructed must be fashioned out of a material capable of actual use for the intended purpose. *Gilman v. Hinson*, (1906) 26 App. Cas. (D. C.) 409.

In order to constitute reduction to practice, it is not necessary that a device should have been made of a material which would be used when it should be placed on the market; nor is it necessary that it should have been mechanically perfect, so long as it was an operative device, and was used as such, and showed that the work of the inventor was complete. *Lowrie v. Taylor*, (1906) 27 App. Cas. (D. C.) 522.

**Necessity for actual tests.**—Where it appears that an invention is a radical departure from previous methods, in order to establish the fact of reduction to practice, thorough tests are necessary. *Gallagher v. Hien*, (1905) 25 App. Cas. (D. C.) 77.

In order that a device may be a reduction to practice, it is necessary in every case, except that of a very simple device, that it be tested. A scale of the pendulum pattern is a device requiring a test to show its accuracy. *Pool v. Dunn*, (1909) 34 App. Cas. (D. C.) 132.

**Mere experiments not reduction to practice.**—It is not necessary, in order to constitute reduction to practice, that actual tests of the invention be made in order to complete the inventive act; but the device relied on must, however, if it has not been worked, clearly be capable of work, and not have been a mere experiment. *Gallagher v. Hien*, (1905) 25 App. Cas. (D. C.) 77; *Ocumpaugh v. Norton*, (1905) 25 App. Cas. (D. C.) 90; *Bourn v. Hill*, (1906) 27 App. Cas. (D. C.) 291.

**Experimental operation.**—In an interference case, where there were tests of the device embodying the invention by men of experience in the particular art to which the invention related, at a place equipped with everything necessary to enable continued and complete tests to be made, it was held that there had been a reduction to practice, in that the test showed the work of the invention to be complete, though the first device so made was not a commercial article. An-

*draws v. Nilson*, (1906) 27 App. Cas. (D. C.) 451.

In order to reduce to practice a device for protecting low-tension telephone circuits from the injurious effects of unduly strong currents, it is sufficient to operate the device with currents such as would prevail in telephone circuits if the latter became crossed with wires carrying more current than is safe, and it is not necessary actually to operate it in a telephone circuit. *Rolfe v. Hoffman*, (1905) 26 App. Cas. (D. C.) 336.

**Necessity of complete machine.**—Where prior patents, or the machines constructed under them, embody the principle covered by a later patent, and sufficiently disclose the invention claimed therein, they are not deprived of their effect as anticipations by the mere fact that such machines are not capable of successful practical working, because of objections as to minor matters of detail in construction. *Van Epps v. United Box Board, etc., Co.*, (C. C. A. 1906) 143 Fed. 869, *reversing* (1905) 137 Fed. 418.

In the case of simple devices, it is not essential that actual tests of the invention be made in order to constitute a reduction to practice. *Rolfe v. Hoffman*, (1905) 26 App. Cas. (D. C.) 336.

An improvement in mantles for incandescent lights of the inverted type, held not so simple or of such obvious efficacy that the making of one of the required description constituted an actual reduction to practice without its test on the inverted lamp then in use. *Daggett v. Kaufmann*, (1909) 33 App. Cas. (D. C.) 450.

Whether the making of a model of a snap hook, so constructed that it may be attached to a chain without the necessity of welding the chain, constitutes reduction to practice, in view of the simplicity of the device, the invention is so simple that the construction of a model containing all the elements of the invention will amount to a demonstration of utility. *Schartow v. Schleicher*, (1910) 35 App. Cas. (D. C.) 347.

**Acts constituting reduction to practice.**—The same act or set of acts may or may not constitute a reduction to practice, modified, as they may be, by the special circumstances of the particular case. *Gallagher v. Hien*, (1905) 25 App. Cas. (D. C.) 77; *Rolfe v. Hoffman*, (1905) 26 App. Cas. (D. C.) 336; *Andrews v. Nilson*, (1906) 27 App. Cas. (D. C.) 451; *Sydeinan v. Thoma*, (1909) 32 App. Cas. (D. C.) 362.

**Delay in filing application as negating reduction to practice.**—A delay of two years and a half in filing an application for a patent is not sufficient to destroy the weight of proof of an actual reduction to practice, especially where it appears that drawings showing substantially the same construction as the original device were sent to the applicant's attorneys more than a year before the filing of the application, and before any one else had entered the field. *Seeberger v. Russel*, (1905) 26 App. Cas. (D. C.) 344. See also *Ocuppaugh v. Norton*, (1905) 25 App. Cas. (D. C.) 90.

**Evidence of reduction to practice.**—Where one of the parties to an interference, and a witness skilled in the art, testified that such party's machine was successfully operated in 1896, and the machine in its present condition, although apparently dismantled by the removal of parts, supports their testimony, it will be regarded as a reduction to practice. *Smith v. Brooks*, (1904) 24 App. Cas. (D. C.) 75.

Where it appears, in an interference case, that the machine claimed as a reduction to practice by one of the parties was submitted by him to his employers, but they adopted another machine, and, this proving unsatisfactory, it was withdrawn and still another machine put on the market, it was held that the circumstances pointed to the conclusion that the machine did not represent a complete and practical invention. *Paul v. Hess*, (1905) 24 App. Cas. (D. C.) 462.

Evidence of reduction to practice must embrace all the elements of the issue, leaving nothing to inference merely. *Robinson v. Seelinger*, (1905) 25 App. Cas. (D. C.) 237.

While the destruction or dismantling of a first construction and the loss of some of its parts or their use in making other machines are sometimes important in determining the question of reduction to practice, they are only important when depending on other circumstances tending to cast doubt on claims of the earlier reduction, notably that of long and unreasonable delay in the exploitation of the invention. *Funk v. Whitely*, (1905) 25 App. Cas. (D. C.) 313.

Where the inventor of an escalator and auxiliary traveling platform, and two witnesses who show themselves thoroughly familiar with its construction, testify fully as to the construction and operation of the device, and state that they used it a number of times and found it successful, a reduction to practice is sufficiently proved, and it is unnecessary that the facts on which they base their conclusion as to the successful working of the device should appear on the record. *Seeberger v. Russel*, (1905) 26 App. Cas. (D. C.) 344.

Although the fact that, after an alleged successful operation of a device, the device was taken apart and one element never used again, is sufficient to warrant an inference that the test was not successful, yet, when a reasonable and satisfactory explanation of such fact is given, such an inference is unwarranted. *Seeberger v. Russel*, (1905) 26 App. Cas. (D. C.) 344.

**Necessity of prior use.**—In determining the question of identity of the inventive idea involved in two patents, it is not a sufficient answer to say of an alleged anticipation that it was a mere paper patent, and that the device had never been operative or commercially successful, because prior existing conditions may not have stimulated full development. *Ideal Stopper Co. v. Crown Cork, etc., Co.* (C. C. A. 1904) 131 Fed. 244, *affirming* (1903) 123 Fed. 666.

To constitute an anticipation by an unpatented device, it is not necessary that it should

have come into general use, but it is sufficient if it was in actual and practical use by a number of persons. *Daniel v. Restein*, (1904) 131 Fed. 469.

A horse collar, made from a casing cut from a single piece of material folded and stitched in a peculiar manner, is one of those devices so simple in their purpose and of an efficacy so obvious that the making of one of a size and form intended for and available for practical use is a sufficient reduction to practice without actual use or test; and therefore the making of such a collar, exhibiting it to a number of persons, and putting it on sale, without testing it on the neck of a harnessed animal, is a reduction to practice of the invention. *Couch v. Barnett*, (1904) 23 App. Cas. (D. C.) 446.

**What constitutes a prior use.**—The rules of law as to what constitutes a prior use and what constitutes a reduction to practice are the same. *Gilman v. Hinson*, (1906) 26 App. Cas. (D. C.) 409.

**Abandonment of use of patented machine.**—A machine fully embodying a device subsequently patented by another does not lose its effect as an anticipation because its use was abandoned solely for the reason that the product in making which it was employed was not successful where it is shown that the machine worked successfully and the maker did not abandon the invention embodied therein. *United Shoe Machinery Co. v. Greenman*, (1906) 145 Fed. 538.

The subsequent abandonment of the use of the machine does not render it an abandoned experiment, nor lessen its effect as an anticipation which will invalidate a subsequent patent to another for substantially the same machine. *Buser v. Novelty Tufting Mach. Co.*, (C. C. A. 1907) 151 Fed. 478.

**Mere invention without use or publication.**—It is not enough to defeat a patent that some one other than the patentee had conceived the invention before he did, or had even perfected it, so long as it had not been in public use, or described in some patent or publication, if the patentee was an original and independent inventor. *Lincoln Iron Works v. W. H. McWhirter Co.*, (C. C. A. 1905) 142 Fed. 967, *affirming* (1904) 131 Fed. 860.

One who invents and constructs a machine, but permits it to slumber, and neither applies for a patent nor makes any public use of it, cannot resort to such invention as an anticipation of a subsequent patent obtained by another. *Welsbach Light Co. v. Cohn*, (1910) 181 Fed. 122.

**Mere experimental device.**—*Gallagher v. Hien*, (1905) 25 App. Cas. (D. C.) 77.

**Complete invention subsequently abandoned.**—Where an unpatented mechanical invention was reduced to practice by the construction and use of the device, and its exhibition by the inventor to others, it cannot be abandoned so as to change its effect as an anticipation of a device subsequently patented by another. *Merrimac Mattress Mfg. Co. v. Feldman*, (1904) 133 Fed. 64.

**Abandoned experiments.**—Oral testimony of prior invention and use, not only unsup-

ported by any writing or exhibits, but also contradicted on the question of priority of date, and which, at best, shows only an unsuccessful and abandoned experiment, is insufficient to defeat a patent. *Arrott v. Standard Sanitary Mfg. Co.*, (1904) 131 Fed. 457.

Where the idea of a machine has been conceived, and the conception carried into effect by the construction of the machine, which is used, or is capable of being used, for the purpose for which it was designed, it is no longer an experiment, but an invention; and the subsequent abandonment of the use of the machine does not render it an abandoned experiment, nor lessen its effect as an anticipation which will invalidate a subsequent patent to another for substantially the same machine. *Buser v. Novelty Tufting Mach. Co.*, (C. C. A. 1907) 151 Fed. 478.

A delay of two years and eight months after an alleged reduction to practice raises a strong presumption that what was done amounted to a mere abandoned experiment, but such presumption may be overcome by satisfactory proof that the machine was successfully operated. *Smith v. Brooks*, (1904) 24 App. Cas. (D. C.) 75.

Long delay in making use of an invention claimed to have been reduced to practice, or in applying for a patent, is a potent circumstance tending to show that the alleged reduction to practice was nothing more than an unsatisfactory or abandoned experiment; and this is specially the case where, in the meantime, the inventor has been engaged in the prosecution of similar inventions. *Gilman v. Hinson*, (1906) 26 App. Cas. (D. C.) 409.

**Abandonment a question of intention.**—Abandonment of an invention in its experimental stage is a question of intention, and may be shown by conduct even within the two years allowed by the statute; the use of an invention by the inventor for the purpose of testing its utility, which is not a public use, may continue indefinitely. *Warren Bros. Co. v. Owosso*, (C. C. A. 1909) 166 Fed. 309.

**Rejection of application as showing abandoned experiment.**—While a rejected application for a patent is not a bar to a subsequent patent to another for the same device, the fact of such rejection does not of itself characterize the invention as an abandoned experiment, and if it, in fact, had passed beyond the experimental stage and was in practical and successful use, it cannot thereafter be appropriated and patented by another. *Miller v. Walker Patent Pivoted Bin Co.*, (1905) 138 Fed. 919.

**Application for patent as negating abandoned experiment.**—Notwithstanding that A, having embodied his invention in a machine whose use was soon abandoned, later failed to describe it in the patent granted him, so that the latter was inoperative, yet the attempt to obtain the patent is evidence that A's invention was not an abandoned experiment. *United Shoe Machinery Co. v. Greenman*, (1906) 145 Fed. 538.

**Prior unpatented device by same inventor.**—The unpatented device of the same inventor cannot be regarded as part of the prior art, so as to compel him to face it as an antici-

pation, or prevent him from drawing on it in the development of his ideas, where it has not been relinquished by two years' prior use or sale. *Eck v. Kutz*, (1904) 132 Fed. 758.

**Experiments in analogous arts.**—The experiments made by Sir Humphry Davy in 1807, in which he decomposed small pieces of potash or soda rendered conductive by moisture, by using an electric current to effect both fusion and decomposition, while interesting as experiments, cannot be held an anticipation of the Bradley process for the reduction of aluminium ores, in view of the facts that the materials operated upon were wholly different, and that for seventy-five years, with such experiments before them, chemists and electricians were unable to make the possibilities suggested thereby practically available for the separation of aluminium from its ores. Moreover, attempts of Davy himself to separate alumina by means similar to those employed with soda and potash were unsuccessful. *Electric Smelting, etc., Co. v. Pittsburg Reduction Co.*, (C. C. A. 1903) 125 Fed. 926, *modifying* (1901) 111 Fed. 742.

**Patented unsuccessful device.**—The defense of anticipation is not made out where the alleged anticipatory process or machine is inoperative or a failure, while that of the patent is operative and successful, even though the same devices or parts are used, but combined in a new way. *Kirchberger v. American Acetylene Burner Co.*, (1903) 124 Fed. 764.

A patent for a device which fails to accomplish the desired end is not an anticipation of one for a device which successfully accomplishes it. *Farmers' Mfg. Co. v. Spruks Mfg. Co.*, (C. C. A. 1904) 127 Fed. 691, *reversing* (1902) 119 Fed. 594.

A patentee cannot be denied invention because of a prior patent for a device which never came into use, unless the idea on which his patent is predicated is so clearly set forth or suggested in the alleged anticipating patent that a mechanic with such patent before him could by the exercise of mere mechanical skill so modify proportions or change the mode of operation as to overcome the difficulties which excluded the prior device from commercial utility. *Ideal Stopper Co. v. Crown Cork, etc., Co.*, (C. C. A. 1904) 131 Fed. 244, *affirming* (1903) 123 Fed. 666.

A patent for an improvement or manufacture which does not accomplish the objects and purpose of its conception and is impracticable does not anticipate a later patent upon a similar device capable of successful operation, unless the objections to the device of the prior patent relate merely to details of construction, or where it can be converted into a successful device by a mechanic of ordinary skill. *Timolat v. Philadelphia Pneumatic Tool Co.*, (1904) 131 Fed. 257.

**Similar device in analogous art.**—There is such analogy in purpose and function between a machine for punching paper and one for punching metal that the former may properly be considered in the metal punching art. *Conley v. King Bridge Co.*, (1909) 175 Fed. 79.

A patent for the first successful machine to accomplish a new and useful result is not

anticipated nor limited by a mere paper patent granted many years before, although it disclosed the theory of the successful machine; such a patent having no place in the prior art. *Kings County Raisin, etc., Co. v. U. S. Consolidated Seeded Raisin Co.*, (C. C. A. 1910) 182 Fed. 59.

The application of an old device or process to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, is not patentable, even if the new form of result has not before been contemplated. *Millett v. Allen*, (1906) 27 App. Cas. (D. C.) 70.

**Different devices in same art.**—Patents covering systems of ventilation belong in the same art, although they may apply the art to different structures. *Jones v. Cyphers*, (C. C. A. 1903) 126 Fed. 753, *affirming* (1902) 115 Fed. 324.

A patent for an improvement in chairs having an adjustable back, and one for a similar device as an improvement in articles of furniture having a swinging member, are in the same art; only mechanical skill being required to adapt the device to the different articles. *Cook v. Heywood Bros., etc., Co.*, (1904) 131 Fed. 755.

**Device not brought into commercial use.**—That the device of a patent never came into commercial use does not prevent such patent from being an anticipation of a later one, if it sufficiently embodies the elements and discloses the principle of operation of the latter or from narrowing its scope; nor is it material that the earlier patentee did not claim the particular device of the later patent as a part of his invention. *E. L. Watrous Mfg. Co. v. American Hardware Mfg. Co.*, (1908) 161 Fed. 362.

**Scope of alleged anticipating machine.**—The scope of a machine, alleged to be an anticipation of a later patented machine, is co-extensive with the range of adjustment of parts which its construction intelligently provides for. *Hillard v. Remington Typewriter Co.*, (C. C. A. 1909) 170 Fed. 73, *affirming* (1908) 163 Fed. 281.

**New contrivance for old purpose.**—Patent No. 491,761 for a car seat having a reversible back of the "walk over" type, the essential feature of which is a pair of arms connecting the back to the seat frame, having the one end of the pair pivoted to the end of the frame near the centre thereof by pivots arranged in a horizontal plane, and having the other or upper end of the pair pivoted to the end of the back by pivots arranged in a plane substantially at right angles to the plane of the back, in such method of pivoting discloses novelty and patentable invention, and is entitled to a broad range of equivalents. *Heyward Bros., etc., Co. v. Syracuse Rapid Transit R. Co.*, (1907) 152 Fed. 453.

A process for pasteurizing beer in bottles by moving the bottles through heated water, which is stationary, is not anticipated by a patent for a process involving the moving of heated water around stationary bottles containing the liquor to be pasteurized. *In re Wagner*, (1903) 22 App. Cas. (D. C.) 267.

**New process for old purpose.**—The fact that a large number of processes for the separation of aluminum from its ores were patented, in all of which external heat was used to fuse the ore, and maintain it in a fused state, some of the applications having been made after that of Bradley, on which patent No. 468,148 was issued, for a process, now exclusively used, in which both fusion and electrolysis were produced by the same electric current, is persuasive evidence that the Bradley process was not anticipated. *Electric Smelting, etc., Co. v. Pittsburgh Reduction Co.*, (C. C. A. 1903) 125 Fed. 926, *modifying* (1901) 111 Fed. 742.

**Old contrivance for new use.**—The use of a composition as a waterproof lining for a reservoir did not anticipate a subsequent patent for a street pavement made of a similar composition. *Warren Bros. Co. v. Owosso*, (C. C. A. 1909) 166 Fed. 309.

To add teeth and a key with cogs to effect motion of the operating sleeve of a drill-chuck, instead of using the fingers or a spanner as previously done, does not involve patentable invention when such method of imparting motion was well known and used in many arts, although the device was one of utility. *Jacobs Mfg. Co. v. T. R. Almond Mfg. Co.*, (C. C. A. 1910) 177 Fed. 935, *affirming* (1909) 169 Fed. 134.

A change in prior devices, in order to be patentable, must be made by transferring an old device to use in an entirely different and unrelated art. *In re Thurston*, (1905) 26 App. Cas. (D. C.) 315.

A form of proposed contract to be entered into with individuals desiring the benefit of burial insurance or guaranty, with blanks attached and readily separable therefrom, which, in addition to the ordinary draft for payment, show the several certificates required in order to provide, as far as practicable, against the perpetration of frauds on the insurer or guarantor, is unpatentable for want of novelty. *In re Moeser*, (1906) 27 App. Cas. (D. C.) 307.

An advertising device to be used in connection with a telephone, and automatically operated by the removal of the telephone receiver from its hook, is anticipated by a similar device used in connection with a cigar lighter, and operated in the same way by the lifting of the lighter from its hook, and by a device for utilizing in a different way a telephone for the display of advertisements. *In re Lyon*, (1909) 33 App. Cas. (D. C.) 501.

**New combination.**—The novelty of an invention is never negated merely by proving that it is made up of old parts. The question is whether they have been newly combined, so as to effect new and useful results. Where this is fairly shown, and the defendant has asserted the novelty of a similar device by having it patented, he cannot well complain that the same conclusion is reached with regard to that of the complainant after which he has patterned. *Eck v. Kutz*, (1904) 132 Fed. 758.

**Elements of new combination found in older patents.**—It constitutes no anticipation and no defense to a claim of infringement

that one or more elements of a patented combination or one or more parts of a patented improvement may be found in one old patent, and others in another, and still others in a third. *J. L. Owens Co. v. Twin City Separator Co.*, (C. C. A. 1909) 168 Fed. 259.

**Mere mechanical improvement.**—That the device of a later patent is a mechanical improvement on that of an earlier one and produces a better result does not prevent the earlier from being an anticipation, where the principle and mode of operation are the same. *E. L. Watrous Mfg. Co. v. American Hardware Mfg. Co.*, (1908) 161 Fed. 362.

Where, in an interference case, it appeared that one of the parties used his machine before the other party's date of conception, and the machine was operated successfully, although it was not so perfect as a machine built by the other party, it was held that the former was the first inventor. *Jenner v. Dickinson*, (1905) 25 App. Cas. (D. C.) 316.

**Prior device serving additional purpose.**—The effect of a device as an anticipation is not altered by the fact that it was made to serve a purpose additional to that for which it was used in the second case, where, so far as the latter goes, the two are equivalents. *American Carriage Co. v. Wyeth*, (C. C. A. 1905) 139 Fed. 389.

**Adapting prior device to new use.**—A patent for an air-brush used for making pictures, in which by a combination device liquid colors are atomized and thrown on a paper or canvas by a jet of compressed air, was not anticipated by oil burners having concentric oil and steam nozzles; invention being required at least to adapt the principle to use in the different art. *Wold v. Thayer*, (1906) 148 Fed. 227, 78 C. C. A. 350, *affirming* 142 Fed. 776.

**Claims of a patent for means for or mechanism adapted to, a certain result, and like functional claims, are not objectionable if limited to the invention shown by the specification and drawings.** *Weed Chain Tire Grip Co. v. Excelsior Supply Co.*, (1910) 179 Fed. 232.

**Novelty of selection of old devices or elements, remote in structure and purpose, for a new use, may evidence patentable invention.** *Hartford v. Moore*, (1910) 181 Fed. 132.

**Prior machine intended for different purpose.**—A patent for a successful machine is not void for anticipation, because a prior machine intended for a different purpose may possibly be capable of use as an inefficient substitute for the later machine. *United Shirt, etc., Co. v. Beattie*, (1907) 149 Fed. 736, 79 C. C. A. 442, *affirming* (1905) 138 Fed. 136.

**Seniority of patents.**—The effect of a patent as an anticipation is to be determined by the date it was issued, and not by that when it was applied for. However, it may be otherwise, when the question is as to who was the original or first inventor. *Eck v. Kutz*, (1904) 132 Fed. 758.

A patent is not anticipated by other patents, which, although prior in date, had not been granted when application for such pat-

ent was filed, and which were therefore not in the prior art. *Gray Telephone Pay Station Co. v. Baird Mfg. Co.*, (C. C. A. 1909) 174 Fed. 417.

**General language in prior patents.**—Anticipation is not shown by broad and general language in prior patents, although, interpreted in the light of the later invention, it may be said to include the same. *Keasbey, etc., Co. v. Philip Carey Mfg. Co.*, (1905) 139 Fed. 571.

**Abandoned application.**—An abandoned application for a patent is not an anticipation of a later patent in the absence of some showing that the later patentee borrowed ideas therefrom. *Wright Co. v. Herring-Curtiss Co.*, (1910) 177 Fed. 257; *Wright Co. v. Paulhan*, (1910) 177 Fed. 261; *Interurban R., etc., Co. v. Westinghouse Electric, etc., Co.*, (C. C. A. 1911) 186 Fed. 166.

**Simultaneous applications without interference declared.**—The fact that two applications for patents were pending to the Patent Office and before the same examiner at the same time, and no interference was declared, is evidence that they were not for the same invention, and that one patent does not anticipate the other. *Beckwith v. Malleable Iron Range Co.*, (1910) 174 Fed. 1001.

**Prior foreign patent.**—That the device of a patent was in fact anticipated by a foreign patent will not constitute a defense to a suit for infringement, where it contains a patentable improvement over the foreign device, and defendant has used the improvement. *Dececo Co. v. George E. Gilchrist Co.*, (C. C. A. 1903) 125 Fed. 293.

A foreign patent, to constitute an anticipation which will defeat a subsequent American patent granted to one who had no knowledge of the foreign invention, must describe the invention in such full, clear, and exact terms as to enable any person skilled in the art to construct the device patented. *Pettibone v. Pennsylvania Steel Co.*, (1904) 133 Fed. 730.

The instrument known under the German law as a "Gebrauchsmuster" is not one the filing of which charges any one with notice of its contents or which has the effect of a foreign patent as an anticipation of a subsequent United States patent. *Steiner v. Schwarz*, (1906) 148 Fed. 868.

**Prior applications of one of the parties to an interference, which are found to have disclosed the invention of the issue, cannot be said to have been anticipated by British patents granted him for the same invention described in such applications, where the applications in interference were filed within the two years after the grant of the British patent.** *Young v. Struble*, (1910) 35 App. Cas. (D. C.) 410.

**Prior patent to same person.**—That a prior patent for the same invention was issued to the same patentee does not avoid anticipation. *McCaslin v. Link Belt Machinery Co.*, (1905) 139 Fed. 393.

**Two patents for same invention.**—Where an application is made for a patent on an alleged method after a patent has been granted on the apparatus, and it appears that

the substitution of the word "means" for the word "method" at two places would not change the sense, and would make the disclosure in the application the same as that in the patent, to grant the alleged method claims would result in two patents for substantially the same thing. *In re Creveling*, (1905) 25 App. Cas. (D. C.) 530.

**Two applications by same person pending at same time.**—An inventor having two applications for patents pending at the same time, both of which disclose his invention, may base his broadest claims on the one which he considers shows the best form of mechanism, although it may be the later application, and the patent issued thereon will not be anticipated by a later patent issued on his earlier application. *Welsbach Light Co. v. Cohn*, (1910) 181 Fed. 122.

**Matters not shown by patent.**—A patent cannot, as an anticipation, properly have applied into it, from necessity, more than it fairly shows, to make it an operative structure. What is required, and not so shown, is left for later inventors. *New England Motor Co. v. B. F. Sturtevant Co.*, (1905) 140 Fed. 866.

Where the disclosures of a process patent in regard to the machines and method employed are so uncertain that they can only be spelled out tentatively, such patent is not an anticipation of a later one for a definitely described process. *Asbestos Shingle, etc., Co. v. H. W. Johns-Manville Co.*, (1910) 184 Fed. 620.

**Description and drawings.**—To constitute an anticipation, the prior patent or publication relied on must, by descriptive words or drawings, or by both, contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art to make the article or practice the invention. *Underwood Typewriter Co. v. Elliott-Fisher Co.*, (1908) 165 Fed. 927.

To overthrow a patent by a foreign one of prior date, the description of the invention must be in such full, clear, and exact terms as to enable one acquainted with the art to which it belongs to make or practice the invention. *Warren Bros. Co. v. Owosso*, (C. C. A. 1909) 166 Fed. 309.

**Incorrect drawing of prior invention.**—It is not an anticipation that by a mistake in the figure of a preceding patent by the error of the draftsman the structure of a patent appears contrary to the conception of the inventors and the reading of the patent. *Edison Electric Light Co. v. Novelty Incandescent Lamp Co.*, (C. C. A. 1909) 167 Fed. 977, *reversing* (1908) 161 Fed. 549.

**Merely suggestion in prior patent.**—A patent must do more than to make untested suggestions or pregnant surmises to constitute an anticipation of a later patent. *Asbestos Shingle, etc., Co. v. H. W. Johns-Manville Co.*, (1910) 184 Fed. 620.

**Prior unclaimed description in patent.**—A patent for a mechanical combination is not anticipated by a prior patent, which incidentally shows a similar arrangement of parts, where such arrangement was not

claimed nor designed to perform the function for which it is designed and claimed in the second patent. *Gray Telephone Pay Station Co. v. Baird Mfg. Co.*, (C. C. A. 1909) 174 Fed. 417.

**Description in prior application.**—Statements in a prior application for a patent, relied on as an anticipation of a patent granted while such application was pending, must be so clear and explicit that those skilled in the art will have no difficulty in ascertaining their meaning. *Hillard v. Fisher Book Typewriter Co.*, (C. C. A. 1908) 159 Fed. 439, *affirming* (1907) 151 Fed. 34.

**Functions not claimed by prior patentee.**—A patent is not anticipated by prior patents for devices which might by slight modifications have been made to perform the functions of that of the later patent, where it does not appear that the patentees had in mind their use or adaption to accomplish such result. *Gunn v. Bridgeport Brass Co.*, (1906) 148 Fed. 239.

A patentee is entitled to a beneficial use of a feature of his device if it actually exists, although he did not specifically claim it, and it may constitute an anticipation of a later patent. *Forest City Foundry, etc., Co. v. Barnard*, (C. C. A. 1910) 176 Fed. 561.

**Time to put invention in public use.**—An inventor who has reduced his invention to practice is entitled to a period of two years in which to put the same in public use and on sale, without a forfeiture of his right to receive a patent, based on an application filed by another before the statutory bar has arisen. *Rolfe v. Hoffman*, (1905) 26 App. Cas. (D. C.) 336.

**Sufficiency of published descriptions.**—An article describing in very general terms a process of some unknown inventor for the reduction of aluminum, as explained at a meeting of mining engineers by one who had not seen it practiced, but spoke from hearsay only, is not such a publication as constitutes an anticipation of a process subsequently invented and patented by another. *Electric Smelting, etc., Co. v. Pittsburg Reduction Co.*, (C. C. A. 1903) 125 Fed. 926, *modifying* (1901) 111 Fed. 742.

A prior publication in a paper, patent, or otherwise, will not negative the novelty of an invention unless it describes a complete and operative invention capable of being put into practical operation, or contains such a disclosure of the invention that any omission would ordinarily be supplied by one skilled in the art. *Crown Cork, etc., Co. v. Standard Stopper Co.*, (1904) 136 Fed. 199.

A disclosure of an invention by publication is not sufficient to invalidate a patent thereafter applied for more than two years thereafter, unless the description was so full and intelligible as to enable persons skilled in the art to which the invention relates to comprehend or make it without assistance from the patent. *Comptograph Co. v. Universal Accountant Mach. Co.*, (1906) 142 Fed. 539, *reversed* on other grounds (C. C. A.) 146 Fed. 981.

Under the rule that to constitute a prior publication which will invalidate a subse-

quent patent the publication must contain such a substantial representation of the patented device as would enable any person skilled in the art to make, construct, and practice the invention to the same practical extent as he would be enabled to do if the information was derived from a prior patent, a published illustration and description of a bicycle, showing every detail of a part subsequently patented by another, except that it did not show that a tube for containing the pedal shaft, shown by the patent to be without perforations, and so appearing in the illustration, may not have been perforated or cut away on the bottom or the opposite side not seen—there being, however, nothing to indicate that such was the fact—fulfills all the conditions of the rule, even conceding that there was a patentable difference between a perforate and imperforate tube used for such purpose. *Pope Mfg. Co. v. Arnold*, (1910) 177 Fed. 419.

A description by a foreign inventor of a process which was never patented and never used in order to constitute an anticipation of a subsequent American patent must be an account of a complete and operative invention, and in case of doubt the success of the patented process, invented many years later, should turn the scale in favor of patentability and nonanticipation. *Schmertz Wire Glass Co. v. Western Glass Co.*, (1910) 178 Fed. 977.

**Statement of mere fact of invention.**—The naked assertion that a certain result has been accomplished, without describing the means which produced it, is insufficient as an anticipation. *American Graphophone Co. v. Leeds, etc., Co.*, (C. C. A. 1909) 170 Fed. 327.

**Publications and devices suggesting invention.**—Devices and publications leading up to, but not fully accomplishing, a desired end, do not anticipate an invention which for the first time effectively meets all requirements and successfully accomplishes such end. *Truax v. George F. Childs Adjustable Parlor Chair Co.*, (1894) 162 Fed. 907.

**Extrinsic evidence.**—It is not competent to read into a publication relied on as an anticipation of a subsequent patent information which it does not give, nor by expert opinion explain an otherwise uninforming statement by evidence of some apparatus or article not itself competent as an anticipation. *Loew Filter Co. v. German-American Filter Co.*, (C. C. A. 1908) 164 Fed. 855, *modifying* (1907) 155 Fed. 124.

**Reasonable diligence in perfecting invention.**—In an interference proceeding to determine priority of invention, the lack of reasonable diligence by a party in reducing his conception to practice is not shown, where the delay in filing his application is accounted for by the loss of his drawings. *Garrelt v. Freeman*, (1903) 21 App. Cas. (D. C.) 207.

Where the senior party to an interference saw working drawings and a model of the invention of the issue, made by the junior party, and understood their construction, and said nothing about any previous conception or disclosure of the invention by himself, although

both parties were at the time in the employment of the same company, which was engaged in the manufacture of similar devices, and the superintendent of which had solicited suggestions from its employees for improvement of such devices, and remained silent for a year before he filed his application, such conduct on his part is inconsistent with the existence of a right which he was desirous to protect, and the junior party will be entitled to an award of priority. *Harter v. Barrett*, (1904) 24 App. Cas. (D. C.) 300.

**Date determined by application.**—The date of a patented invention is at least as early as the date of the application, provided it sufficiently describes the invention to enable those skilled in the art to understand it, such application being conclusive evidence that the invention is perfected and adapted to use, and the equivalent of an actual reduction to practice under the statute. *Automatic Weighing Mach. Co. v. Pneumatic Scale Corp.*, (C. C. A. 1909) 166 Fed. 288, *reversing* (1908) 158 Fed. 415.

In an interference between an applicant and a prior patentee, the date of the filing of the latter's application, in the absence of proof on his part to show an earlier date of conception and reduction to practice, must be taken as his date of conception, disclosure, and constructive reduction to practice; the patent standing as proof of those facts. *Dashiell v. Tasker*, (1903) 21 App. Cas. (D. C.) 64.

The filing date of a party to an interference who takes no testimony stands for his date of conception and constructive reduction to practice. *McKnight v. Pohle*, (1907) 30 App. Cas. (D. C.) 92.

**Successive applications.**—The abandonment of one application for a patent on the filing of another for the same device does not preclude the patentee from showing the actual date of his invention to meet a claim of anticipation. *Corrington v. Westinghouse Air Brake Co.*, (1909) 173 Fed. 69.

**Date determined by testimony of inventor.**—Where the date of an invention contended for depends on the mere say-so of the inventor and his son, without any convincing or corroborating circumstances, this does not fulfil the high degree of proof required to escape anticipation. *Eck v. Kutz*, (1904) 132 Fed. 758.

**Date of foreign patent to same inventor.**—As against an infringer, the patentee in a United States patent for an invention previously made by him and patented in a foreign country may, to avoid alleged use in this country before the date of the foreign patent, show the date of the application for the foreign patent, for the purpose of showing the actual date of his invention. *Badische Anilin, etc., Fabrik v. Klipstein*, (1903) 125 Fed. 543.

**Date of foreign anticipating patent.**—A patent will not be invalidated for anticipation by a foreign patent of prior date, if the invention is shown to have been made by the American patentee before such date; but, where anticipation is otherwise clear, the burden rests on him to establish such priority

beyond a reasonable doubt. *Columbus Chain Co. v. Standard Chain Co.*, (1906) 148 Fed. 622, 78 C. C. A. 394.

**Identity of anticipating device.**—A patent cannot be supported against a claim of anticipation by features not referred to, claimed, or even suggested therein, and not a function of the thing patented, except when used in a special combination. *Greene v. United Shoe Machinery Co.*, (1904) 132 Fed. 973, 66 C. C. A. 43, *reversing* (1902) 115 Fed. 155.

**Substantial identity.**—The fact that a mechanical structure is crude does not prevent it from being an anticipation of one subsequently patented, where the inventive thought embodied is the same in both. *Merrimac Mattress Mfg. Co. v. Feldman*, (1904) 133 Fed. 64.

**Possible accomplishment of results.**—A patent cannot be invalidated by a structure which can only be altered into an anticipation by the use of inventive skill. *Waterbury Buckle Co. v. Aston*, (C. C. A. 1910) 183 Fed. 120, *affirming* (1909) 172 Fed. 672.

It is not sufficient to constitute anticipation that the devices relied upon might, by a process of modification, reorganization, or combination, be made to accomplish the function performed by the device of the patent. *Los Alamitos Sugar Co. v. Carroll*, (C. C. A. 1909) 173 Fed. 280.

**Devices operating on different principles.**—A device which does not operate on the same principle as that of a patent cannot be an anticipation. *Los Alamitos Sugar Co. v. Carroll*, (C. C. A. 1909) 173 Fed. 280.

**Infringement as test of anticipation.**—A process is not an anticipation of one subsequently patented, unless, if invented later, it would have been an infringement. *Electric Smelting, etc., Co. v. Pittsburg Reduction Co.*, (C. C. A. 1903) 125 Fed. 926, *modifying* (1901) 111 Fed. 742.

A patentee cannot avoid anticipation of broad claims by showing the presence in the alleged anticipatory device of elements which would not obviate infringement of such broad claims. *Standard Mach. Co. v. Rambo*, (1910) 181 Fed. 157.

**Subsequent device not infringing.**—Where a subsequent patent does not infringe a former one, it is independent thereof, and will be regarded as a new patent, and not a mere improvement of the former one. *Stitzer v. Withers*, (1906) 122 Ky. 181, 91 S. W. 277.

**Change of material.**—The Miller patent, No. 524,178, for a packing consisting of two wedge-shaped sections, intended to slide on each other, with a yielding cushion back of one of said sections, by means of which the steam pressure transmitted to the sliding sections causes that side of the strip to widen, forming a tight joint, describes an effective and useful device; but the claims are not limited as to the materials to be used, and, the form of construction having been in use in a prior unpatented packing, the patent is void for anticipation. *Daniel v. Restein*, (1904) 131 Fed. 469.



**Prior chemical compound having same formula.**—That a chemical compound is not a new article of manufacture in a patentable sense is not conclusively shown by the fact of a prior known compound having the same formula. *Kuehmsted v. Farbenfabriken of Elberfeld Co.*, (C. C. A. 1910) 179 Fed. 701, *affirming* (1909) 171 Fed. 887.

**Reduction in cost of chemical product.**—A chemical compound in a new form may be patentable where by reason of its greater purity or efficiency or of its comparative cheapness it is made a commercial instead of merely a laboratory product. *Union Carbide Co. v. American Carbide Co.*, (C. C. A. 1910) 181 Fed. 104, *reversing* (1909) 172 Fed. 120.

**Novelty of process producing previously known article.**—A patent for the product of a process is void where the same product had previously been produced by other processes. *Société Fabriques de Produits Chimiques de Thann et de Mulhouse v. Lueders*, (1904) 135 Fed. 102.

The production of aldehyde by selective oxidation of the hydrogen of a hydrocarbon is old in the art, and there can therefore be no invention in the idea that formic aldehyde can be thus produced, the chemical reaction being well known to chemists; and it is not a new discovery that the temperature must not be above the dissociating point of the aldehyde desired. *In re Blackmore*, (1909) 33 App. Cas. (D. C.) 434.

**Novelty of manufactured article.**—The Kahn patent, No. 669,011, claim 3, covering as an article of manufacture a flat knit cap formed from a single length of tubular fabric by distending and setting it on a block or form, is void for lack of novelty; the product, as distinguished from the process of making, differing not at all from other caps in extensive prior use. *Kahn v. Starrells*, (1904) 131 Fed. 464.

Whatever novelty, in a patentable sense, there may be in flakes of cooked wheat, must be found in some superior efficaciousness or some new properties which they possess, and not in any mere change of form produced by mechanical division of the cooked grain either before or after the last step in cooking. Nor does the fact that such flakes contain some dextrin make them a new product in a patentable sense, that being true to a greater or less extent of other forms of cooked wheat. *Sanitas Nut Food Co. v. Voigt*, (C. C. A. 1905) 139 Fed. 551.

**Improvement in well-known art.**—In a long-developed art, in which there is a meagre sphere for invention, a marked improvement in product evidences corresponding originality in making such product. *Greenwald v. Enochs*, (C. C. A. 1910) 183 Fed. 583, *reversing* 180 Fed. 478.

**Better results of new device.**—Anticipation is not avoided because the anticipating structure, while mechanically the same, is not so efficient as that of the patent, owing to the use in the latter of different and better materials, which are not, however, claimed as a feature of the invention. *Daniel v. Restein*, (1904) 131 Fed. 469.

**Disproof of asserted novelty.**—It is not the law that the asserted novelty of a patented combination can only be overcome by showing that all of the elements have previously been employed as a unit in the same relation to each other. *Voightmann v. Weis, etc.*, *Cornice Co.*, (1904) 133 Fed. 298.

**Equivalents**—*chamotte* and crushed fire brick.—The term "*chamotte*," as used in the arts and in the Panzl patent, No. 644,367, as an ingredient used in making an acid-resisting composition for lining pulp digesters, denotes a species of specially pure calcined clay, which must be silicate of alumina, and is not the equivalent of crushed fire brick, used in prior preparations, which may or may not have the chemical composition and properties of *chamotte*. *Panzl v. Battle Island Paper Co.*, (C. C. A. 1905) 138 Fed. 48, *reversing* (1904) 132 Fed. 607.

**Lack of interchangeability of parts.**—The lack of interchangeability of parts in two combinations is an important factor in determining the question of equivalency or mechanical suggestion, where lack of novelty and invention is claimed because of a prior patent. *Steiner, etc., Hardware Co. v. Tabor Sash Co.*, (1910) 178 Fed. 831.

**Simplification of complicated mechanism.**—Patentable novelty may be found in an improvement which simplifies a complicated train of mechanism by eliminating some of its elements, with the result that defects due to the presence of those elements are done away with. *Brown v. Huntington Piano Co.*, (1904) 134 Fed. 735, 67 C. C. A. 639, *affirming* 131 Fed. 273.

**Same result by two devices.**—An improvement in mechanism for sawing stone by which the saw is moved against the stone, which remains at rest during the operation, instead of being fed to the saw as in machines of the prior art, discloses patentable novelty. *Diamond Stone Sawing Mach. Co. v. Brown*, (1904) 130 Fed. 896.

**State of art.**—When it is sought to ascertain the state of the art by means of prior patents, nothing can be used except what is disclosed on the face of those patents. They cannot be reconstructed in the light of the invention in suit, and then used as a part of the prior art. *Naylor v. Alsop Process Co.*, (C. C. A. 1909) 168 Fed. 911. See *Smyth Mfg. Co. v. Sheridan*, (1906) 149 Fed. 208, 79 C. C. A. 166.

**Knowledge of inventor of prior state of art.**—In determining the question of patentable invention, a patentee is chargeable with knowledge of all that preceded him in the art. *Daylight Glass Mfg. Co. v. American Prismatic Light Co.*, (1905) 142 Fed. 454, 73 C. C. A. 570.

**Success and adoption in doubtful cases.**—General public acceptance and use of a patented device is only a fact to be considered with all the other facts in the case on the issue of patentable novelty, and is most appropriately resorted to where the issue is in grave doubt. *Torrey v. Hancock*, (C. C. A. 1910) 184 Fed. 61, *reversing* (1909) 170 Fed. 600.

Although the commercial success of a de-

vices does not confer patentability on it, and although a combination of old elements is not patentable, yet, where the question of novelty is in doubt, the fact that a new combination and arrangement of known elements produces a new and useful result, displacing other devices employed for a like purpose, is sufficient to turn the scale in favor of invention. *In re Thomson*, (1906) 26 App. Cas. (D. C.) 419.

Although the fact that a device has supplanted prior devices in the trade may turn the scale in favor of the existence of invention, where that question is in doubt, yet such fact has no weight where the want of patentable novelty is already reasonably clear. Utility is not novelty. *In re Garrett*, (1906) 27 App. Cas. (D. C.) 19.

The fact that a new device or construction may have displaced others, by reason of its manifest superiority, is material only when the question of patentable novelty is otherwise a matter of doubt. *Millett v. Allen*, (1906) 27 App. Cas. (D. C.) 70.

**Patent as evidence of novelty.**—The granting of a patent is *prima facie* evidence of the novelty of the device described, and the burden of proof to establish anticipation rests on the defendant alleging it. *Hancock v. Boyd*, (1909) 170 Fed. 600; *Phoenix Knitting Works v. Bradley Knitting Co.*, (1910) 181 Fed. 163.

The presumption of novelty arising from the granting of a patent is greater or less according to circumstances. If the patent relates to something of temporary interest, and the object sought is of little importance, it may receive but little attention in the Patent Office, and the presumption is slight; but where the problem sought to be solved is of such importance that its solution promises great pecuniary returns, and it is shown that all the claims were subjected to critical analysis, resulting in amendments and disclaimers designed to distinguish the invention from everything in the prior art, the presumption of novelty is greater than in those cases where the patent may have passed by inadvertence. *Imperial Bottle Cap, etc., Co. v. Crown Cork, etc., Co.*, (C. C. A. 1905) 139 Fed. 312, *reversing* (1903) 123 Fed. 669.

Where there is a mere comparison of a patent with others to determine the novelty of the device, it is immaterial just when the invention was conceived or reduced to practice, or whether due diligence was used; a patent taking rank as a publication, negating novelty, only when it comes out, and a mere application has no effect. *Union Typewriter Co. v. Smith*, (1909) 173 Fed. 288.

**Application as rebutting presumption against novelty.**—Where an inventor applies for and receives a patent which discloses another unpatented invention, not claimed, it is presumed not to be novel, but this presumption is rebutted if the patentee has another application pending in the Patent Office, claiming it. *Saunders v. Miller*, (1909) 33 App. Cas. (D. C.) 456.

**Novelty of part of combination.**—Where one of two contested features of a combination patented is lacking to a certain extent in

novelty, but the other is not, nor admittedly is the whole, and all that can be said against the invention is that the existing art has been somewhat drawn upon, but this has not been without new and independent treatment, nor so but that the conjoined result in form and function is the inventor's own, this is not sufficient to negative novelty or inventive skill, of the existence of which the efforts of other inventors in the same direction are to be accepted as persuasive proof. *Eck v. Kutz*, (1904) 132 Fed. 758.

**Proof of novelty.**—Where a patent duly issued is attacked for want of novelty, and oral evidence is relied on, the proof must be clear, satisfactory, and beyond a reasonable doubt. *Clark v. George Lawrence Co.*, (1908) 160 Fed. 512.

**Burden of proof.**—A patent duly issued being presumptively valid, a person attacking it for want of novelty has the burden of proof. *Clark v. George Lawrence Co.*, (1908) 160 Fed. 512.

**Burden of proving priority.**—A public knowledge and use of a device by others prior to the application for a patent therefor being shown, the burden is cast on the patentee to furnish convincing proof that the anticipation was anticipated by him in making the invention. *New England Motor Co. v. B. F. Sturtevant Co.*, (C. C. A. 1906) 150 Fed. 131, *reversing* (1905) 140 Fed. 866.

On an issue as to anticipation, the burden of proof rests on the party pleading such defense, and where the identity of methods and results in the two devices is doubtful the doubt must be resolved in favor of the patent. *Victor Talking Mach. Co. v. Duplex Phonograph Co.*, (1909) 177 Fed. 248.

Where an anticipatory device is shown to have been in use prior to the application for a patent, the burden rests on the patentee to carry the date of his invention back to a time antedating such use by satisfactory and convincing proof. *Torrey v. Hancock*, (C. C. A. 1910) 184 Fed. 61, *reversing* (1909) 170 Fed. 600.

Where the junior parties to an interference were admittedly employed by the senior party to construct a machine embodying an invention made by him, the burden is on them to prove that the improvements embodied by them in the machine were their own invention, and not the ideas suggested by the senior party. *Corry v. McDermott*, (1905) 25 App. Cas. (D. C.) 305.

**Convincing evidence of anticipation required.**—Anticipation must be proved by evidence so cogent as to leave no reasonable doubt in the mind of the court. *Underwood Typewriter Co. v. Elliott-Fisher Co.*, (1908) 165 Fed. 927.

In a suit for infringement of a patent, the burden rests on a defendant to prove the defenses of anticipation or prior use beyond a reasonable doubt. *Beckwith v. Malleable Iron Range Co.*, (1910) 174 Fed. 1001.

Prior use, in order to show anticipation of a patent, must be proved beyond a reasonable doubt, and it cannot be said to have been proved with such degree of certainty by oral testimony, where it may be reasonably de-

duced from all the record that other and conclusive evidence might have been obtained, and no effort was made to produce it nor to excuse the omission. *H. Mueller Mfg. Co. v. Glauber*, (C. C. A. 1910) 184 Fed. 609.

**Declarations of patentee.**—Declarations of a patentee relating to his invention, accompanied by descriptions thereof, and made before his application for a patent was filed, are competent evidence to carry the date of his invention back to the time when they were made. *Bullock Electric Mfg. Co. v. Crocker-Wheeler Co.*, (1905) 141 Fed. 101.

**Unaided recollection of witnesses.**—A patent will not be held void for anticipation by an unpatented machine on the oral testimony of witnesses, the accuracy of which depends on their unaided recollection of events which occurred twenty-five years previously, unless it is exceptionally clear and convincing. *United Shirt, etc., Co. v. Beattie*, (1907) 149 Fed. 736, 79 C. C. A. 442, *affirming* (1905) 138 Fed. 136.

Where oral testimony of witnesses speaking from memory only is relied on to establish a defense of prior use to invalidate a patent, it must be so clear and specific as to convince the court beyond a reasonable doubt. *Parker v. Stebler*, (C. C. A. 1910) 177 Fed. 210.

Where an anticipatory device is shown to have been in use prior to the application for a patent, oral testimony given many years after the event, unsupported by physical exhibits, and which is in itself somewhat contradictory, is not sufficient to sustain the burden resting on the patentee to carry the date of his invention back to a time antedating such use by satisfactory and convincing proof. *Torrey v. Hancock*, (C. C. A. 1910) 184 Fed. 61, *reversing* (1909) 170 Fed. 600.

**Rebutting presumption of novelty.**—The rule that evidence relied on to overthrow the presumption of patentable novelty should be of the most cogent character does not preclude the court from accepting as sufficient the oral testimony of witnesses describing prior anticipating devices, although none of such devices are produced, where the testimony is of such character as to produce conviction beyond a reasonable doubt. *Rodwell Sign Co. v. F. Tuchfarber Co.*, (C. C. A. 1903) 127 Fed. 138.

**Disclosure of ideas by inventor.**—Where an inventor communicates his ideas to one who is thoroughly competent to understand and perpetuate them in case of his death, having effectively given his invention to the world in this way, he is entitled to bring forward the disclosure to maintain the asserted priority of his invention. *Westinghouse Electric, etc., Co. v. Roberts*, (1903) 125 Fed. 6.

The facts of each case must control the determination of whether there is patentable novelty in an invention. *In re Eastwood*, (1909) 33 App. Cas. (D. C.) 291.

**Estoppel to assert novelty.**—The cancellation in the Patent Office, on references cited by the examiner, of a part of the original application in which one feature of the patent as finally allowed is claimed, does not estop the inventor from asserting the novelty of

that feature, where the defendant is sought to be held for infringement of the whole combination of which it forms a part. *Eck v. Kutz*, (1904) 132 Fed. 758.

**Particular devices, etc., held wanting in patentable novelty.**—The making of an annular flange on the feed section of a fountain pen, over which the mouth of the elastic rubber reservoir for holding the ink is stretched for the purpose of making the connection more secure, is only a usual and well-known method of making a tight connection between an elastic tube and an inelastic one, and does not disclose patentable novelty. *Lancaster v. Witte*, (1910) 175 Fed. 976.

An improvement in mechanism for sawing stone by which the saw is moved against the stone, which remains at rest during the operation, instead of being fed to the saw as in machines of the prior art, discloses patentable novelty. *Diamond Stone Sawing Mach. Co. v. Brown*, (1904) 130 Fed. 896.

An application for a patent for a method of treating shells in the manufacture of pearl buttons, consisting of reducing portions of the shells to a suitable thickness and then cutting blanks therefrom, held to disclose no patentable invention. *In re Weber*, (1905) 26 App. Cas. (D. C.) 29.

In an infringement case, involving the claims of a patent for improvements in computing scales, in which nonpatentability and noninfringement are claimed, where it appears that the main difference between the complainant's device and a former patent is that his cylinders are arranged vertically, while those of the former patent were arranged horizontally, and that such vertical arrangement was old long before any date that can be assigned to the complainant, it must be held that there was no invention in complainant's device, as invention could not be predicated on differently positioning the cylinders. *Computing Scale Co. v. Automatic Scale Co.*, (1905) 26 App. Cas. (D. C.) 238, *affirmed* (1907) 204 U. S. 609, 27 S. Ct. 307, 51 U. S. (L. ed.) 645.

An application for a patent for a process of producing ammonia by passing air and steam over peat maintained at varying temperatures is not novel. *In re Woltareck*, (1909) 34 App. Cas. (D. C.) 130.

## VI. PRIOR USE OR SALE.

**Public use in general.**—A patent must be held invalid if there has been sale and public use of the article for more than two years prior to the filing of an application for a patent. *Federal Mfg., etc., Co. v. U. S.*, (1907) 42 Ct. Cl. 479.

Where the inventor of an improvement in pumps for fire engines had the device placed on an engine of which he was in charge as engineer, where it was publicly tested, and thereafter used successfully for many years without material alteration, and was shown and explained by the inventor to the manufacturers of the engine without any injunction of secrecy, the action of the manufacturers in placing the device on an engine which they subsequently built for another city did

not involve any breach of trust or confidence such as to render the use of the invention on the new engine surreptitious, fraudulent, or piratical, and defeat its effect as a public use, even though they knew that the inventor contemplated applying for a patent. *Eastman v. New York*, (1904) 134 Fed. 844, 69 C. C. A. 628.

The use of a process by the patentee and his employees for more than nine years before application was filed for the patent, without any substantial change therein, during which time some 8,000 articles were produced for commercial purposes, cannot be considered experimental, although it is claimed that improvement was constantly sought, but is a public use which invalidates the patent. *National Phonograph Co. v. Lambert Co.*, (1905) 142 Fed. 164, 73 C. C. A. 382, *affirming* (1903) 125 Fed. 388.

The use of a composition for lining pulp digesters in the practical lining of digesters for use in a number of different plants by persons to whom it had been disclosed without secrecy was a public use, which, if continued for more than two years, would bar a patent whether such use was known to the inventor or not, unless the delay was for the purpose of perfecting the invention. *Hentschel v. Carthage Sulphite Pulp Co.*, (1909) 169 Fed. 114.

**Necessity of general use.**—To constitute an anticipation by an unpatented device, it is not necessary that it should have come into general use, but it is sufficient if it was in actual and practical use by a number of persons. *Daniel v. Restein*, (1904) 131 Fed. 469.

**Use prior to application.**—The Weisgerber design patent, No. 35,043, for a design for a rolling chair held not infringed, on evidence which showed that defendant's chairs, if they would otherwise infringe, were constructed and in use by defendant prior to complainant's application for the patent. *Weisgerber v. Clowney*, (1904) 131 Fed. 477.

**Use prior to application not prosecuted with diligence.**—Where the Commissioner of Patents denied a petition for the revival of an application on the ground that there had been such unexcused delay in its prosecution as to work an abandonment under R. S. sec. 4894, a new application filed thereafter cannot be regarded as a continuation of the same proceedings, but stands on the same footing as though no previous application had been made; and to authorize the granting of a patent thereon it must appear that the invention had not been in public use or on sale in this country for more than two years prior to such application. *Hayes-Young Tie Plate Co. v. St. Louis Transit Co.*, (1904) 130 Fed. 900.

**Public use of similar invention.**—Public use of an unpatented lamp which was not successful does not defeat a patent for another lamp, where the first lamp, while resembling the second one in external appearance, did not embody the nice adjustment of parts which was the gist of the patent. *Campbell v. New Idea Arc Light Co.*, (1909) 175 Fed. 115.

**Computing time of use — pendency of original application.**—Where the original application has not been abandoned, subsequent applications and amendments constitute a continuance of the first proceeding, and the two years' public use or sale, which may avoid the patent, must be reckoned from the presentation of the first application, and not from the filing of subsequent applications or amendments. *Hayes-Young Tie Plate Co. v. St. Louis Transit Co.*, (C. C. A. 1905) 137 Fed. 80, *affirming* (1904) 130 Fed. 900.

**New application after abandonment of original.**—The abandonment of an application destroys the continuity of the solicitation of the patent, and a subsequent application institutes a new proceeding, and the two years' public use or sale which may invalidate the patent must be counted from the latter application. *Hayes-Young Tie Plate Co. v. St. Louis Transit Co.*, (C. C. A. 1905) 137 Fed. 80, *affirming* (1904) 130 Fed. 900.

**Delay in application on advice of solicitor.**—The fact that an inventor delayed making application for a patent, under the advice of his solicitor, does not prevent the running of the statutory period of limitation from a prior public use from rendering the patent invalid. *Eastman v. New York*, (1904) 134 Fed. 844, 69 C. C. A. 628.

**Single prior use.**—The public use of an invention for more than two years before the application for a patent therefor, although in but a single instance, will defeat the right to a patent. *Bradley v. Eccles*, (1905) 138 Fed. 911.

**What constitutes sale generally.**—The manufacture of a machine on an order for its construction, followed by its delivery and acceptance, constitutes a "sale" within the patent statute. *National Cash Register Co. v. American Cash Register Co.*, (C. C. A. 1910) 178 Fed. 79.

**Single sale for experimental purposes.**—A single sale of an invention by the inventor for experimental purposes, where he is unable otherwise to make proper tests, does not put the invention "on sale" within the meaning of the statute. *In re Mills*, (1905) 25 App. Cas. (D. C.) 377.

**Single unrestricted sale by inventor.**—A single sale of a single machine by the inventor more than two years before his application for a patent thereon, without restriction as to its use, is sufficient to invalidate the patent. *National Cash Register Co. v. American Cash Register Co.*, (C. C. A. 1910) 178 Fed. 79.

A single unrestricted sale by the inventor of his invention is a public sale, or puts it "on sale," within the meaning and intent of this section. *In re Mills*, (1905) 25 App. Cas. (D. C.) 377.

**Improvements during public use as extending time for application.**—The duplication of a set of rollers on a machine which was before complete and operative, and had been in use for two years, the purpose being merely to reinforce the work of the original rollers in certain cases where necessary, did not constitute a part of the invention of the machine, so as to extend the time within which a pat-

ent might be applied for. *Jenner v. Bowen*, (C. C. A. 1905) 139 Fed. 556.

**Delay from unsuccessful effort to construct machine.**—An inventor of a complicated device, who attempts to construct a completed machine with his own hands during a period of over a year, and finally abandons the effort from lack of time and money, and immediately makes a model and drawings, is exercising due diligence. *Davis v. Garrett*, (1906) 28 App. Cas. (D. C.) 9.

**Commercial use as public use.**—Where the inventor of a machine made and set up one for a customer, who paid for it and used it commercially, selling the product, as was intended, neither he nor his employees being under any obligation of secrecy, such use was public and not private, and its continuance for more than two years before application for a patent deprived the inventor of the right to a patent. *Jenner v. Bowen*, (C. C. A. 1905) 139 Fed. 556.

The commercial use of a machine for more than four years, although its operation was unsatisfactory to the inventor, leading to frequent experiments to improve the combination and finally to the addition of an element of such value that a patent was applied for, was an abandonment to the public of the invention so far as it was embodied in the combination before the addition of such improvement, and invalidates a claim of the subsequent patent from which the new element is omitted. *Star Mfg. Co. v. Crescent Forge, etc., Co.*, (C. C. A. 1910) 179 Fed. 856.

**Experimental use.**—An inventor has a reasonable time in which to experiment for the purpose of perfecting his invention and demonstrating its utility, and the time thus spent, if in good faith, is no part of the two-year period of limitation. *Eastman v. New York*, (1904) 134 Fed. 844, 69 C. C. A. 628.

Where a patent is for a manufactured article itself, designed for general use, a presumption arises that, when the inventor issues such article to the public, he regards it as a finished product, and, in case he does not apply for a patent within two years, abandonment of his purpose to do so may well be assumed; but where the invention is for a machine designed to produce articles, a different rule as to experimental use may well apply, and, although the articles produced may be perfect, the machine may not, and the sale of the product does not necessarily, render the use of the machine a public use, where none are sold, and the use is entirely under the observation of the inventor. *Bryce Bros. Co. v. Seneca Glass Co.*, (1905) 140 Fed. 161.

The Conroy patent, No. 735,949, for a machine for shaping or chipping the edges of glass articles, discloses invention, and is not invalid for public use because the machine was in fact used for more than two years prior to the application; it being shown that, while the machine was fairly successful, and its product was sold, the purpose of its use was experimental, and it was during such time being perfected by the inventor and was kept under lock and key and as far as possible from the knowledge even of the

factory workmen who were not engaged in its operation. *Conroy v. Penn Electrical, etc., Co.*, (1907) 155 Fed. 421.

The use of a machine while it was being perfected, in a room from which the public and all others not engaged in its operation were excluded, changes and improvements being made from time to time, although extending back to more than two years before application was made for a patent, was an experimental and not a public use, and did not invalidate the patent granted therefor, and it is immaterial that the product of such experimental use was sold. *Penn Electrical, etc., Co. v. Conroy*, (C. C. A. 1908) 159 Fed. 943.

The use of a telephone transmitter by the inventor for the purpose of determining its efficiency only, although known to others, was not a public use which invalidated a later patent. *International Telephone Mfg. Co. v. Kellogg Switch Board, etc., Co.*, (C. C. A. 1909) 171 Fed. 651, *affirming* (1907) 158 Fed. 104.

An experimental use of a new invention or discovery, which will not defeat the right of the inventor to a patent unless application is made within two years, must have been in perfecting the invention, and where the discoverer of a new form of calcium carbide, who made a considerable quantity, used the same in experiments in making acetylene gas, etc., not for the purpose of perfecting it, but to demonstrate its commercial value, and also sent a quantity abroad without injunctions of secrecy or restrictions upon its use, where it was used for like purposes, such use constituted a public use or disclosure within the meaning of the law. *Union Carbide Co. v. American Carbide Co.*, (1909) 172 Fed. 120.

An experimental use of an invention, to be such, need not necessarily be made by the inventor himself, or at his shop. *In re Mills*, (1905) 25 App. Cas. (D. C.) 377.

**Burden of proving experimental character of use.**—When a clear case of prior public use is established, the burden is on the inventor to prove by convincing proof that the use was experimental. *Eastman v. New York*, (1904) 134 Fed. 844, 69 C. C. A. 628; *Corbett Bros. Co. v. Reinhardt-Meding Co.*, (1909) 166 Fed. 767; *Greenwald v. Weiss*, (1910) 180 Fed. 474; *In re Mills*, (1905) 25 App. Cas. (D. C.) 377.

**Sale of product of experimental use.**—A patent is not invalidated because a machine like that of the patent was made and used by the patentee more than two years before the application was filed, where such use was for the purpose of experiment only, nor is such use a public use which will defeat the patent because the product of the machine during the time was sold. *American Caramel Co. v. Mills*, (1906) 149 Fed. 743, 79 C. C. A. 449, *reversing* (1905) 138 Fed. 142.

**Exhibition of experimentally constructed machines.**—The mere exhibition of an experimentally constructed machine by the inventor to an audience, accompanied by an explanation of the invention, no charge being made, is not such a public use as will defeat his right to a patent applied for more than

two years afterwards. *Victor Talking Mach. Co. v. American Graphophone Co.*, (1905) 140 Fed. 860, *affirmed* (C. C. A. 1906) 145 Fed. 350.

**When experimental use becomes public.**—The use of an unpatented invention on a machine in actual service, continued for years without any change therein, although it may have been experimental in the beginning, becomes a public use from the time the success of the invention is demonstrated, and a patent therefor issued on an application filed more than two years after such time is invalid. *Eastman v. New York*, (1904) 134 Fed. 844, 69 C. C. A. 628.

**Use to test utility.**—The use of an invention by the inventor for the purpose of testing its utility, which is not a public use, may continue indefinitely. *Warren Bros. Co. v. Owosso*, (C. C. A. 1909) 166 Fed. 309.

**Trial use by purchaser.**—Allowing the purchaser of an unpatented device a period of use to determine whether it will satisfactorily do his work must be deemed the user's trial, and not the inventor's. It cannot be regarded as extending to the experimental stage of the invention. *Federal Mfg., etc., Co. v. U. S.*, (1907) 42 Ct. Cl. 479.

**Insanity of inventor after authorizing public use.**—The right of one who purchased an unpatented machine from the inventor, with the intention and understanding that it was to be used commercially, to so use the same, is not terminated by the subsequent insanity of the inventor, and such continued use prior to the application for a patent constitutes a prior public use within the meaning of the patent law. *Jenner v. Bowen*, (C. C. A. 1905) 139 Fed. 556.

**Use by permission of inventor.**—If an inventor passes his invention into the hands of different persons to use and test as to the usefulness of the device before application for a patent, such use by them must be restricted to experimental use; and if they are permitted to use the device publicly as a nonpatented article, and it is either sold or given away to even a few persons, their use of it will be a prior public use which may deprive the inventor of his right to a patent. *Bradley v. Eccles*, (1905) 138 Fed. 911.

**Conditional sale.**—While a shop test of a machine may be sufficient to show a reduction to practice, especially in view of favorable results being obtained by a later actual test under the conditions of ordinary use for which the machine is intended, it does not necessarily remove the machine from the domain of experiment, so as to constitute a conditional sale a public sale. *In re Mills*, (1905) 25 App. Cas. (D. C.) 377.

**Unaided recollection of witness as to prior use.**—As a general proposition, mere oral testimony, depending on the recollection of the witnesses, will not be regarded as sufficient to establish prior public use, to defeat a patent. *Interurban R., etc., Co. v. Westinghouse Electric, etc., Co.*, (C. C. A. 1911) 186 Fed. 166.

**Applicant as witness regarding prior use.**—Where it is sought to be shown that an invention was in public use, the applicant is

entitled to be heard as a witness in his own behalf. *In re Mills*, (1905) 25 App. Cas. (D. C.) 377.

**Character of evidence of prior use.**—There is no hard and fast rule as to the measure or kind of proof required to establish prior use of a patented device, further than that it must be clear and satisfactory to the judicial mind in each case. *Sipp Electric, etc., Co. v. Atwood-Morrison Co.*, (1906) 142 Fed. 149, 73 C. C. A. 367, *reversing* (1905) 136 Fed. 859.

**Burden of proving prior use.**—A defendant has the burden to establish an alleged prior use to defeat a patent by proofs clear, satisfactory, and beyond reasonable doubt. *Timolat v. Philadelphia Pneumatic Tool Co.*, (1904) 131 Fed. 257.

Under the rule that the defense of prior use must be established beyond a reasonable doubt it will not be sustained when it rests on the recollection of a single witness, especially when his knowledge depends in large part on information received from others who are not called. *Albright v. Langfeld*, (1904) 131 Fed. 473.

The burden of proof to establish a defense of prior use to invalidate a patent rests on the defendant. *Parker v. Stebler*, (C. C. A. 1910) 177 Fed. 210.

## VII. ABANDONMENT.

**Accepting interference as to one of several claims.**—An inventor is not estopped from insisting on his application for a patent in which were united process and apparatus claims for essentially the same invention by requiring his process claims to be placed in interference with those of an existing patent after receiving a letter from the primary examiner permitting the retention of the process and apparatus claims pending the determination of the interference, but stating that the acceptance of an interference on one of the process claims would be held by the office to be an election of the prosecution of such claims, and further prosecution of the apparatus claims would not be permitted. *U. S. v. Allen*, (1904) 192 U. S. 543, 24 St. Ct. 416, 48 U. S. (L. ed.) 555, 109 Off. Gaz. 549.

**Intention the test of abandonment.**—*Burdon Wire, etc., Co. v. Williams*, (1904) 128 Fed. 927; *Victor Talking Mach. Co. v. American Graphophone Co.*, (1905) 140 Fed. 860, *affirmed* (C. C. A. 1906) 145 Fed. 350; *International Telephone Mfg. Co. v. Kellogg Switch Board, etc., Co.*, (C. C. A. 1909) 171 Fed. 651, *affirming* (1907) 158 Fed. 104.

**Question of fact.**—Questions relating to the actual or constructive abandonment of an invention are questions of fact; and every reasonable doubt thereon should be resolved in favor of the patent. *Victor Talking Mach. Co. v. Duplex Phonograph Co.*, (1909) 177 Fed. 248.

**Burden of proof.**—The burden of proving abandonment of an invention to defeat a patent therefor rests upon the party alleging the same, and evidence is insufficient which rests on doubtful inferences. *Victor Talking Mach. Co. v. American Graphophone Co.*,

(1905) 140 Fed. 860, *affirmed* (C. C. A. 1906) 145 Fed. 350.

**Convincing evidence required.**—Kellogg Switchboard, etc., Co. v. International Telephone Mfg. Co., (1907) 158 Fed. 104; Computing Scale Co. v. Automatic Scale Co., (1905) 26 App. Cas. (D. C.) 238, *affirmed* (1907) 204 U. S. 609, 27 S. Ct. 307, 51 U. S. (L. ed.) 645; Saunders v. Miller, (1909) 33 App. Cas. (D. C.) 456.

**Discontinuance of experiments.**—Total abandonment of experiments, and neglect and loss of the physical things made, together with inaction by the alleged inventor and his assignee for two years, justify the conclusion of abandoned experiment and failure to successfully reduce to practice. Richards v. Burkholder, (1907) 29 App. Cas. (D. C.) 485.

**Within two years.**—An inventor who has reduced his invention to practice being entitled to a period of two years in which to put it in public use and on sale, an abandonment within such period cannot be presumed, but it must be proved. Rolfe v. Hoffman, (1905) 26 App. Cas. (D. C.) 336.

**Concealed invention.**—The fact that the first inventor failed to apply for a patent and to manufacture and to put his invention on the market for about two years, because of business reverses and poverty and inability to obtain assistance from others, shows such concealment of his invention as will deprive him of an award of priority as against a subsequent inventor who had obtained a patent. Brown v. Blood, (1903) 22 App. Cas. (D. C.) 216.

**Deliberate concealment,** by the junior party to an interference, of an invention from the public for two and a half years, with no change of such policy of concealment until he obtained knowledge of the senior party's efforts in the same field, during which time the senior party, with no knowledge of his rival's invention, worked diligently to perfect the invention and to put his product on the market, and applied for a patent, will render the junior party's rights, based on his prior construction of an operative device, subordinate to the right of the senior applicant, who, within the policy of the law, is the first to invent; and the fact that the senior party's application had not ripened into a patent before the filing of the junior party's application will not affect the cause. Matthes v. Burt, (1904) 24 App. Cas. (D. C.) 265.

**Patent for combination as affecting right to basic patent.**—Where an application for a basic patent is pending, the granting to the same inventor of a limited combination patent of which the subject-matter of the basic patent is an essential element is not an abandonment of the latter to the public. Westinghouse Electric, etc., Co. v. Electric Appliance Co., (1906) 142 Fed. 545.

**Experimental use.**—Abandonment and dedication to the public use by one of the parties to an interference involving an apparatus for the manufacture of rubber shoes is not shown, where it appears that he made experimental tests of the product of his invention by having boots made with it worn by the men in the employ of the company

with which he was connected, testing them in connection with boots then being manufactured, continued his experiments for two years, and filed an application for the process, followed by an application for the apparatus. Saunders v. Miller, (1909) 33 App. Cas. (D. C.) 456.

**Discontinuance of experimental use.**—A party to an interference claimed to have made and successfully tested a device embodying the invention of the issue, an improvement in sewing machines, by attaching it to a sewing machine manufactured by his assignee, a sewing machine company, and operating it. It appeared that the device was then removed from the machine—which was afterwards sold to the trade—and put away in the drawer of a desk in a room to which the officers of the company alone had access, where it remained four years, during which time the old machines and improved ones were sold without such device being attached to them or used in any way, or any attempt being made to obtain a patent upon it, although it was a simple device, easily attached to the machines then in use, and there were no difficulties in the way of its manufacture. Held, that the making and operating of the device must be regarded as an unsuccessful and abandoned experiment. Quist v. Ostrom, (1904) 23 App. Cas. (D. C.) 69.

**Mere delay.**—Abandonment is not to be predicated on mere delay. Where, therefore, the complainant, as early as July, 1891, had a complete conception of his device substantially as it now appears, which he reduced to practical form, he has the right to claim this as the date of his invention; and it cannot be regarded as abandoned simply because, for business and other reasons, he let the matter rest for upwards of three years, having eventually in September, 1894, put his ideas into exact shape. Eck v. Kutz, (1904) 132 Fed. 758.

**Unreasonable delay in application.**—The fact that the inventor of a device did not apply for a patent until six years after it had been perfected, and successfully tested, did not operate as an abandonment or dedication to the public, in the absence of proof of anything indicating such an intention, such as a public use or publication. International Telephone Mfg. Co. v. Kellogg Switch Board, etc., Co., (C. C. A. 1909) 171 Fed. 651, *affirming* (1907) 158 Fed. 104.

An inventor who, after perfecting his invention and reducing it to practice, without adequate excuse delays applying for a patent for five or six years, and until another has invented and patented the same device, and then applies for and obtains a patent, is estopped by his laches from asserting such patent as against the second inventor. Curtain Supply Co. v. National Lock Washer Co., (1909) 174 Fed. 45.

The fact that the first inventor failed to apply for a patent, and to manufacture and to put his invention on the market for about two years, because of business reverses and poverty and inability to obtain assistance from others, shows such lack of diligence as will deprive him of an award of priority as

against a subsequent inventor who had obtained a patent. *Brown v. Blood*, (1903) 22 App. Cas. (D. C.) 216.

Failure by one of the parties to an interference to file an application for four years after conception of the invention, during which time he constructed a device embodying it, discussed it freely with others, and endeavored to interest men of means to exploit it, does not show such lack of diligence as will preclude him from asserting his rights against the other party, although the latter was diligent both in respect to reduction to practice and in applying for a patent. *Rolfe v. Kaisling*, (1909) 32 App. Cas. (D. C.) 582.

While, if an invention which is the subject of an interference has been actually reduced to practice, the inventor will not be deprived of the benefit of his invention by reason of mere delay, without intention to secrete or suppress it, or by the exploitation of a preferred substitute, yet long delay in making use of the invention, or in applying for a patent, are potent circumstances tending to show that an alleged reduction to practice was nothing more than an abandoned experiment. *Daggett v. Kaufmann*, (1909) 33 App. Cas. (D. C.) 450.

Evidence held to establish reasonable diligence. — *Eck v. Kutz*, (1904) 132 Fed. 758.

Delay on account of proposed related invention. — To delay one invention for the sake of another projected invention to be used in connection with it, and which may never be realized, cannot in patent law be construed as an exercise of due diligence. *Lotterhand v. Hanson*, (1904) 23 App. Cas. (D. C.) 372.

Delay to work out details. — An inventor having grasped an idea and put it in mechanical form may not wait to secure a monopoly on the broad thought until everything in the nature of mere accessory improvement that makes it commercially better has been worked out and perfected. *Universal Adding Mach. Co. v. Comptograph Co.*, (1906) 146 Fed. 981, 77 C. C. A. 227, reversing 142 Fed. 539.

Delay to obviate defects in operation. — Delay by an inventor in applying for a patent after he has reduced his invention to practice for the purpose of perfecting it, or testing its practical value, will not constitute an abandonment or laches which will defeat his right to a patent where, from some unknown cause, it was not successful in operation, although it subsequently develops that the trouble was due to external causes not affecting the utility or successful working of the invention. *Appert v. Brownsville Plate Glass Co.*, (1904) 144 Fed. 115.

Failure to prosecute application after rejection by examiner. — The failure of an applicant for a patent to further prosecute his application after it has been rejected by the examiner for anticipation does not operate as an abandonment of the invention, nor an acquiescence in the ruling, where it was caused by his lack of funds. *Shepherd v. Deitsch*, (1905) 138 Fed. 83.

An abandonment of an application for a patent is not an abandonment of the invention, and a patent may lawfully issue on a

second application. *Hayes-Young Tie Plate Co. v. St. Louis Transit Co.*, (C. C. A. 1905) 137 Fed. 80, affirming (1904) 130 Fed. 900; *Commercial Acetylene Co. v. Acme Acetylene Appliance Co.*, (1911) 188 Fed. 89; *Tripler v. Linde*, (1902) 21 App. Cas. (D. C.) 32.

Successive applications. — Pending an application for a patent, the specification of which is broad enough to warrant the making of certain claims which are not made, the applicant, instead of inserting such claims by amendment, may at his election make them the subject of a new application, which in such case may fairly be considered a continuation of the first, and their omission therefrom will not operate as an abandonment. *Victor Talking Mach. Co. v. American Graphophone Co.*, (C. C. A. 1906) 145 Fed. 350, affirming (1905) 140 Fed. 860.

A second application for a patent, which describes precisely the same device as a former one, which has been abandoned by permission, will be treated as continuous of the first. *L. E. Waterman Co. v. McCutcheon*, (C. C. A. 1904) 127 Fed. 1020, affirming (1903) 121 Fed. 103; *Corrington v. Westinghouse Air Brake Co.*, (1909) 173 Fed. 69; *Duryea v. Rice*, (1906) 28 App. Cas. (D. C.) 423.

Matter described and not claimed. — The question whether a patentee has abandoned any part of what he has described in his patent is largely one of intention, and the fact that while the specification of a process patent describes two or three ways of performing one of the steps of the process which are equivalent but one is mentioned in the claims does not constitute an abandonment of those not so mentioned. *Burdon Wire, etc., Co. v. Williams*, (1904) 128 Fed. 927.

A patent is not invalidated by the fact that the invention claimed was described, but not claimed, in an earlier application by the patentee, on which a patent was issued after the one in suit, where it is apparent that there was no intention to abandon the invention to the public. *Victor Talking Mach. Co. v. American Graphophone Co.*, (1905) 140 Fed. 860, affirmed (C. C. A. 1906) 145 Fed. 350.

Pending an application for a patent, the specification of which is broad enough to warrant the making of certain claims which are not made, the applicant, instead of inserting such claims by amendment, may at his election make them the subject of a new application, which in such case may fairly be considered a continuation of the first, and their omission therefrom will not operate as an abandonment. *Victor Talking Mach. Co. v. Duplex Phonograph Co.*, (1909) 177 Fed. 248.

Where an inventor applies for and receives a patent which discloses another unpatented invention not claimed, it is presumed to be dedicated to the public by the patentee, but this presumption is rebutted if the patentee has another application pending in the Patent Office claiming it. *Saunders v. Miller*, (1909) 33 App. Cas. (D. C.) 456.

Unclaimed matter in another application. — The fact that an invention is described but not claimed in a patent does not operate as a disclaimer or abandonment of the same, where it is the subject-matter of a pending



application by the inventor for another patent. *Kinnear Mfg. Co. v. Wilson*, (C. C. A. 1905) 142 Fed. 970.

**Disuse of patent.**—A patentee is under no obligation, during the life of his monopoly, to use or place on the market a device or machine embodying his invention. *Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co.*, (C. C. A. 1908) 163 Fed. 950.

The making of an invention and its reduction to practice, without any public use or other act placing the public in possession of the invention, although the inventor may by delay in applying therefor lose his right to a patent, does not constitute an abandonment of the invention to the public, which will invalidate a patent subsequently granted to another therefor. *Davis, etc., Temperature Controlling Co. v. National Steam Specialty Co.*, (1908) 164 Fed. 191.

**Public benefit.**—An applicant for a patent, who, after another applicant has been adjudged priority of invention as to certain of his claims in interference proceedings, canceled such claims, did not acquire any right in the subject-matter thereof by the subsequent defeat of issuance of a patent to the other applicant on the ground of prior public use, but the same became abandoned to the public. *Dodge Needle Co. v. Jones*, (C. C. A. 1908) 159 Fed. 715, *affirming* (1907) 153 Fed. 186.

If the original inventor has, by his action, forfeited his right to a patent, the invention will be deemed to have been dedicated to the public, and no one subsequently claiming to be the inventor can acquire a property right in the invention. *Saunders v. Miller*, (1909) 33 App. Cas. (D. C.) 456.

**Abandonment of application for product patent as affecting process patent.**—The abandonment of an application for a product patent, on a finding of an examiner in interference proceedings that the product had been in use for more than two years prior to the application, is not a conclusive admission that the process for the manufacture of such product for which the applicant had been granted a patent on an application filed at the same time, was old, nor does it estop the patentee from asserting the validity of such patent. *Mica Insulator Co. v. Commercial Mica Co.*, (C. C. A. 1908) 166 Fed. 440, *reversing* (1907) 157 Fed. 90.

#### VIII. DIVISION OF INVENTIONS.

**Two patents for same invention.**—Two valid patents may not be issued to a party, based on the same patentable invention. *In re Wickers*, (1907) 29 App. Cas. (D. C.) 71.

### Vol. V, p. 468, sec. 4887.

#### DECISIONS CONSTRUING SECTION 4887 PRIOR TO THE AMENDMENT OF MARCH 3, 1897.

**Construction of second clause.**—The second clause of the section that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," is plain and un-

An enlargement of a patent is not to be effected by the engrafting of broad claims on a later patent, based on an application of narrow scope, where the second patent is applied for as an improvement on the first. *Union Typewriter Co. v. Smith*, (1909) 173 Fed. 288.

The fact that a prior design patent is invalid, because the subject of it is not within the law, will not save a subsequent mechanical patent for the same device from constituting a case of double patenting; the patentee having enjoyed a nominal, and for a time an apparently unquestioned, monopoly therefrom, and it not being open to him to set himself right for a mistake which he has made in the character of the patent by taking out another and different one for substantially the same thing. *Williams Calk Co. v. Neverslip Mfg. Co.*, (1905) 136 Fed. 210.

**Process and apparatus.**—No general rule can be laid down by which to determine when a given invention or improvement shall be embraced in one, two, or more patents. The Commissioner of Patents is vested with a discretion in determining whether or not to require a division of claims for a process and an apparatus. *In re Frasch*, (1906) 27 App. Cas. (D. C.) 25.

**Generic and subordinate inventions.**—An inventor has the right, by contemporaneous applications, to a generic and specific patent; and, when he has thus applied, he does not lose the right to his generic patent because one or more of the specific patents may happen to be issued first. Nor does he lose such right by the subsequent filing of an amended or new application changing the specification of the generic invention, where the patent is still sought for the substance of the invention as originally claimed. *Badische Anilin, etc., Fabrik v. Klipstein*, (1903) 125 Fed. 543.

**Generic invention and improvement.**—Where a patent first granted is distinctly and only for an improvement on another and generic invention which is the subject of a prior application by the patentee, then pending, it does not invalidate the patent subsequently granted thereon, although there is no express disclaimer of the matter claimed in such prior application. *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, (C. C. A. 1904) 131 Fed. 853.

**Burden of proving unitary invention.**—The burden of proof is on the applicant to prove that two statutory inventions constitute one unitary invention. *In re Frasch*, (1906) 27 App. Cas. (D. C.) 25.

ambiguous, and not to be extended by construction, and applies only to cases where the inventions actually claimed in the foreign and domestic patents are identical; it is not sufficient that the foreign patent may disclose the invention of the later United States patent, where it is not therein claimed. *Westinghouse Electric, etc., Co. v. Stanley Instrument Co.*, (C. C. A. 1905) 138 Fed. 823.

**Improvement as differentiating patents.**—The Pickard patent, No. 448,072, for construction of pleasure canals or waterways, shows a canal which, while the same in principle, is not identical in structure with that shown in the prior British patent of 1888, No. 10,519, to the same inventor, but contains the additional feature that the longitudinal partition through the centre is extended to the ends, dividing the canal throughout its entire length, while in the British patent an opening is left at each end, through which the water flows and the boats pass. Hence, as to such feature, which is an improvement of great value and utility, showing patentable invention, the United States patent did not expire with the British patent. *Aquarama Co. v. Old Mill Co.*, (1903) 124 Fed. 229.

**Method and apparatus.**—A foreign patent for a method is not for the same invention as an application for a United States patent for an apparatus for practicing that method. *Commercial Acetylene Co. v. Acme Acetylene Appliance Co.*, (1911) 188 Fed. 89.

**Foreign patent for minor part of basic invention.**—A prior patent in a foreign country for a minor part of a broad or basic invention is not for the same invention as a subsequent United States patent covering both the minor parts and the broad main invention, and such foreign patenting of a part does not so affect the whole that the expiration of the foreign patent terminates the whole of the American patent including the broad claims. *Victor Talking Mach. Co. v. Leeds, etc., Co.*, (1906) 148 Fed. 1022, 79 C. C. A. 536, *affirming* 146 Fed. 534.

**Substantial identity.**—The identity contemplated relates to matters of substance and not of form merely, applying only where there is a valid foreign patent, and a United States patent for an alleged invention which was covered by a prior certificate of addition to a French patent is not limited to the term of the French patent, where the same was adjudged null and void by the French courts on the ground of anticipation; the effect of such judgment under the law of France being to render the patent, with any certificates of addition thereto, a nullity from the beginning. *Hennebique Constr. Co. v. Myers*, (C. C. A. 1909) 172 Fed. 869.

**Formal identity of claims** is not necessary to constitute identity of a United States and a foreign patent, but substantial identity of the invention as covered by the claims is sufficient. *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, (1906) 148 Fed. 31.

In determining whether the invention of a United States patentee was previously patented in a foreign country so that its term is

limited by such foreign patent, the court must look through the mere form of phraseology and determine what was the essence of the invention laid open to the public by the foreign patent. *Commercial Acetylene Co. v. Searchlight Gas Co.*, (1911) 188 Fed. 85.

**Different claims in foreign and domestic patents.**—All the claims of a domestic patent do not necessarily expire with a foreign patent because of the provision that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," but only such claims expire as are embodied in the foreign patent. *Leeds, etc., Co. v. Victor Talking Mach. Co.*, (1909) 213 U. S. 301, 29 S. Ct. 495, 53 U. S. (L. ed.) 805, *affirming* (1906) 148 Fed. 1022, 79 C. C. A. 536.

**Effect of foreign extensions.**—Article 4 *bis*, inserted in the international convention for the protection of industrial property of March 20, 1883, by the additional Act proclaimed by the President, Aug. 25, 1902 (32 Stat. L. 1936, 1939), did not have the effect of changing the term of a patent granted by the United States to a citizen thereof, as that term is fixed by statute; and such a patent, granted prior to Jan. 1, 1898, and which is limited by the provisions of this section to the term of a prior foreign patent for the same invention, is not extended by such additional Act. *United Shoe Machinery Co. v. Duplessis Shoe Machinery Co.*, (1906) 148 Fed. 31; *Malignani v. Hill-Wright Electric Co.*, (1910) 177 Fed. 430.

**Forfeiture of foreign patent.**—The provision that a United States patent shall expire at the same time as a prior foreign patent for the same invention, has reference to the legal term of the foreign patent as appears on its face at the time of the issuance of the United States patent, and the latter is not further limited by the subsequent lapse or forfeiture of any portion of such legal term of the foreign patent by the failure to comply with a condition subsequent, such as the payment of additional fees at stated intervals. *Victor Talking Mach. Co. v. Leeds, etc., Co.*, (1906) 148 Fed. 1022, 79 C. C. A. 536, *affirming* 146 Fed. 534.

The expiration of a Canadian patent by reason of the failure to pay the fee required to keep such patent alive for the second six years of the eighteen-year term for which it was granted does not affect the duration of a domestic patent. *Leeds, etc., Co. v. Victor Talking Mach. Co.*, (1909) 213 U. S. 301, 29 S. Ct. 495, 53 U. S. (L. ed.) 805, *affirming* (1906) 148 Fed. 1022, 79 C. C. A. 536.

## Vol. V, p. 472, sec. 4888.

- I. APPLICATIONS, 1590.
- II. SPECIFICATIONS AND DESCRIPTIONS, 1591.
- III. CLAIMS, 1594.

### I. APPLICATIONS.

**Separate applications for machines and process.**—Under Patent Office rule 41, re-

quiring that two or more independent inventions cannot be claimed in one application, and providing that claims for a machine and the process in the performance of which the machine is used must be presented in separate applications, a process is the mode of treatment of certain materials to produce a

certain result, and a machine or apparatus is a combination of mechanical elements, which may or may not be useful in performing the acts which constitute the process. *U. S. v. Allen*, (1903) 22 App. Cas. (D. C.) 56.

**Variance between venue and jurat of affidavit.**—A patent will not be declared invalid by a court because the venue of the affidavit to the application was laid in one state and the jurat was made by a notary in another, where such application was accepted by the Patent Office and no fraud is shown. *Empire Cream Separator Co. v. Sears*, (1907) 157 Fed. 238.

**Alteration of application.**—The Commissioner of Patents has the power, either in an *ex parte* proceeding or in an interference case, to inquire and determine whether an application for a patent has been altered or substituted without authority by the attorney for the applicant with the applicant's connivance or consent, or by any one else, because, if altered or substituted, the application will not be the one contemplated by the statute as the foundation of a patent. *Moore v. Heany*, (1909) 34 App. Cas. (D. C.) 31.

**Time for filing application.**—In an interference case, an application, to countervail a patent already granted, must be shown to have been made within a reasonable time from the date of reduction to practice, or from conception of the invention, with the exercise of reasonable diligence to reduce to practice, or otherwise the claim to the invention, as opposed to that covered by the patent, will be rejected. *Dashiell v. Tasker*, (1903) 21 App. Cas. (D. C.) 64.

**Multiplication of applications.**—The law does not favor the multiplication of applications and of patents for devices closely related to each other, when they can properly be included in one application and in one patent. *Norden v. Spaulding*, (1904) 24 App. Cas. (D. C.) 286.

**Joinder of inventions.**—So far as rule 41 of the Patent Office rules of practice prevents an inventor from uniting in one application process and apparatus claims which are essentially the same invention, it is invalid as an abuse of the discretion vested in the Patent Office to permit or deny a joinder of inventions. *U. S. v. Allen*, (1904) 192 U. S. 543, 24 S. Ct. 416, 48 U. S. (L. ed.) 555, 109 Off. Gaz. 549.

**Application as creating vested right.**—While letters patent, when issued, give the patentee a vested right in them, the mere filing of an application for a patent gives the applicant no such right which Congress has no power to affect by legislation. *De Ferranti v. Lyndmark*, (1908) 30 App. Cas. (D. C.) 417.

**Construction in light of prior art.**—An applicant's specifications and drawings must be construed in the light of the prior art. *Gold v. Gold*, (1909) 34 App. Cas. (D. C.) 152.

## II. SPECIFICATIONS AND DESCRIPTION.

**Object of specifications.**—It is not essential to the validity of a patent to insert in the drawings and specification a description

of every detail. It is sufficient if the description is such as to enable a mechanic skilled in the art to construct the device patented. *American Delinter Co. v. American Machinery, etc., Co.*, (1904) 128 Fed. 709, 63 C. C. A. 307.

A statement in the specifications of the Dolan patent, No. 589,342, for a duplex acetylene gas burner or tip of the Bunsen type, having a series of inclined air passages on the sides, that, if the burner were cut off, the general shape and condition of the flame would be the same, does not indicate with sufficient definiteness that the essence of the invention is to have so short a chamber or cylinder as to prevent the mixing of the air taken into it, and to emit a current of gas surrounded by the greater part of such air as an envelope or film. *Steward v. American Lava Co.*, (1909) 215 U. S. 161, 30 S. Ct. 46, 54 U. S. (L. ed.) 139, *affirming* (1907) 155 Fed. 731, 740, 84 C. C. A. 157, 166.

**Vague and uncertain description.**—The specification in the claims of a patent for a process, of a "weak acid" to be added to a solution, does not render the patent void for uncertainty, where the specification names vinegar as a preferable acid, which for practical purposes indicates the standard of strength meant, although it does not limit the claims to the acid so specified, and they are infringed by the use of a dilute mineral-acid. *Fullerton Walnut Growers' Assoc. v. Anderson-Barngrover Mfg. Co.*, (C. C. A. 1908) 166 Fed. 443.

**Incorrect description.**—An applicant's claims to a ball-bearing ring are properly rejected by the Commissioner of Patents, where they do not correctly describe his invention, but include new matter borrowed from a patent granted to another party. *In re Dilg*, (1905) 25 App. Cas. (D. C.) 9.

**Essential features of invention.**—Where the essence of an invention is the location, form, size, or any other characteristic of the means employed, the patentee must distinctly specify the peculiarities in which his invention is to be found. *American Lava Co. v. Steward*, (C. C. A. 1907) 155 Fed. 731.

**Details of construction.**—When the device consists of a yielding packing ring of asbestos and tallow, and every description in the patent imports a predominance of the one central idea of a yielding packing composed of asbestos and tallow, it is the invention; the details of construction are of minor importance. *Société Anonyme des Anciens Etablissements Cail v. U. S.*, (1907) 43 Ct. Cl. 25.

**Well-known things.**—While the applicant for a patent is required to point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery, his specifications are not addressed to the public generally, but to those skilled in the art; and it is unnecessary for him to describe that which is common and well known. *Mark v. Greenawalt*, (1908) 32 App. Cas. (D. C.) 253, 267.

**Simple device.**—Where an applicant's ball-retaining ring for ball bearings is a simple invention, there is no warrant for introducing ambiguous terms, thereby failing to clearly

and correctly describe it. *In re Dilg*, (1905) 25 App. Cas. (D. C.) 9.

**Construction by those skilled in the art.**—The failure to describe a complete mechanism in the specifications of a patent for a process is not material if enough is disclosed to indicate to those skilled in such matters the mechanism whereby the method of the patent can be put into operation. *Expanded Metal Co. v. Bradford*, (1909) 214 U. S. 366, 29 S. Ct. 652, 53 U. S. (L. ed.) 1034, *reversing* (1906) 146 Fed. 984, 77 C. C. A. 230, and *affirming* (C. C. A. 1908) 164 Fed. 849; *Shepherd v. Deitsch*, (1905) 138 Fed. 83; *Société Anonyme des Anciens Etablissements Cail v. U. S.*, (1907) 43 Ct. Cl. 25; *Hopkins v. Newman*, (1908) 30 App. Cas. (D. C.) 402; *General R. Signal Co. v. Thullen*, (1909) 32 App. Cas. (D. C.) 575.

The drawings of a patent are addressed to those skilled in the art, and must also be considered in connection with the claims and specification and with each other; and a patent is not invalidated by a clerical mistake in a drawing, which, when so considered, would not mislead one skilled in the art to which it relates. *Cutler-Hammer Mfg. Co. v. Union Electric Mfg. Co.*, (1906) 147 Fed. 266.

That the claim of a patent for a method of exhausting incandescent electric lamps contains no limitation as to the extent to which the bulb must be exhausted before sealing, and the specification only states it approximately, would not render the disclosure of the patent insufficient to enable one skilled in the art to practice the process, though it might be necessary to make several tests to determine with exactness what the patentee meant by the expression "exhausted to the extent of about two millimeters of mercury." *Malignani v. Jasper Marsh Consol. Electric Lamp Co.*, (1910) 180 Fed. 442.

In claiming a patent for the discovery of a useful result in any art, machine, manufacture, or composition of matter by the use of certain means, the applicant must specify the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he describes. *In re Blackmore*, (1909) 32 App. Cas. (D. C.) 338.

**Device not fully explained.**—In an interference involving an improvement in an automatic locking device for hose couplers, the senior party stated in his specifications that to provide the upper side of his locking pin with a "short inclined face" would permit automatic coupling of the device. Held that the disclosure did not justify the claims that the failure to state the angle of inclination was immaterial, as it would appear to any one skilled in the art that the specifications and drawings would immediately suggest an automatic coupler. *Gold v. Gold*, (1909) 34 App. Cas. (D. C.) 152.

**Necessity of describing all details.**—It is not essential to the validity of a patent to insert in the drawings and specification a description of every detail. It is sufficient if the description is such as to enable a mechanic

skilled in the art to construct the device patented. *American Delinter Co. v. American Machinery, etc., Co.*, (C. C. A. 1904) 128 Fed. 709.

**Statement of one mode only.**—A patent for a method of maintaining a constant electric current in an alternating current circuit, in which there are translating devices in series, is not limited by the description therein of an apparatus for practicing such method, which must be taken as merely illustrative. *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, (1905) 135 Fed. 785.

**Description of best mode.**—The description in a specification or drawing of a form or construction of a mechanical element when that form or construction is not essential to the combination or improvement claimed is a mere pointing out of the best mode in which the patentee contemplated applying the principle of his invention, and does not deprive him of protection against mechanical equivalents, nor indicate that he gave up all other modes of application. *J. L. Owens Co. v. Twin City Separator Co.*, (C. C. A. 1909) 168 Fed. 259.

The statutory requirement that an applicant for a patent shall explain the best mode in which he has contemplated applying the principle of his invention (R. S. sec. 4988), does not preclude him from claiming any other mode which embodies his principle. *Vrooman v. Penhollow*, (C. C. A. 1910) 179 Fed. 296.

**Features recommended as preferable.**—Features of construction which the specifications of a patent recommend or describe as preferable do not thereby become essential parts of the patent or limitations of the claims. *Smeeth v. Perkins*, (1903) 125 Fed. 285, 60 C. C. A. 199.

**Description of material.**—A claim of a patent calling in general terms for a "non-combustible and nonconducting material" cannot be limited by construction to a particular noncombustible nonconducting material named in the specification, either to avoid anticipation or infringement. *Empire Circuit Co. v. Channon*, (C. C. A. 1909) 168 Fed. 705.

**Form of structure.**—While an invention is undoubtedly to be regarded as residing in a structure of the same general character as that which is described in the specifications, to which the inventor is to be confined, this does not restrict him to the particular form to which prominence is there given, where it is evident that he had variations of it in mind, and has formulated a claim in broad terms to cover them; the particular form having also been made the subject of a separate claim. *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, (1905) 135 Fed. 785.

**Novelty in dimensions or material.**—When the novelty of an invention consists in the dimensions or the material of the new thing devised, the patentee must specify the particular dimensions or the particular material his invention contemplates. *Bullock Electric Mfg. Co. v. General Electric Co.*, (1906) 149 Fed. 409, 79 C. C. A. 229, *reversing* 146 Fed. 549.

**Description of manufacture.**—A patent for a machine, described as one for moulding tubes

or cylinders, is not invalid because in the use of the machine it makes only half tubes or cylinders capable of being fitted together and so designed. *Keasbey, etc., Co. v. American Magnesia, etc., Co.*, (C. C. A. 1906) 143 Fed. 490, *reversing* (1905) 137 Fed. 602.

**Failure to describe design in words.**—Under this section and section 4933, a design patent is not invalid for failure to describe the design in words. *Cheney v. Weinreb*, (1910) 185 Fed. 531; *National Casket Co. v. New York, etc., Casket Co.*, (1911) 185 Fed. 533; *Ashley v. Samuel C. Tatum Co.*, (C. C. A. 1911) 186 Fed. 339, *reversing* (1910) 181 Fed. 840.

**Description of art or process.**—Where the only suggestion of a method as a distinctive part of an inventive concept in the specification is in the use of the word "method" at two places therein, and it does not appear that there is any difference in the inventive concept underlying such disclosure from that underlying the disclosure in a patent to the applicant on the apparatus, the alleged method claims are not patentable. *In re Creveling*, (1905) 25 App. Cas. (D. C.) 530.

**Inventor ignorant of chemical changes.**—If the inventor of a process in the claims of his patent therefor has so defined his ingredients that there can be no mistake as to what he means, and has indicated a process which will transform those ingredients into the product claimed, it is immaterial that he was wholly ignorant of all of the chemical changes that take place in the course of such process, and such fact will not defeat the patent, but it may properly be taken into consideration in construing the language and terms used in the specification in describing the process. *National Enameling, etc., Co. v. New England Enameling Co.*, (1905) 139 Fed. 643.

**Unnecessary parts of combination.**—A patent for a machine for delinting cotton seed, which shows that the seed is to be fed into the machine at one end and discharged at the other, is not invalidated by the failure to specify or show in the drawings a feed screw or other device for assisting to move the seed through the machine; the machine being operative without it, but it being obvious that some such device would aid the passage of the seed through the machine, and when in fact it was used in the construction of the first machine. *American Delinter Co. v. American Machinery, etc., Co.*, (C. C. A. 1904) 128 Fed. 700.

**Specification of means generally.**—The rule applied that where the claims of a patent for a machine refer generally to "means" for accomplishing a specified result, or movement, without claiming such means, they are not limited by a description of particular means in the specification, given for the purpose of explaining the mode in which the patentee contemplates applying the principle of his invention. *Eastern Paper Bag Co. v. Continental Paper Bag Co.*, (1905) 142 Fed. 479.

Where the claims of a patent specify the elements of a combination, but do not specify the means whereby those elements perform their functions but call for "means" gener-

ally, and close with the words "substantially as and for the purpose" described, or specified, or set forth, such words import into the claims the specific means described in the specification, and the claims are limited accordingly. *Union Match Co. v. Diamond Match Co.*, (C. C. A. 1908) 162 Fed. 148.

**Specification construed as mere description.**—In the *Postlethwaite* patent, No. 622,532, for a gold-dredging apparatus, claim 3, which contains as one element of the combination "a perforated spray pipe leading into the separator or grizzly from the lower end thereof," the statement of the location of such pipe as entering the grizzly at the lower end thereof is in the nature of a mere description, and is not a limitation of the claim to that precise construction. *Western Engineering, etc., Co. v. Risdon Iron, etc., Works*, (C. C. A. 1909) 174 Fed. 224.

**The effect of the words "substantially as described"** in a claim of a patent is not to limit the claim to the precise construction shown in the specification, nor to deprive the patentee of the benefit of the doctrine of equivalents, where his invention is of a primary character. *Lowrie v. H. A. Meldrum Co.*, (1903) 124 Fed. 761.

The words "to operate substantially as described," at the end of a claim, do not import into the claim elements described in the specification, but not mentioned in the claim, for the purpose of either extending or limiting it. *General Electric Co. v. International Specialty Co.*, (C. C. A. 1903) 126 Fed. 755.

An element of a combination, although not definitely described in the claims, except by reference to the specification by the words "substantially as described" at the end of each claim, may be read into the claims, where it is fully described in the specification, and is essential to the operation of the machine. *Sanders v. Hancock*, (C. C. A. 1904) 128 Fed. 424.

Where a patent contains specific claims in which certain features described in the specification are expressly claimed, and also broad claims from which such features are omitted, they cannot be read into the broad claims because of the closing formula "substantially as described," for the purpose of narrowing such claims to avoid anticipation. *Avery v. J. I. Case Plow Works*, (1905) 139 Fed. 878.

The specification of a patent must be construed for the purpose of ascertaining the intent of the parties when the words "substantially as specified" are found in the claim, for the claim is founded on and explained by the specification, whether these words appear in it or not, and they refer to the elements and operation set forth in the specification. *O. H. Jewell Filter Co. v. Jackson*, (C. C. A. 1905) 140 Fed. 340.

A claim of an applicant, made the issue of an interference without objection on the part of the other party, and reading, "a boiler flue having one end reduced in internal diameter and increased in external diameter, substantially as described," will not be read at the instance of such other party, so as to require that the external and internal reinforcement

of the tube should be integral with it. *Geltz v. Crozier*, (1909) 32 App. Cas. (D. C.) 324.

**Reference to drawings.**—Where a patentee has pointed out in his claims the precise construction that is to be regarded as his invention, by references to the drawings, his patent may properly be confined to such construction on an issue as to infringement. *Schaum v. Riehl*, (1903) 124 Fed. 320.

**Purpose of drawings generally.**—The drawings of a patent are not required to be working plans, but are merely illustrative, to be read in connection with the specification and claims, and a patented device will not be held inoperative merely because of imperfections in the drawing in respect to the dimensions or relative position of parts of the mechanism. *Wold v. Thayer*, (1906) 148 Fed. 227, 78 C. C. A. 350, *affirming* 142 Fed. 776.

**Irregularities in signature to drawings.**—Irregularities in the signing of the drawings filed with the application for a patent, or in witnessing the signatures, where they did not operate as a fraud on the commissioner who considered the application and issued the patent on the merits, cannot avail to defeat a suit for its infringement. *Hallock v. Babcock Mfg. Co.*, (1903) 124 Fed. 226.

**Absence of description.**—While a doubtful or ambiguous description in the specification of a patent may be aided and made plain by the drawings, they cannot supply the entire absence of any written description of a feature of the invention. *Windle v. Parks, etc., Mach. Co.*, (1904) 134 Fed. 381, 67 C. C. A. 363, *reversing* 128 Fed. 58.

**Changing specifications to broaden claims.**—An applicant for a patent, after a successful contest in interference proceedings, cannot, without changing his specification, broaden his claims to include something not shown nor claimed in his original application, but which is claimed in the interfering application. *General Electric Co. v. Sangamo Electric Co.*, (C. C. A. 1909) 174 Fed. 246.

**Amendment of specifications.**—An inventor may so amend his specification as to include therein all the advantages within the scope of his invention, where his amendment is filed before other inventors have entered the field, whose rights might be prejudiced, and the original drawings and specification sufficiently show and suggest the claims finally made. *Kirchberger v. American Acetylene Burner Co.*, (C. C. A. 1904) 128 Fed. 599, *affirming* (1903) 124 Fed. 764.

An applicant for a patent has the right to alter and amend his specification to conform to the state of the art as the facts are developed in the Patent Office, so long as he does not, by enlarging its scope, appropriate prior inventions, or any that have in the meantime gone into public use; and he may also amend his claims to conform more closely to the specification and drawings. *Keasbey, etc., Co. v. Philip Carey Mfg. Co.*, (1905) 139 Fed. 571.

An applicant for a patent in his endeavor to protect his invention may amend his specification and claims, so long as he keeps within the requirements of the statutes and rules of the Patent Office; but he cannot be per-

mitted at any time to introduce new matter into his application, and obtain therefor a date as of the date of his original application. *In re Dilg*, (1905) 25 App. Cas. (D. C.) 9.

**New matter introduced by amendment.**—Where the applicant for a patent originally disclosed standards springing from both edges of an annular base, and according to the original disclosure both were necessary, an amendment claiming a base having standards springing from one edge only involved new matter; and where the original case disclosed the top pieces of the standards with straight sides an amendment stating that those top pieces were sector shaped or flaring also involved new matter. *In re Dilg*, (1905) 25 App. Cas. (D. C.) 9.

Where a claim inserted by amendment includes new matter not originally disclosed, it was held that if the change from the original was an obvious one which would occur to any one, it was not patentable, and if it was not obvious it involved new matter. *In re Scott*, (1905) 25 App. Cas. (D. C.) 307.

If an amended application embodies anything new that was not in the original application, or materially differs or varies from the original application, it cannot be sustained and made to relate back to the latter. The law does not permit such an enlargement of the original specifications as will interfere with the right of inventors who have entered the field or filed applications in the meantime. *McFarland v. Watson*, (1909) 33 App. Cas. (D. C.) 445.

Where amendments are made to an application before another party has entered the field, the rule prohibiting the insertion of new matter by amendment will not be applied as strictly as where it is sought to enlarge the scope of an application to the prejudice of inventors whose rights have accrued between the date of filing and the date of amendment. *Young v. Struble*, (1910) 35 App. Cas. (D. C.) 410.

### III. CLAIMS.

**Interpretation of claims in general.**—In interpreting the claims of a patent, proper regard should be had to the natural import of the terms in question, the context, and the specification. *Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co.*, (C. C. A. 1908) 163 Fed. 950.

**Liberal construction of claims.**—The reasonable presumption is that an inventor intends to protect his invention broadly; and the scope of a claim should not be restricted beyond the fair and ordinary meaning of the words, save for the purpose of saving it. *Miel v. Young*, (1907) 29 App. Cas. (D. C.) 481.

**Claim interpreted in light of specifications.**—The claim of the issue of an interference is to be interpreted in the light of the specifications of the party first making it. *Viele v. Cummings*, (1908) 30 App. Cas. (D. C.) 455.

**Claim limited by application.**—A claim first made by one of the parties to an interference and only presented by the other party on the suggestion of the Patent Office for the purpose of interference must be given the

meaning intended by the party with whom it originated, and read in the light of his application. *Weintraub v. Hewitt*, (1910) 34 App. Cas. (D. C.) 487.

**Arbitrary limitation of claim.**—A limitation in a claim that is merely arbitrary and without function ought not to be permitted to deprive the first inventor of reward simply because the one first to file an application has inserted it. *Arbetter v. Lewis*, (1910) 34 App. Cas. (D. C.) 491.

**In case of doubt**, a claim should be given the evident meaning intended by the party first making it. *Viele v. Cummings*, (1908) 30 App. Cas. (D. C.) 455.

**Form.**—If an applicant desires the claims interpreted or limited otherwise than expressed by the plain and usual meaning of the words employed, he should draw his claims to embody the meaning intended. *Lindmark v. Hodgkinson*, (1908) 31 App. Cas. (D. C.) 612.

**Claims unnecessarily multiplied.**—Where an invention can be clearly defined by means of four claims, the presentation of twelve claims is objectionable, because unnecessarily multiplied. *In re Carpenter*, (1904) 24 App. Cas. (D. C.) 110.

**Mere verbal differences** between the original claims of one of the parties to an interference and the claims of the issue will not preclude an award of priority to him. *Furman v. Dean*, (1904) 24 App. Cas. (D. C.) 277.

**Effect of amending specifications.**—Claims of a patent are to be taken as they read, and are not limited by an amendment of the specification more particularly describing the device shown in the drawings to meet objections of the Patent Office, where the claims themselves are left unchanged. *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, (1905) 135 Fed. 785.

**Changing or enlarging claim.**—The law requires a patentee to define in his claim precisely what his invention is, and, when that has been done in plain terms, a court has no power to disregard such terms and either change or enlarge the claim by reference to the specification. *Cincinnati R. Supply Co. v. American Hoist, etc., Co.*, (C. C. A. 1906) 143 Fed. 322.

**Inaccurate claim.**—A claim which is inaccurate is not patentable. *In re Creveling*, (1905) 25 App. Cas. (D. C.) 530.

**Indefinite claims.**—On an appeal from a decision of the Commissioner of Patents rejecting certain claims of an application for a patent for a process of extracting aluminum and other metals, the invention disclosed in the application being the reduction of the metal-containing compound in a fused bath, or specifically the reduction of aluminum oxide fused with aluminum fluoride, it was held on a review of the claims that they were not warranted by the description in the application, and were too indefinite, and that the commissioner properly rejected them. *In re Blackmore*, (1909) 32 App. Cas. (D. C.) 338.

**General language used in the claims of a patent relating to a limited field is merely general as to this limited field, and should not**

be held to render the claims indefinite because as a matter of literary composition the same language might be applied to some other field, if the public would not thereby be deceived. *Hohmann, etc., Mfg. Co. v. Charles J. Tagliabue Mfg. Co.*, (1909) 175 Fed. 87.

**Agreement of claims and description.**—A patentee cannot read the specification into a claim for the purpose of changing it, or to escape anticipation or establish infringement, and much less can be read into it a feature not shown in either the specification or drawings. *H. Mueller Mfg. Co. v. Glauber*, (C. C. A. 1910) 184 Fed. 609.

**Claim broader than description.**—A broad claim in a patent cannot be based on a description in the specification that is specifically limited to a single device and does not present it as an example or a preferred structure. *Excelsior Drum Works v. Sheip*, (1909) 173 Fed. 312.

**Rights determined by claim.**—A patentee is bound by his claims, and cannot claim a broader invention than that which he has specifically described therein, even though he may have been entitled to make broader claims. *Hardison v. Brinkman*, (C. C. A. 1907) 156 Fed. 962.

A patent is not granted nor to be sustained by what the patentee may have done in fact, but only for what he particularly points out and distinctly claims. *Harder v. U. S. Piling Co.*, (C. C. A. 1908) 160 Fed. 463, *affirming* (1906) 149 Fed. 434.

When a claim of a patent is explicit, the courts cannot alter or enlarge it. *Dey Time Register Co. v. Syracuse Time Recorder Co.*, (C. C. A. 1908) 161 Fed. 111, *affirming* (1907) 152 Fed. 440.

An element not claimed therein cannot be read into a claim of a patent to impart to it patentable novelty. *Simplex Railway Appliance Co. v. Pressed Steel Car Co.*, (1910) 177 Fed. 426.

A patentee cannot describe something to the world in his letters patent that means just that thing or its equivalent, and, having claimed that, claim in addition something not thus described and not equivalent. *Chicago State Bank v. Hillman's*, (C. C. A. 1910) 180 Fed. 732.

**Description of useless device in combination as limiting claim.**—The fact that the specification of a patent, in describing the invention, describes a device which is, in fact, entirely useless so far as contributing to the result is concerned, does not restrict the claims to a combination including such device as an element where it is not mentioned therein. *Barnes v. Lingo*, (1907) 151 Fed. 59.

**Patent exceeding claims.**—A claim for a mechanical or apparatus patent, otherwise invalid as an abstraction, will not be sustained by reference to the specifications, where it not only goes far beyond anything which is there suggested, but fails to refer to that which is admittedly a distinguishing feature of the invention on which its novelty is made to depend. *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, (1905) 135 Fed. 785.

**Special features not indicated.**—In the construction of a patent the omission of the pat-

entee to point out or refer in his specification or claims to a special feature which he subsequently maintains is the most important part of his invention is very significant, and should be carefully scrutinized. *Stirling Co. v. Rust Boiler Co.*, (1906) 144 Fed. 849.

**Intervention limited by claims.**—The claim in a patent is the measure of the invention, and, while the specification may be referred to for the purpose of explaining any ambiguity in the claim, it cannot be referred to for the purpose of expanding or changing the claim. *National Enameling, etc., Co. v. New England Enameling Co.*, (C. C. A. 1906) 151 Fed. 19, *reversing* (1905) 139 Fed. 643.

**Scope of claims generally.**—A patentee having described his invention and shown its principle, and claimed it in that form which perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied, unless they are disclaimed. *Albright v. Langfeld*, (1904) 131 Fed. 473.

Where an inventor has placed his invention before the public in a form best fitted for practical use, and disclosed his conception of his invention, both in his description and in his claim, so as to accurately express his idea, he is entitled to the exclusive privilege of all other forms that can be embraced in the one claim, unless such other forms are disclaimed. *Oehrle v. William H. Horstmann Co.*, (1904) 131 Fed. 487.

**Estoppel as to matters not claimed.**—When an inventor has made his claims he has dedicated to the public all other devices, combinations, and improvements manifest from his specification and claims, and is estopped by his patent from claiming a monopoly as to such devices, combinations, or improvements. *O. H. Jewell Filter Co. v. Jackson*, (C. C. A. 1905) 140 Fed. 340.

**Intention to claim.**—Where claims following the specification in a patent end with the words "substantially as described," the specification must be looked to in construing such claims which may be thereby limited or qualified. *Scott v. Fisher Knitting Mach. Co.*, (1905) 139 Fed. 137.

It does not necessarily follow, from the fact that a claim of a patent describes a specific form of construction of a machine or part, that the inventor is limited to that form; but it depends on his expressed intention and the scope of his actual invention. *Kings County Raisin, etc., Co. v. U. S. Consolidated Seeded Raisin Co.*, (C. C. A. 1910) 182 Fed. 59.

Where an applicant's invention is a machine for covering eyelets, a claim by him of a machine for covering studs or lacing hooks is improperly made, where he does not point out in his description any modification of the machine by which it could be made to cover studs or hooks, and any such modification would not be a matter of mere mechanical skill. *Neuberth v. Lizotte*, (1909) 32 App. Cas. (D. C.) 329.

**Invention narrowed.**—Where a patentee has pointed out in his claims the precise construction that is to be regarded as his invention, by references to the drawings, his patent

may properly be confined to such construction on an issue as to infringement. *Schaum v. Riehl*, (1903) 124 Fed. 320.

**Claims too broad.**—A patent cannot cover generally any and every means or method for producing a given result. *American Steel, etc., Co. v. Denning Wire, etc., Co.*, (1908) 160 Fed. 108.

Where, in a press for making screw insulators, an essential element, to differentiate the prior art, is a rotary table or its equivalent to support the moulds and carry them in a fixed and predetermined path to and from other parts of the machine, by which the process involved is carried out, the specification of a "movable mould adapted to travel," although under some circumstances competent to imply a structural arrangement by which the mould is moved back and forth mechanically, in a predetermined way, between designated points, the specific means employed for doing so in the patent in suit being of the essence of the invention, a claim in which it is not made an element of the combination is invalid, as being too broad; or if, disregarding this, the omitted element is read into the claim as being implied, it will also be bad where, as here, it thereby duplicates another claim. *Novelty Glass Mfg. Co. v. Brookfield*, (C. C. A. 1909) 170 Fed. 946, *affirming* (1908) 170 Fed. 830.

**Claim must include complete invention.**—The rule is that each claim of a patent covers a complete invention, and is in substance an independent patent. *XXth Century Heating, etc., Co. v. Taplin, etc., Co.*, (C. C. A. 1910) 181 Fed. 96.

**Immaterial omissions.**—The fact that a patentee described and claimed "a trestle consisting of two pairs of legs" pivoted as shown, whereas by the accepted definition a top piece is essential to constitute a trestle, does not render the claim invalid, where the meaning is plain, and the legs as shown are adapted to be used with any kind of a top piece to complete the trestle, as intended. *Chicago Wooden Ware Co. v. Miller Ladder Co.*, (1904) 133 Fed. 541, 66 C. C. A. 517.

**Claim for function or effect.**—A claim of a patent is not invalid, as for a function and not a mechanism, because it claims generally a means for doing a certain thing, provided the mechanism is fully described in the specification, which must be read in connection with the claim, and as a limitation thereof, whether specifically referred to therein or not. *Corrington v. Westinghouse Air Brake Co.*, (1909) 173 Fed. 69.

Claims in an application for a patent are properly rejected by the commissioner as claims for functions or results, where, if allowed, they would cover means substantially different from those described, which might be discovered by another for accomplishing the same results. *In re Gardner*, (1906) 32 App. Cas. (D. C.) 249.

**Recital of function.**—If the claims of a patent are for means sufficiently specified and described in the claims and specifications, they are not invalidated as being for a function by a recital therein of the function to be performed or the result to be secured by such



means. *Continental Automobile Co. v. Spalding*, (1910) 177 Fed. 693.

**Process and apparatus.**—While it is competent, when the circumstances permit it, for an inventor in describing a machine or apparatus which he has devised to make a claim for a process which his patented device is capable of carrying out, to entitle him to do so the process must be one capable of being carried out by other means, otherwise the claim is merely for a function of the machine; and, unless such other means are known or are within the reach of ordinary skill or judgment, the patentee is bound to point them out. *American Lava Co. v. Steward*, (C. C. A. 1907) 155 Fed. 731.

Where a process and an apparatus, while presumptively independent inventions, when construed with reference to R. S. sec. 4886, 5 Fed. Stat. Annot. 421, providing that inventions or discoveries may be either arts, machines, or composition of matter, are so dependent as to constitute a unitary invention, they may be claimed in the same application; but otherwise when they in fact constitute independent inventions. *In re Frasch*, (1906) 27 App. Cas. (D. C.) 25.

While an applicant for a patent, in describing a machine or apparatus which he has devised, may make claim for a process which his device is capable of carrying out, to entitle him to do so the process must be capable of being carried out by other means than by the operation of his machine, and, unless such other means are known or within the reach of ordinary skill and judgment, the applicant is bound to point them out; for, unless the public are informed by what other means the process can be carried out, the process to them is nothing less than the operation of the machine—in other words, the exercise of its functions—and the function of a machine is not patentable. *In re White*, (1908) 31 App. Cas. (D. C.) 607.

**Product only.**—The Adams patent, No. 24,915, for "a tube or cylinder cast out of copper, and free from blowholes and other similar defects, when produced as herein stated," covered a product only, and not the process, and was void for anticipation, it being shown that other processes previously in use also produced sound copper tubes, although not so large a percentage as that described in the patent. *American Tube Works v. Bridgewater Iron Co.*, (1904) 132 Fed. 16, 65 C. C. A. 636, *affirming* (1903) 124 Fed. 782.

**Claims of pioneer invention.**—A pioneer inventor is entitled to a generic claim, and may also include specific claims in the same patent, and in such case the broad claims are not, *prima facie*, to be restricted by reading into them the specific devices claimed in the narrower ones. *Los Angeles Art Organ Co. v. Aeolian Co.*, (C. C. A. 1906) 143 Fed. 880.

**Operative device necessary.**—Where a claim of a patent is for a combination, it must be for an operative combination; and if an element essential to make it operative is shown and described in the specification, but is omitted from the claim, it must be read into

the claim. *McCaslin v. Link Belt Machinery Co.*, (1905) 139 Fed. 393.

**Defective method.**—A claim purporting to cover a method cannot be regarded as patentable where it is lacking in one of the steps which, in accordance with the statement of invention, description, and drawings, are essential to the carrying out of the alleged method. *In re Creveling*, (1905) 25 App. Cas. (D. C.) 530.

**Enumeration of elements.**—Where one claim of a patent specifically names two elements, and another claim specifically names these two elements and in addition thereto a third element, it must be presumed that the patentee intended to limit the claims to the elements enumerated. *Marshall v. Pettingell-Andrews Co.*, (C. C. A. 1908) 164 Fed. 862, *affirming* (1907) 153 Fed. 579.

**Element claimed conditionally.**—A patent is granted for solving a problem, not for stating one, and a claim for a combination which embraces an element only in case it is made capable of being employed in the combination and without disclosing means of adapting it is invalid as disclosing nothing definite. *Columbia Motor Car Co. v. Duerr*, (C. C. A. 1911) 184 Fed. 893, *reversing* (1909) 172 Fed. 923.

**All elements included material.**—Where a patentee in a claim for a combination specifies any element as entering into the combination, he makes such element material to the combination, and it cannot be held immaterial by the court for the purpose of finding infringement. *Avery v. J. I. Case Plow Works*, (1905) 139 Fed. 878.

Every part of a combination claimed in a patent is presumed to be material to the combination, and in a suit for its infringement evidence to the contrary is not admissible. *Automatic Switch Co. v. Monitor Mfg. Co.*, (1910) 180 Fed. 983.

In patents for a combination if the patentee specifies any element as entering into the combination, either directly by the language of the claim or by such a reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. *Electric Protection Co. v. American Bank Protection Co.*, (C. C. A. 1911) 184 Fed. 916, *modifying* (1910) 181 Fed. 350.

**Construction of claims for improvements.**—In construing improvement claims of a patent, consideration should be given to the character of the improvements introduced by the patentee and the change in the art attributable to them. When they result in converting imperfection into completeness, and in producing the first practically and commercially successful machine, however simple the change appears, the invention is entitled to liberal treatment by the courts. *Wagner Typewriter Co. v. Wyckoff*, (C. C. A. 1907) 151 Fed. 585, *modifying* (1905) 138 Fed. 108.

**Improvement does not include whole device.**—It is not necessary that a patent for specific improvements on a burglar alarm system should include as an element of the combina-

tion the burglar alarm system itself. *American Bank Protection Co. v. Johnson City Nat. Bank*, (1909) 181 Fed. 375.

**Accepting narrowed claim.** — The claims of a patent as allowed must be construed with reference to the action of the Patent Office thereon as the prior art; they are not affected by a mere change in the wording at the instance of the Patent Office which leaves the substance unchanged, but, if narrowed in scope, and so accepted by the applicant, he is bound thereby. *Welsbach Light Co. v. Cremo Incandescent Light Co.*, (C. C. A. 1907) 151 Fed. 1023, *affirming* (1906) 145 Fed. 521.

Where an applicant for a patent repeatedly acquiesced in the rejection of broad claims and substituted therefor narrower ones until his application was granted, the owner of the patent cannot be heard to insist that the narrower claims allowed shall cover the same as the broader ones rejected. *St. Louis Street Flushing Mach. Co. v. American Street Flushing Mach. Co.*, (C. C. A. 1907) 156 Fed. 574.

An applicant for a patent, who trims away, modifies, and otherwise defines his specification and claims to meet references made by the Patent Office, must be deemed to have surrendered and disclaimed what he conceded, and to have imposed such definitions upon the language of the patent as he attributed to it in order to secure the grant. *American Stove Co. v. Cleveland Foundry Co.*, (C. C. A. 1908) 158 Fed. 978, *reversing* (1907) 157 Fed. 562.

Where an applicant for a patent contesting with others, and after repeated rejections, in order to obtain a patent at all bases his claim thereto on a "peculiar organization" of parts, and specifies and specifically names and locates those several parts, he is held to the peculiar organization so particularized, specified, and claimed. *Safety Car Heating, etc., Co. v. Consolidated Car Heating Co.*, (1908) 160 Fed. 476.

**Amendments to meet objections of Patent Office.** — Where an applicant for a patent persisted in the basic idea on which he claimed invention, although amending his claim from time to time after rejections by the examiner as to details of construction in attempts to avoid references by the examiner, and his application was finally rejected by the examiner, but allowed on appeal, on the broad ground that such basic idea involved invention, such amendment did not limit the claim as finally allowed to the precise construction therein described. *Gray Telephone Pay Station Co. v. Baird Mfg. Co.*, (C. C. A. 1909) 174 Fed. 417.

Where an applicant for a patent materially modifies a claim in accordance with a requirement of the Patent Office, it will not be construed as it would have been if it had not been so modified, even though the modification was made under protest, or the decision of the Patent Office was erroneous. *Johnson Furnace, etc., Co. v. Western Furnace Co.*, (C. C. A. 1910) 178 Fed. 819.

It is of the essence of the rule whereby an inventor is estopped from claiming to the full of his invention as disclosed by his specification and claims in consequence of his concessions to meet the requirements of the Patent

Office, and so obtain his patent, that the requirements which were conceded by him should concern the matter on which the estoppel is raised, and whether the examiner states his objection, or contents himself with a reference, the estoppel does not extend to a matter not stated in the objection or disclosed by the reference. *Vrooman v. Penhollow*, (C. C. A. 1910) 179 Fed. 296.

**Claim rejected.** — Where, after the granting of a patent for a process, an application filed by the same applicant at the same time for a patent on the resulting product was rejected by the Patent Office on the ground of lack of patentable novelty, because of more than two years' prior use, and the applicant acquiesced in such rejection, he is bound by the finding, at least as to want of patentable novelty, and his process patent must be construed as limited in accordance with such finding. *Mica Insulator Co. v. Commercial Mica Co.*, (1907) 157 Fed. 90.

The fact that a claim in an application for a patent was rejected by the Patent Office and another substituted by the applicant does not preclude a broad construction of the claim as allowed, except as to features which were clearly surrendered by the substitution; and where the claim as allowed contained a new feature or element not contained in the original claim, such feature or element is entitled to the benefit of the doctrine of equivalents wholly unaffected by the rejection of the original claim. *Sharp v. Physicians', etc., Appliance Co.*, (1909) 174 Fed. 424.

**Acquiescence in rejection of claim.** — A patentee who acquiesces in rejection of his claim is estopped from maintaining that an amended claim covers the combinations and devices shown in the references, or that it has the breadth of the rejected claim, but is not estopped from securing by an amended claim every improvement and combination he has invented that was not disclosed by the references on which his original claim was rejected. *J. L. Owens Co. v. Twin City Separator Co.*, (C. C. A. 1909) 168 Fed. 259.

Where a patentee acquiesces in the rejection of his claim, he is estopped from maintaining that an amended claim covers the combinations and devices shown in the first claim, or that it has the breadth of the rejected claim. *Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co.*, (C. C. A. 1909) 168 Fed. 271, *affirming* (1908) 157 Fed. 559.

**Estoppel by acquiescence in rejection.** — Where an applicant for a patent acquiesces in the rejection of claims presented, and amends the same or substitutes others to meet the objections of the Patent Office, he must be deemed to have surrendered and disclaimed what he thus conceded, and is bound by the limitations so imposed, and it is immaterial whether the office was right or wrong in rejecting the original claims. *Campbell v. American Shipbuilding Co.*, (C. C. A. 1910) 179 Fed. 498.

A patentee who originally sought broader claims which were rejected, and who acquiesced in such rejection, cannot insist on such a construction of an allowed claim as would cover what had been previously re-

jected. *Automatic Switch Co. v. Monitor Mfg. Co.*, (1910) 180 Fed. 983.

When an inventor seeking a patent for a broad claim acquiesces in the rejection of the same by the Patent Office and substitutes therefor a narrower one which is allowed, such claim must be construed with reference to the rejected claim and the prior state of the art, and will not be so interpreted as to cover either what was rejected by the Patent Office or disclosed by prior devices. *Boss Mfg. Co. v. Thomas*, (C. C. A. 1910) 182 Fed. 811.

A claim in a patent as allowed must be read and interpreted with reference to claims that have been rejected and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the Patent Office or disclosed by prior devices. *Cotto-Waxo Chemical Co. v. Perolin Co.*, (C. C. A. 1911) 185 Fed. 267.

**Estoppel by acquiescence in modification.**—If a claim of a patent is itself so changed through action of the Patent Office as to limit it to a particular means for performing a function, acquiescence therein by the inventor estops him from claiming any different device as an infringement, and also acquiescence in the rejection of certain claims for "means" generally, and the allowance of claims describing specific means precludes a construction of such claims which would include other means. *XXth Century Heating, etc., Co. v. Taplin, etc., Co.*, (C. C. A. 1910) 181 Fed. 96.

A patentee who canceled all the original claims in his application on objections by the Patent Office, and substituted a new claim which was allowed, is estopped to claim a construction of such claim which would make it equivalent to those canceled. *Langan v. Warren Axe, etc., Co.*, (1910) 181 Fed. 143.

**Claims limited by estoppels in general.**—While the courts will ascertain what contribution an inventor has made to the art to which his invention relates, and will protect him to the full extent of that contribution, due weight must be given to any estoppel which he has created by reason of anything done by him, or suffered to be done, either prior or subsequent to the issuing of his patent, which prevents him from claiming his invention in its entirety. *Computing Scale Co. v. Automatic Scale Co.*, (1905) 26 App. Cas. (D. C.) 238, *affirmed* (1907) 204 U. S. 609, 27 S. Ct. 307, 51 U. S. (L. ed.) 645.

**Part described not claimed.**—An element not mentioned in a claim of a patent for a combination cannot be read into it, although it may appear in the specification; but if a claim includes an element in general terms and refers to the specification to identify it, such element may be read into the claim. *Duncan v. Cincinnati Butchers' Supply Co.*, (C. C. A. 1909) 171 Fed. 656.

**Claims limited by specifications.**—For the purpose of sustaining a patent, as where a nonpatentable principle or function appears to be claimed, but the specification shows that the patent was sought for a machine, device, or process which is patentable, the specification may be read into the claims, but not for the purpose of escaping anticipation or estab-

lishing infringement. *General Sub-Constr. Co. v. Netcher*, (1909) 167 Fed. 549.

A feature of a process not covered by the claims of a patent, but merely recommended in the specification, instead of being required or stated to be an essential part of the process, cannot be read into the claims. *General Sub-Constr. Co. v. Netcher*, (1909) 167 Fed. 549.

**Feature not claimed.**—Where an alleged element or characteristic feature of an invention is not necessarily inherent in the invention itself, the failure of the patentee to refer to it is persuasive evidence that it is not within the scope of his invention, and, not being disclosed to the public, it should not be read into the patent. *Edison Gen. Electric Co. v. Crouse-Hinds Electric Co.*, (C. C. A. 1907) 152 Fed. 437, *reversing* (1906) 146 Fed. 539.

**Action of Patent Office as prior art.**—The claims of a patent as allowed must be construed with reference to the action of the Patent Office thereon as the prior art; they are not affected by a mere change in the wording at the instance of the Patent Office which leaves the substance unchanged, but if narrowed in scope, and so accepted by the applicant, he is bound thereby. *Welsbach Light Co. v. Cremo Incandescent Light Co.*, (1906) 145 Fed. 521.

The words "substantially as specified," at the end of a claim for a combination, refer to the whole claim, and import nothing into it not already there, either to narrow it so as to escape anticipation, or to broaden it so as to establish infringement. *American Can Co. v. Hickmott Asparagus Canning Co.*, (1905) 142 Fed. 141, 73 C. C. A. 359.

**Combination including new elements.**—An inventor of a new and useful combination is not confined to his combination claims unless all of the elements are old; but if any of the elements are new and useful and show invention they may be claimed and patented either in a separate patent or by separate and distinct claims in the patent covering the combination, even though such parts are without utility save in combination with the other parts of the device. *National Malleable Casting Co. v. American Steel Foundries*, (1910) 182 Fed. 626.

**General and specific claims.**—Where a patent contains a general claim for a combination of certain elements, and a specific claim for a combination of a particular form or construction of an element of that combination with its other elements, the general claim is not limited to the particular form or construction of the element claimed in the specific claim, but protects the element and its mechanical equivalents, though they may differ from the form or construction claimed in the specific claim. *J. L. Owens Co. v. Twin City Separator Co.*, (C. C. A. 1909) 168 Fed. 259.

**Limitation of claims.**—Features of construction which the specifications of a patent recommend or describe as preferable do not thereby become essential parts of the patent or limitations of the claims. *Smeeth v. Perkins*, (C. C. A. 1903) 125 Fed. 285.

**Limitation in one claim omitted from others.**—Where a limitation expressly stated in some of the claims of a patent is omitted from others, it cannot be read into them to avoid a charge of infringement. *Diamond Match Co. v. Ruby Match Co.*, (C. C. A. 1904) 127 Fed. 341.

**Claim construed with description.**—The specification of a patent which forms a part of the same application as its claims must be construed with the latter for the purpose of ascertaining the true meaning of the claims and the intent of the parties when they were made and allowed. *O. H. Jewell Filter Co. v. Jackson*, (C. C. A. 1905) 140 Fed. 340.

**Ambiguous claims.**—Where the meaning of the language used in the claims of a patent is doubtful, or is susceptible of two different constructions, the specification and drawings may properly be referred to for the purpose of ascertaining the true construction of the claims. *Robins Conveying Belt Co. v. American Road Mach. Co.*, (1906) 145 Fed. 923, 76 C. C. A. 461, *affirming* (1905) 142 Fed. 221.

**Part claimed not described.**—Where, in an application for patent for an improvement in cans and powder boxes, the claim is for a combination of two closures, and such combination is held to have no patentable novelty, the applicant cannot successfully contend that he is nevertheless entitled to a patent, in that he has substituted a permanent for a movable perforated pivoted cap and that he makes a specific perforation at a specified point in the box or can. Even if such features are patentable, they should have been pointed out in the specifications, and the claims should have been limited to them. *In re Seabury*, (1904) 23 App. Cas. (D. C.) 377.

**Enlargement of claims by construction.**—Claims of a patent cannot be broadened by construction or elements imported into them for the purpose of giving them novelty or establishing infringement. *Continental Automobile Co. v. Spalding*, (1910) 177 Fed. 693.

**Reference to figure in drawing.**—The use in a claim of a patent of a letter of reference to the drawings which show a part composed of two pieces does not limit the patentee to a two-piece construction where it is not of the essence of the invention claimed. *Brunswick-Balke-Collender Co. v. Rosatto*, (1908) 159 Fed. 729.

**Knowledge of theory.**—If the construction of a patentee effects the desired results, and they are beneficial, he does not lose the benefit of his invention because he may not have correctly understood the principles of its operation. *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, (C. C. A. 1904) 131 Fed. 853.

Even where a theory is erroneously advanced by an inventor in his specifications to explain a patented process, the scope of the invention is not to be narrowed thereby, so as to preclude him from laying claim to other beneficial results. It is the process, not the theory, which is patented, and the inventor is entitled to all the benefits legitimately to be derived therefrom. *U. S. Mitis Co. v. Midvale Steel Co.*, (1904) 135 Fed. 103.

**Extent of patentee's rights.**—Where a patented pump was designed primarily for use as an air pump, the fact that it may also be used as a combined air and water pump, or as a water pump, and that such uses are claimed, does not deprive the patentee, in determining invention, of the weight to be given to the merits which attach to the use of the pump as an air pump. *Warren Steam Pump Co. v. Blake, etc.*, *Steam Pump Works*, (C. C. A. 1908) 163 Fed. 263, *affirming* (1907) 155 Fed. 285.

A patentee who has sufficiently described and distinctly claimed his invention is entitled to every use to which his device can be applied, whether he perceived or was aware of all of such uses at the time he secured his patent or not. *Acme Truck, etc., Co. v. Meredith*, (C. C. A. 1910) 183 Fed. 124.

**Particular advantage not claimed.**—That a particular advantage of a patented device was not claimed or mentioned in the specification will not exclude it from the scope of the patent if it was necessarily achieved by the invention. *Kellogg Switchboard, etc., Co. v. Dean Electric Co.*, (C. C. A. 1910) 182 Fed. 991, *affirming* (1908) 168 Fed. 549.

**Characteristics of device disclosed but not specifically claimed.**—A patentee is entitled to the benefit accruing from a characteristic of his device which is clearly disclosed, although not specifically claimed. *E. H. Angle Regulating Appliance Co. v. Aderer*, (1909) 171 Fed. 93.

**Machine capable of use not indicated in patent.**—The rule applied that the fact that the machine of a patent is capable of a method of use not referred to nor indicated in the patent cannot be availed of to affect the construction of the claims. *U. S. Peg-Wood, etc., Co. v. B. F. Sturtevant Co.*, (1903) 125 Fed. 378, 60 C. C. A. 244, *affirming* 122 Fed. 470.

**Claim includes mechanical equivalents.**—If there was no amendment narrowing a claim of a patent in respect to the essential feature of the invention disclosed therein, amendments made in reference to an incidental matter intended to perfect the claim or device impose no restriction on the rights of the patentee in respect to equivalents. *Heywood Bros., etc., Co. v. Syracuse Rapid Transit R. Co.*, (1907) 152 Fed. 453.

In a combination patent for an improvement in the arrangement or adaptation of old elements, the inventor is not entitled to a broad interpretation of the doctrine of mechanical equivalents, so as to cover a device not specifically included in his claims and specification. *Hardison v. Brinkman*, (C. C. A. 1907) 156 Fed. 962.

The use of reference letters in a claim of a patent does not confine the claim to a part having all of the characteristics of that shown in the drawing, but it covers any equivalent of such part. *Electric Candy Mach. Co. v. Morris*, (1905) 156 Fed. 972.

The facts that the specification of a patent describes two forms of one element of the combination which may be used in the alternative, while a claim describes but one of such forms, does not preclude the patentee

from invoking the doctrine of equivalents as to the alternative form. *Whitin Mach. Works v. Houghton*, (C. C. A. 1910) 178 Fed. 444.

**Amendment of claims.**—If an inventor comes to better understand the principles of his invention while his application for a patent is pending, an amendment of his claims to conform thereto does not introduce any original matter nor enlarge his invention, and is within his legal right. *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, (C. C. A. 1904) 131 Fed. 853.

The settled limitation on the amendment of applications in respect of claims is that there must be a basis for them in the description and specifications of the application as originally filed. *In re Duncan*, (1906) 28 App. Cas. (D. C.) 457.

**Improvements set up by amendment of claims.**—A patentee is not estopped from maintaining and securing by an amended claim every improvement that he has invented that was not disclosed by the references on which his original claim was rejected. *Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co.*, (C. C. A. 1909) 168 Fed. 271, *affirming* (1908) 157 Fed. 559.

**Additional claims by amendment.**—The fact that a new claim was inserted in an application for a patent by the attorney for the applicant without any new oath does not render the patent invalid as to such claim, where it was within the invention described in the specification. *Cutler-Hammer Mfg. Co. v. Union Electric Mfg. Co.*, (1906) 147 Fed. 266.

**Additional applications for new claims.**—While amendment of claims and the introduction of new claims are freely allowed, pro-

vided they are disclosed and there is proper basis for them in the original specifications or drawings, yet no such amendment or addition will be allowed when it involves new matter not so disclosed in the original application, as intervening rights of other parties may have accrued which may be affected by it; but an applicant advancing such claims is not precluded from presenting them in a new and distinct application, if he so desires. *In re Scott*, (1905) 25 App. Cas. (D. C.) 307.

**Functions discovered after grant of patent.**—A patentee is entitled to every function his device will perform, though he was ignorant of it when he procured his patent, but he secures no patent on the function, and the discovery of a new one in the patented device does not operate to enlarge or broaden the letter of his claim, which is the measure of his rights. *Dunlap v. Willbrandt Surgical Mfg. Co.*, (C. C. A. 1906) 151 Fed. 223.

**Cancellation of one of several claims.**—The cancellation of a claim in an application for a patent, while it is pending in the Patent Office, does not affect the validity of a retained claim which is substantially the same, although, if susceptible of two constructions, it will not be so construed as to cover the canceled claim. *Bullock Electric Mfg. Co. v. Crocker-Wheeler Co.*, (1905) 141 Fed. 101.

**Invention involving single feature of construction.**—Where a patent depends for its novelty over the prior art on a single limited feature of construction, the claims cannot be expanded by any doctrine of equivalents to cover a device which lacks that single essential feature. *Liberman v. Ruwell*, (C. C. A. 1909) 170 Fed. 590, *affirming* (1908) 165 Fed. 208.

## Vol. V, p. 486, sec. 4889.

**Patent Office drawings are not working drawings.** Their object is to aid in conveying to one skilled in the art the idea of the in-

ventor. *Gold v. Gold*, (1909) 34 App. Cas. (D. C.) 152.

## Vol. V, p. 487, sec. 4892.

**Insertion of new claim within invention.**—An applicant for a patent may properly file new claims in the Patent Office without verification, where they are within the invention as disclosed in the specification and drawings, and narrower than the original claims. *General Electric Co. v. Morgan-Gardner Electric Co.*, (C. C. A. 1908) 168 Fed. 52, *reversing* (1907) 159 Fed. 951.

**New matter not sworn to.**—The amended specification of the Dolan patent, No. 589,342, for a duplex acetylene gas burner or tip of the Bunsen type, having a series of inclined air passages in the sides, which, for the first

time, if at all, indicates as the essence of the invention so short a chamber or cylinder as to prevent the mixing of the air taken into it, and to emit the current of gas, surrounded by the greater part of such air as an envelope or film, is void under this section, because introducing entirely new matter not sworn to, where the original application made no claim for a process, and disclosed no invention of a device. *Steward v. American Lava Co.*, (1909) 215 U. S. 161, 30 S. Ct. 46, 54 U. S. (L. ed.) 139, *affirming* (1907) 155 Fed. 731, 84 C. C. A. 157.

## Vol. V, p. 488, sec. 4893.

**No power to annul patent.**—The Patent Office has no power to annul or vacate a patent duly issued. *Mica Insulator Co. v. Commercial Mica Co.*, (1907) 157 Fed. 90,

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**Doubt as to patentability.**—Where there is doubt as to whether or not an applicant's invention is patentable, the doubt will be resolved in his favor. *In re Schraubstadter*,

(1905) 26 App. Cas. (D. C.) 331; *In re Eastwood*, (1909) 33 App. Cas. (D. C.) 291.

**Presumption as to knowledge and skill of examiner.**—The examiners in a Patent Office, who are selected and appointed for their skill and scientific knowledge, will be presumed to have the requisite skill and knowledge to understand the use of, and the manner of using, the microscope in their work. *Flora v. Powrie*, (1904) 23 App. Cas. (D. C.) 195.

**Effect of granting patent.**—The validity of a patent which is regular on its face cannot be collaterally attacked in a suit for its infringement on the ground of irregularities in the proceedings in the Patent Office, as that the final fee was not paid within the six

months required by the statute. *Calculus Co. v. Wilson*, (1904) 132 Fed. 20.

The grant of a patent raises a presumption that the device described and claimed therein is not an infringement of an earlier patent. *Simplex Electric Heating Co. v. Leonard*, (1910) 180 Fed. 763.

**Damages for fraudulently procuring issuance of patent.**—A complaint in an action to recover damages for the fraudulent procuring of a patent by defendants in the name of one of them for an invention alleged to have been made by plaintiff, held to state a cause of action on demurrer. *Le Brocq v. Childs*, (1908) 158 Fed. 412.

## Vol. V, p. 488, sec. 4894.

**Divisional application after final action on original application.**—The provision of this section, before the amendment of 1897, that application shall be regarded as abandoned on failure of the applicant to prosecute the same within two years after any action there-

on, does not apply where a divisional application was filed within two years after final action by the Patent Office on the original application. *Duryea v. Rice*, (1906) 28 App. Cas. (D. C.) 423.

## Vol. V, p. 492, sec. 4895.

**Application in name of inventor.**—Whether an applicant for a patent has assigned his interest in his invention or not, the application must be prosecuted in his own name. *Moore v. Heany*, (1909) 34 App. Cas. (D. C.) 31.

**Assignability of invention or discovery.**—The discoverer or inventor has a kind of property right in his invention or discovery which he may transfer, either absolutely or to a limited extent. *Pomeroy Ink Co. v. Pomeroy*, (1910) 77 N. J. Eq. 293, 78 Atl. 698.

An inventor or his assignee has, before the issuance or allowance of a patent, an inchoate right of property in his invention and in a pending application for a patent, which he may assign, or with which he may deal, as an article of property. *Richardson Shoe Machinery Co. v. Essex Mach. Co.*, (1911) 207 Mass. 219, 93 N. E. 650.

**Single assignment as evidence of agreement**

**by employee to assign all inventions.**—The fact that an employee assigned to his employer the right to patents applied for by him for inventions made in the course of his employment does not alone warrant an inference that he was bound by a contract to assign all such inventions, especially where his action is reasonably explained on other grounds. *Pressed Steel Car Co. v. Hansen*, (1904) 128 Fed. 444.

**Parol agreement to assign right to patent.**—A parol agreement to assign the right to obtain a patent for an invention is valid. *Pressed Steel Car Co. v. Hansen*, (1904) 128 Fed. 444.

**Successive assignments.**—A patent may be issued to an assignee of an inventor through mesne assignments, provided they are first entered of record in the Patent Office. *Elliott-Fisher Co. v. Underwood Typewriter Co.*, (1909) 176 Fed. 372.

## Vol. V, p. 493, sec. 4896.

**Time for filing applications by guardian of insane person.**—The guardian of an insane inventor is not allowed two years from the time the inventor became insane, but he must

file his application within the two years allowed to the inventor himself. *Jenber v. Bowen*, (C. C. A. 1905) 139 Fed. 558.

## Vol. V, p. 494, sec. 4897.

**Only one renewal application allowed.**—Under this section only one renewal application may be made; and, even if more are allowable, the final application must be made within two years after the allowance of the first, otherwise a valid patent cannot issue thereon. *Weston Electrical Instrument Co. v. Empire Electrical Instrument Co.*, (1904) 131 Fed. 90.

**Abandonment of former application.**—While, in the case of a renewal application, the intention of the party in allowing his former application to be forfeited may, under this section, be inquired into for the purpose of determining the question of abandonment, such inquiry must be directed to the abandonment of the invention claimed in the original application, and not to some other invention

that may be described incidentally therein, and subsequently made the subject of a new application by the same party, and brought into interference. *Saunders v. Miller*, (1909) 33 App. Cas. (D. C.) 456.

**Two years allowed for renewal application.**—The Commissioner of Patents is without authority to issue a patent on an application

filed more than two years after the allowance of a patent for the same invention on a prior application by the same party, which has been forfeited for nonpayment of fees. *Weston Electrical Instrument Co. v. Empire Electrical Instrument Co.*, (1905) 136 Fed. 599, 69 C. C. A. 329, *affirming* (1904) 131 Fed. 90.

## Vol. V. p. 499, sec. 4904.

**Interference defined.**—An interference is a judicial proceeding carried on in the Patent Office, for the purpose of determining the question of priority between two or more parties, each of whom is seeking a patent for the same invention, or between two or more parties, at least one of whom is seeking a patent for an invention already covered by a patent which has not yet expired. *Lattig v. Dean*, (1905) 25 App. Cas. (D. C.) 591.

**Effect of declaring interference.**—While the Commissioner of Patents, during the pendency before him of an interference, may for cause appearing suspend the proceeding and refer the case back to the primary examiner for review of the question whether the interference was rightfully declared, the question whether one of the parties has a right to make the claim in issue is determined and becomes *res judicata* by the declaration of interference so far as the interference proceeding is concerned. *Herman v. Fullman*, (1904) 23 App. Cas. (D. C.) 259.

**Necessity of patentability.**—In the sense of the patent law, there can be no interference unless there is a patentable invention, and there are rival claimants of it. *Lattig v. Dean*, (1905) 25 App. Cas. (D. C.) 591.

**Prior declaration of difference.**—The fact that one of the parties to an interference had declared that his invention was different from that of the other party will not necessarily estop him from taking a contrary position in the interference proceeding, as there might be differences of detail between the two devices while they might be the same in substance. *Furman v. Dean*, (1904) 24 App. Cas. (D. C.) 277.

**Second application pending interference.**—In a case where a party whose application is involved in a pending interference presents another application based on the invention involved in the interference, he will be refused a patent on the later application until the interference has terminated. *In re Wickers*, (1907) 29 App. Cas. (D. C.) 71.

**Application for reissue pending interference.**—Claims in an application for reissue are properly disallowed by the Patent Office, when the subject-matter of them is embraced in a subsequent and pending application by the same party, which is in interference, and the purpose of the applicant for reissue is apparently to gain an advantage over his opponent in the interference proceeding. *In re Lacroix*, (1908) 30 App. Cas. (D. C.) 299.

**Sole issue in interference.**—Interferences are declared between applications rather than applicants, and are intended to disclose and determine which invention was first produced,

not who has the title. *Automatic Racking Mach. Co. v. White Racker Co.*, (1906) 145 Fed. 643; *Westinghouse v. Hien*, (C. C. A. 1907) 159 Fed. 936; *Hillard v. Remington Typewriter Co.*, (C. C. A. 1911) 186 Fed. 334; *Lattig v. Dean*, (1905) 25 App. Cas. (D. C.) 591.

**Priority between parties only.**—The question whether a senior party to an interference may be entitled to priority as against all persons is not at issue in the interference, but the question is whether the junior applicant has sustained the burden of establishing his own priority over that of his opponent. *Prindle v. Brown*, (1904) 24 App. Cas. (D. C.) 114.

**Issue of patentability.**—The question of the patentability of the claims of an interference is settled by the allowance of them by the Patent Office, and will not be considered by this court on an appeal from an award of priority by the commissioner. *Dunbar v. Schellenger*, (1907) 29 App. Cas. (D. C.) 129.

**Right to patent.**—Whether either of the parties to an interference will ultimately have a right to a patent under his pending application will not be determined in the interference proceeding, which involves solely the question of priority of invention. *Gueniffet v. Wictorsohn*, (1908) 30 App. Cas. (D. C.) 432.

**Operativeness of invention.**—Ordinarily the question of operativeness will not be considered by this court in an interference case. *Lotterhand v. Hanson*, (1904) 23 App. Cas. (D. C.) 372.

**Res judicata.**—The doctrine of *res judicata* does not apply so as to estop an applicant in interference from claiming against a previously granted patent of his adversary, where the record of the patent shows that the patentee had no right to make in his application the claims which are the issue of the interference. *McKnight v. Pohle*, (1907) 30 App. Cas. (D. C.) 92.

**The question of the right of a party to make a claim in interference proceedings** may sometimes be an ancillary question, to be considered in awarding priority of invention. *Wickers v. McKee*, (1907) 29 App. Cas. (D. C.) 4, 21, 28.

**Issues construed in light of application.**—The issues of an interference are to be construed in the light of the application of the party making the claims, and it is improper for the commissioner to read into them, for any purpose, limitations not disclosed in such party's application. *Sobey v. Holsclaw*, (1906) 28 App. Cas. (D. C.) 65.

**Effect of dates in preliminary statement.**—The sworn preliminary statements required when an interference has been declared constitute the pleadings of the parties, and they are to be held strictly to the dates given therein. *Hammond v. Basch*, (1905) 24 App. Cas. (D. C.) 469; *Fowler v. Boyce*, (1906) 27 App. Cas. (D. C.) 48; *Neth v. Ohmer*, (1906) 27 App. Cas. (D. C.) 319; *Lowrie v. Taylor*, (1906) 27 App. Cas. (D. C.) 522; *Parkes v. Lewis*, (1906) 28 App. Cas. (D. C.) 1.

The rule in interference cases, that the parties are limited to the dates set out in their preliminary statements, will not be ignored, with the consent of counsel, unless expressly approved by the Commissioner of Patents or his representatives—especially where it appears that leave was asked to file an amended preliminary statement and was refused. *Fowler v. Boyce*, (1906) 27 App. Cas. (D. C.) 55.

**Effect of filing second application.**—Where the application of one of the parties to an interference is only a division of an application theretofore filed, he is entitled to the filing date of his first application for the purposes of the interference. *Hillard v. Brooks*, (1904) 23 App. Cas. (D. C.) 526.

**Reopening interference.**—It is not error for the Commissioner of Patents to refuse to reopen an interference on the ground of newly discovered evidence, when the only effect of admitting such evidence would be to show that some of the counts were first invented by one not a party to the interference. *Dunbar v. Schellenger*, (1907) 29 App. Cas. (D. C.) 129.

**Burden of proof.**—The burden is on the junior party to an interference to overcome the earlier filing date of his adversary. *Cherney v. Clauss*, (1905) 25 App. Cas. (D. C.) 15; *Fowler v. Dyson*, (1906) 27 App. Cas. (D. C.) 52; *Lowrie v. Taylor*, (1906) 27 App. Cas. (D. C.) 522; *Sobey v. Holsclaw*, (1906) 28 App. Cas. (D. C.) 65; *Gibbons v. Peller*, (1907) 28 App. Cas. (D. C.) 530; *Munster v. Ashworth*, (1907) 29 App. Cas. (D. C.) 84.

A junior applicant in interference proceedings must, in order to overcome a decision against him, prove prior conception coupled with diligence, or prior conception and prior reduction to practice. *Ball v. Flora*, (1905) 26 App. Cas. (D. C.) 394.

In an interference case between an applicant and a patentee, where the applicant proves that he made patterns embodying certain counts of the issue before any date proved by the patentee, and the patentee asserts they were made from disclosures by him, but this is denied by the applicant, the burden is on the patentee to prove the disclosure, and if he fails to sustain it the applicant will be entitled to an award of priority of invention on those counts. *Cherney v. Clauss*, (1905) 25 App. Cas. (D. C.) 15.

**Preponderance of evidence required.**—The burden is on the junior applicant in interference to establish his right to a patent by a preponderance of the evidence. *Smith v. Phelps*, (1910) 35 App. Cas. (D. C.) 358.

**Uncorroborated evidence of inventor.**—The practically uncorroborated evidence of the in-

ventor himself cannot be accepted on an interference proceeding as proof of conception. *French v. Halcomb*, (1905) 26 App. Cas. (D. C.) 307.

**Proof of priority beyond reasonable doubt.**—An applicant in interference must prove priority beyond a reasonable doubt. *Rolfe v. Hoffman*, (1905) 26 App. Cas. (D. C.) 336; *Anderson v. Wells*, (1906) 27 App. Cas. (D. C.) 115; *Orcutt v. McDonald*, (1906) 27 App. Cas. (D. C.) 228; *Bourn v. Hill*, (1906) 27 App. Cas. (D. C.) 291; *Shuman v. Beall*, (1906) 27 App. Cas. (D. C.) 324, 329; *Andrews v. Nilson*, (1906) 27 App. Cas. (D. C.) 451.

**Effect of disclaimer as to third persons.**—The fact that, after interference proceedings had been declared between two applications for patents for the same device, one of the applicants entered a disclaimer in favor of the other, while not conclusive as to a third person, who may still show that such disclaiming party was the real inventor, it is strong evidence to the contrary, although, when the withdrawal is the result of a compromise in which the withdrawing party is given large privileges, it is not so significant as if the withdrawal was purely voluntary. *Eck v. Kutz*, (1904) 132 Fed. 753.

**Inadvertent grant of patent.**—A patent granted to a party to a subsequently declared interference, when granted inadvertently and on an application filed subsequently to that of the other party, will not, in the interference proceeding, avail the party to whom it is granted. *Watson v. Thomas*, (1904) 23 App. Cas. (D. C.) 65; *Shaffer v. Dolan*, (1904) 23 App. Cas. (D. C.) 79; *Furman v. Dean*, (1904) 24 App. Cas. (D. C.) 277.

**Effect of decision as to issues in infringement suit.**—On the question of fact whether one who conceived an invention and made drawings and a disclosure to others of the same was reasonably diligent in adapting and perfecting the same, the decision of the Patent Office tribunals and the Supreme Court of the District of Columbia in interference proceedings to which he was a party is entitled to great weight, if not absolutely controlling, in subsequent litigation between the same parties. *Automatic Weighing Mach. Co. v. Pneumatic Scale Corp.*, (C. C. A. 1909) 166 Fed. 288, *reversing* (1908) 158 Fed. 415.

**Language of claims not controlling.**—An interference in fact, like the question of the validity of two patents issued to the same party, depends chiefly upon the subject-matter disclosed, and not merely upon the language of the respective claims. *Blackford v. Wilder*, (1907) 28 App. Cas. (D. C.) 535.

**Identity of description as evidence of interference.**—While the same language may be applied to two structures that are not the same, the employment of such identical language in two claims does not necessarily prove that there is an interference in fact. *Podlesak v. McInerney*, (1906) 26 App. Cas. (D. C.) 399.

**Maliciously procuring interference proceedings.**—The action of a defendant in causing interference proceedings to be instituted and prosecuted in the patent office, thereby delay-



ing the issuance of a patent to complainant, although malicious and for the purpose of obtaining the benefit and use of the invention

in the meantime, does not give a right of action at law for damages. *Avery v. J. L. Case Plow Works*, (1908) 163 Fed. 842.

## Vol. V, p. 501, sec. 4906.

Subpoena duces tecum not authorized.—*In re Outcault*, (1906) 149 Fed. 228.

## Vol. V, p. 501, sec. 4909.

**Remand with leave to appeal.**—Where, on appeal to the Commissioner of Patents from a decision of the examiners-in-chief rejecting an application for a patent, a new and additional claim is suggested, *semble*, that the proper procedure is for the applicant to request that his application be remanded to the examiner with leave to amend by inserting such claim as an additional one, or as a substitute for others. *In re Garrett*, (1906) 27 App. Cas. (D. C.) 19.

**Ex parte cases.**—The provision giving every applicant for a patent the right to have his claim twice rejected by the primary examiner applies only to *ex parte* cases, where the rejection following the first consideration has not afforded the applicant opportunity for hearing and argument. It does not confer on an applicant whose right to make a claim has been denied in an *inter partes* proceeding the privilege of contesting that question *ex parte*, after the adverse *inter partes* decision has been rendered. *U. S. v. Moore*, (1908) 30 App. Cas. (D. C.) 464.

**Division required by examiner.**—Where the primary examiner requires a division, under rule 41 of the Patent Office, of the process claims and the apparatus claims in an application for a patent, refusing to act on the merits of the application until the di-

vision is made, an appeal from his action to the examiners-in-chief does not lie; but his action may be reviewed on a petition to the commissioner under rule 45. *U. S. v. Allen*, (1903) 22 App. Cas. (D. C.) 56.

**Rejection of claim.**—A ruling by an examiner that an applicant for a design patent cannot have a certain claim, but must offer a claim suggested by the examiner, is in effect a rejection of the claim, and if repeated entitles the applicant to an appeal to the examiners-in-chief. *In re Mygatt*, (1905) 26 App. Cas. (D. C.) 366.

**Rules of Patent Office relating to appeals.**—An appeal from a decision of the primary examiner on a motion to dissolve an interference, holding that the party had the right to make the interfering claims, may be prohibited by the rules of the Patent Office without infringing the right of appeal in interferences given by this section and sections 482, 483, 4904, of the Revised Statutes, since the appeal therein provided for must be deemed limited to final decisions on the question of priority of invention, which, under these statutes, is the sole question for determination in interference cases. *U. S. v. Allen*, (1908) 203 U. S. 476, 27 S. Ct. 141, 51 U. S. (L. ed.) 281, 125 Off. Gaz. 2365, *affirming* (1905) 26 App. Cas. (D. C.) 8.

## Vol. V, p. 502, sec. 4910.

**Motion to transmit to primary examiner.**—After an appeal from the decision of the examiners-in-chief, a motion to transmit an interference to the primary examiner will only be entertained by the Commissioner of Patents when it appears that a clear and unmistakable error has been committed in the prior decision. *Parkes v. Lewis*, (1906) 28 App. Cas. (D. C.) 1.

**Nature of commissioner's functions.**—The

Commissioner of Patents, in all matters involving the validity and patentability of claims and priority of invention, exercises only an appellate jurisdiction; but in matters of practice and procedure, not involving the merits and final rejection of claims, he acts in his supervisory capacity as head of the Patent Office, and his action is final, and not reviewable on appeal. *U. S. v. Allen*, (1903) 22 App. Cas. (D. C.) 56.

## Vol. V, p. 502, sec. 9.

**Constitutionality.**—The Commissioner of Patents, in passing on applications and deciding controversies between rival applicants for patent for the same invention, exercises a power that is essentially judicial; and for that reason Congress has the power to provide for a review of his decisions by appeal to the courts. *Moore v. U. S.*, (1909) 33 App. Cas. (D. C.) 597.

**The jurisdiction of this court to entertain appeals in patent cases** from the Commissioner of Patents is limited to two classes of decisions, namely, a final rejection of an ap-

plication for a patent, and a final award of priority to one of the parties in an interference case. *Cosper v. Gold*, (1909) 34 App. Cas. (D. C.) 194, 198.

**Refusal of examiners-in-chief to entertain appeal.**—Although it is the better practice usually, in cases where the examiners-in-chief have erred in refusing to entertain an appeal, to require the Commissioner of Patents to direct them to entertain the appeal, yet in cases of general public interest, and where the case, if sent back, would undoubtedly come up again, this court will itself entertain an ap-

peal from a decision of the commissioner upholding the action of the examiners-in-chief. *In re Myatt*, (1905) 26 App. Cas. (D. C.) 368.

**Discretionary matters.**—Rules of practice in interference cases are necessary and should not be disregarded; and this court does not sit to review the rulings of the Commissioner of Patents in discretionary matters, or decisions of the examiner of interferences, not lawfully appealed from. *Jones v. Starr*, (1905) 26 App. Cas. (D. C.) 64.

The Commissioner of Patents being vested with a discretion in determining whether or not to require a division of claims for a process and an apparatus, the Court of Appeals will not interfere when such discretion has been exercised except in cases of clear abuse. *In re Frasch*, (1906) 27 App. Cas. (D. C.) 25.

Whether leave shall be given to amend a preliminary statement is a matter that rests in the discretion of the Commissioner of Patents, and is not reviewable in the Court of Appeals, save possibly in a case of palpable abuse of that discretion. *Neth v. Ohmer*, (1906) 27 App. Cas. (D. C.) 319.

The exercise of the discretion of the Commissioner of Patents in granting or refusing a motion by one of the parties to an interference for leave to take the testimony of experts is not reviewable on appeal, especially where it appears that the party making the motion has not been prejudiced, in view of the fact that everything which he desired to prove has been admitted by his adversary. *Weintraub v. Hewitt*, (1910) 34 App. Cas. (D. C.) 487.

**Retaking testimony.**—The granting or refusal, by the Commissioner of Patents, of a motion by one of the parties to an interference for leave to retake testimony which had been suppressed for irregularities in taking it, is within the discretion of the commissioner, and is not such a decision as this court may review on appeal. As an interlocutory proceeding this court would not review it, and it is not one which should be reviewed as necessary or proper in connection with the final decision of priority. *Jones v. Starr*, (1905) 26 App. Cas. (D. C.) 64.

**Sufficiency of affidavits filed in Patent Office.**—The Court of Appeals will not consider affidavits filed therein or in the Patent Office relating to changes that may have occurred in the drawings, models, experimental machines, and like exhibits, as such matters must be wholly settled in the Patent Office. *Greenwood v. Dover*, (1904) 23 App. Cas. (D. C.) 251.

**Amendment of preliminary statement.**—Whether an amendment to a preliminary statement in an interference proceeding shall be allowed is discretionary with the Commissioner of Patents, and nothing less than an abuse of that discretion, causing a palpable miscarriage of justice, will warrant a review and a reversal of his action. *Hammond v. Basch*, (1905) 24 App. Cas. (D. C.) 469.

**Questions not raised before commissioner.**—Where, on appeal to the Commissioner of Patents from a decision of the examiners-in-chief rejecting an application for a patent, a

new and additional claim is suggested by the applicant, but not acted on by the commissioner, the Court of Appeals on an appeal from his decision is not at liberty to pass on such claim. *In re Garrett*, (1906) 27 App. Cas. (D. C.) 19.

Where the tribunals of the Patent Office, without objection on the part of an applicant and apparently with his consent, treat claims substituted by him for his original claims as having been presented by way of amendment, in order to put the claims in better form for appeal, he will be considered as having waived an objection, for the first time made in this court, that the substituted claims were not substantially the same as the original ones, and therefore should have been referred back to the primary examiner for reconsideration. *In re Heinz*, (1900) 34 App. Cas. (D. C.) 187.

**Comments on inutility of descriptive language.**—Comment by the Commissioner of Patents, in his opinion on the rejection of an application for a design patent, on the inutility of the descriptive language contained in the applicant's specifications, cannot properly be made the ground of assignment of error by the applicant on an appeal to the Court of Appeals from a decision rejecting his application. *In re Freeman*, (1904) 23 App. Cas. (D. C.) 226.

**Remanding cause for determination of questions reserved.**—A mere suggestion by a party in interference to the effect that new references brought forward before the commissioner for the first time will show want of patentable novelty in the subject-matter of the controversy is not the equivalent of a reservation of the question of patentability by the commissioner, and a motion to remand the cause for the determination of the question cannot be allowed. *Luger v. Browning*, (1903) 21 App. Cas. (D. C.) 201.

**Reissue of patent omitting interfering claims.**—Where pending an interference between an application and a patent, the patentee applies for a reissue of his patent, omitting from his application the claims involved in the interference, and the reissue is allowed, the surrender of the original patent takes effect on the reissue, and a subsequent award of priority by the examiner of interferences being void, on an appeal by the patentee from the decision of the commissioner awarding priority to the applicant the appeal will be dismissed, as any judgment of priority of invention awarded would be equally void, and the case will be remanded to the Patent Office, to be dealt with as law and justice may require. *Lattig v. Dean*, (1905) 25 App. Cas. (D. C.) 591.

**Decisions appealable.**—The decision of the commissioner on appeal from a determination of the examiners in an interference case requiring a division of the process claims and apparatus claims on an application for a patent, and refusing to act on the merits of the application until the division should be made, does not involve the merits and final rejection of the claims and therefore is not reviewable by the Court of Appeals. *U. S. v. Allen*, (1903) 22 App. Cas. (D. C.) 56.

**Review of discretion.**—The exercise by the Commissioner of Patents of his discretion in refusing to reopen an interference case for the introduction of newly discovered evidence may be the subject of review and correction on appeal, when undoubtedly abused and productive of palpable injustice, especially when the question has been raised and decided by the commissioner along with the general question of priority. *Dunbar v. Schellenger*, (1907) 29 App. Cas. (D. C.) 129.

**Decision not involving merits.**—Under this statute a decision of the commissioner on appeal from the refusal to act on the merits of an application until the applicant makes a division of his process claims from his apparatus claims, as it does not involve the merits and final rejection of the claims, is final, and not reviewable by the Court of Appeals. *U. S. v. Allen*, (1903) 22 App. Cas. (D. C.) 56.

**Assignments of errors.**—An assignment of error by the appellant in an interference proceeding that there was irregularity in the declaration of the interference, consisting of the failure of the primary examiner to make formal allowance of the claims of the parties before declaring the interference, is without merit. *Luger v. Browning*, (1903) 21 App. Cas. (D. C.) 201.

**Sufficiency of description in design case.**—The question whether a description in a design case is a proper one is not reviewable in the Court of Appeals, except in an extraordinary case. *In re Mygatt*, (1905) 26 App. Cas. (D. C.) 366.

**Interlocutory orders.**—In an interference case, the Court of Appeals cannot review the rulings of the Patent Office on interlocutory matters that occurred in the Patent Office during the pendency of the case, such as motions for rehearing, motions to vacate orders and remand the cause, which have no reference to the merits of the controversy, unless, perhaps, in extreme cases it should be necessary for the maintenance of the jurisdiction of this court. *Ritter v. Krakau*, (1904) 24 App. Cas. (D. C.) 271.

An order dissolving an interference on the ground that one of the parties has no right to make the claims of the issue, being interlocutory, cannot be appealed from to this court, independently of a final decision putting an end to the litigation through an award of priority to the other party; but, when a final award has been made, the interlocutory order may be reviewed on an appeal from the final order, but not otherwise. *Cosper v. Gold*, (1909) 34 App. Cas. (D. C.) 194, 198.

**Dissolving interference.**—A motion to dissolve an interference in the Patent Office before the final hearing of the question of priority, and before the case is ready for such hearing, is an interlocutory proceeding, and is not appealable to the Court of Appeals unless made so by statute or sale of court. *Allen v. U. S.*, (1905) 26 App. Cas. (D. C.) 8.

**Conclusiveness of decision of Patent Office.**—An appellant in an interference case, who is the junior applicant, with the burden of proof therefore upon him, and who also has

the unanimous concurrence of all the tribunals of the Patent Office against him, must make out a very clear case in this court. *Luger v. Browning*, (1903) 21 App. Cas. (D. C.) 201; *Cobb v. Goebel*, (1904) 23 App. Cas. (D. C.) 75; *Orcutt v. McDonald*, (1906) 27 App. Cas. (D. C.) 228; *Lecroix v. Tyberg*, (1909) 33 App. Cas. (D. C.) 586.

Where a party to an interference case is admittedly not entitled to an award of priority of invention, for the reason that in his preliminary statement he fails to allege conception prior to the filing date of his adversary, he will not be heard, on an appeal from an adverse decision of the commissioner, to question the patentability of the invention of the issue. *Potter v. McIntosh*, (1906) 28 App. Cas. (D. C.) 510.

The patentability of the issue in an interference proceeding is not a jurisdictional fact without which there can be no determination of priority of invention; and in such a proceeding this court will not review the action of the Patent Office in deciding that the issue is a patentable one, but will confine its consideration to the question of priority alone. *Johnson v. Mueser*, (1907) 29 App. Cas. (D. C.) 61.

**Identity of invention.**—A proceeding to dissolve an interference for want of identity of invention of the devices of the parties is collateral to the interference itself, and does not, as a general rule, enter into the consideration of the question of priority of invention when the interference is brought to the Court of Appeals. *Luger v. Browning*, (1903) 21 App. Cas. (D. C.) 201; *Lecroix v. Tyberg*, (1909) 33 App. Cas. (D. C.) 586.

In extreme cases, where palpable error has been committed, a decision of the Patent Office holding identity of invention between the devices of the parties to an interference may be reversed. But the court, although of opinion that error has been committed, may refuse to hold that there is no interference in fact, and may send the case back to the Patent Office for further consideration. *Podlesak v. McInerney*, (1906) 26 App. Cas. (D. C.) 390.

Except in extreme cases this court will not go behind the declaration of interference in order to determine the question of identity of invention; and such a case is not presented where it appears that the assignee and employer of the junior and unsuccessful party, after the latter saw his rival's application and drawings, filed the junior party's application, with specifications reading very much like those of the senior party. *Bechman v. Southgate*, (1906) 28 App. Cas. (D. C.) 405.

**Operativeness of device.**—On an appeal from a decision of the Commissioner of Patents in an infringement case, the question of the operativeness of the device cannot be considered by this court as an incident of the main question of priority. *Duryea v. Rice*, (1906) 28 App. Cas. (D. C.) 423.

**Ancillary questions.**—The decision of a primary examiner that a party to an interference has the right to make a claim which is the same as a count of the issue of an interference will be reviewed by the Court of Appeals as an ancillary question to be con-

sidered in awarding priority of invention. But where the examiners-in-chief and the commissioner have concurred in this decision, the court will not disturb their finding unless manifest error has been committed. *Podlesak v. McInerney*, (1906) 26 App. Cas. (D. C.) 399.

The "reasons of appeal," in a patent appeal, are in the nature of the ordinary assignments of error in actions at law or in equity. *Horine v. Wende*, (1907) 29 App. Cas. (D. C.) 415.

**Amendment of notice of appeal.**—A reason of appeal filed in the Patent Office with the notice of appeal to this court may be amended so as to make it more specific, or to remedy some inadvertence in its preparation, if the amendment is made in due time and no injury is done the opposing party. *Horine v. Wende*, (1907) 29 App. Cas. (D. C.) 415.

## Vol. V, p. 505, sec. 4912.

**Indefinite assignment.**—An assignment of errors on an appeal from a decision of the Commissioner of Patents, that the commissioner "erred in many material respects," will not be considered. *In re Frasch*, (1906) 27 App. Cas. (D. C.) 25.

**Failure to assign error.**—Where an appel-

**Right of party not appealing.**—Where one of three parties to an interference fails to appeal from a decision of the examiners-in-chief of the Patent Office adverse to him, so that under rule 132 of the Patent Office his claims which were involved in the interference stand finally rejected, he can have no standing in the Court of Appeals on an appeal by one of the other parties from the commissioner's decision. *Fowler v. Boyce*, (1906) 27 App. Cas. (D. C.) 48.

**Rules of Patent Office binding on court.**—The Court of Appeals on appeal in the Patent Office in interferences is bound by the rules lawfully established for the taking of testimony in such cases. *Lowrie v. Taylor*, (1906) 27 App. Cas. (D. C.) 522.

**No appeal to Supreme Court.**—*Rousseau v. Brown*, (1903) 21 App. Cas. (D. C.) 73.

lant in an interference case, in his assignment of errors, does not challenge the decision of the Commissioner of Patents on the question of priority of invention, he will, to that extent, be presumed to have acquiesced in the decision against him. *Bechman v. Southgate*, (1906) 28 App. Cas. (D. C.) 405.

## Vol. V, p. 506, sec. 4914.

**Conclusiveness of Patent Office decisions generally.**—Ordinarily, in an interference case, the decision of the Patent Office in respect of the identity of the inventions of the parties will be accepted by this court as conclusive, especially where the invention is one of elaborate and complicated mechanism; but in extreme cases, where palpable error has been committed, such a decision may be reversed, and, under certain circumstances, a decision of the commissioner will be reversed where one party has been permitted to broaden his application for a specific invention into a generic one, and thereby dominate another and different specific invention contained in the later application of another. *Seeberger v. Dodge*, (1905) 24 App. Cas. (D. C.) 476.

Ordinarily in a technical case this court will accept the views of the expert tribunals of the Patent Office, but if it is apparent that those tribunals are not in harmony on controlling questions involved, or if the court is satisfied that an incorrect conclusion has been reached, it will consider the case afresh. *Arbetter v. Lewis*, (1910) 34 App. Cas. (D. C.) 491.

**Concurrent decisions of Patent Office tribunals.**—The burden to sustain his claim is on a party to an interference who appeals to the Court of Appeals, where he is the junior applicant, and also comes here with the concurrent decisions of all the tribunals of the Patent Office against him. *Harris v. Stern*, (1903) 22 App. Cas. (D. C.) 164; *Talbot v. Monell*, (1904) 23 App. Cas. (D. C.) 108, 112; *Murphy v. Meissner*, (1904) 24 App. Cas. (D. C.) 260; *In re Adams*, (1904) 24 App. Cas. (D. C.) 275; *Thibodeau v. Hildreth*,

(1905) 25 App. Cas. (D. C.) 320, 323; *Ball v. Flora*, (1905) 26 App. Cas. (D. C.) 394; *Cleveland v. Wilkin*, (1906) 27 App. Cas. (D. C.) 311; *Turnbull v. Curtis*, (1906) 27 App. Cas. (D. C.) 567; *In re Duncan*, (1906) 28 App. Cas. (D. C.) 457; *Wickers v. McKee*, (1907) 29 App. Cas. (D. C.) 4, 21, 28; *In re Blackmore*, (1909) 33 App. Cas. (D. C.) 434; *Daggett v. Kaufmann*, (1909) 33 App. Cas. (D. C.) 450; *Woodbridge v. Winship*, (1909) 33 App. Cas. (D. C.) 490; *Gold v. Gold*, (1909) 34 App. Cas. (D. C.) 229; *In re Gold*, (1909) 34 App. Cas. (D. C.) 239.

**Decision of question of fact.**—The Court of Appeals will not overrule the concurrent findings of the three Patent Office tribunals, that certain evidence of one of the parties to an interference proves a disclosure. *Fowler v. McBerty*, (1906) 27 App. Cas. (D. C.) 41, 46; *O'Connell v. Schmidt*, (1906) 27 App. Cas. (D. C.) 77; *Oreutt v. McDonald*, (1906) 27 App. Cas. (D. C.) 228; *Bourn v. Hill*, (1906) 27 App. Cas. (D. C.) 291.

**Affirmance on motion.**—A case must be a very clear one to justify an appellate court in affirming a decision of the Commissioner of Patents on motion and in advance of the hearing on the printed record. *Jones v. Starr*, (1905) 26 App. Cas. (D. C.) 64.

**Remand to Patent Office for proof.**—A motion in the Court of Appeals by the appellant in a patent interference case to remand the case to the Commissioner of Patents in order that it might be reopened in the Patent Office for the introduction of newly discovered evidence, and also for the allowance of the filing of an amended preliminary statement by the appellant, denied; the Commissioner of Pat-

ents having denied a similar motion. *Richards v. Meissner*, (1904) 24 App. Cas. (D. C.) 305.

**Evidence not offered before commissioner.**—Where, in an interference case, exhibits are offered in evidence on which to predicate a reduction to practice, and they are lacking in one or more elements of the issue, the necessary elements in them cannot be supplied by this court unless warrant for such finding is found in the record. *Robinson v. Seelinger*, (1905) 25 App. Cas. (D. C.) 237.

**Failure to include testimony in record.**—Where the record, on appeal in an interference case, does not contain the testimony, but only the assignments of error and the decisions of the Patent Office tribunals, it will be assumed that the decision of the commissioner was correct, and it will be affirmed.

## Vol. V, p. 507, sec. 4915.

**Effect of other Acts.**—This section, so far as it relates to the remedy in equity in interference cases, was not repealed by Act Feb. 9, 1893, ch. 74, sec. 9, 27 Stat. L. 436, 5 Fed. Stat. Annot. 502, the only effect of such Act being to require the applicant to exhaust his remedy in the direct proceedings by an appeal from the decision of the commissioner before being entitled to proceed in equity. *McKnight v. Metal Volatilization Co.*, (1904) 128 Fed. 51; *Dover v. Greenwood*, (1906) 143 Fed. 136.

The broad scope of this section was in no way limited or qualified by the Act of 1893, providing for appeals from the decision of the Commissioner of Patents to the Supreme Court of the District of Columbia. *Prindle v. Brown*, (C. C. A. 1907) 155 Fed. 531, *reversing* (1905) 136 Fed. 616.

**Necessity of appeal in interference case before filing bill.**—An applicant for a patent, who failed to appeal from the adverse decision of the commissioner to the Court of Appeals, as provided by the Act of 1893, cannot maintain a suit in equity to obtain a patent. *Prindle v. Brown*, (1905) 136 Fed. 616.

**Nature of proceeding.**—A suit by an unsuccessful applicant to compel the issuance of a patent to him under this section is not an appeal from the proceedings in the Patent Office or the decision of the Court of Appeals of the District of Columbia, but is one of original equity jurisdiction. *Appert v. Brownsville Plate Glass Co.*, (1904) 144 Fed. 115.

A suit brought under this section to obtain the issuance of a patent is not revisory, but an original suit in equity; and testimony taken in interference proceedings before the Patent Office, although between the same parties, is incompetent and inadmissible, unless a foundation is laid for its introduction as secondary evidence. *Dover v. Greenwood*, (1907) 154 Fed. 854.

A suit to obtain the issuance of a patent is a plenary suit in equity, to which all the rules of practice and evidence in such suits apply, and a party cannot be deprived of the right given him by equity rule 67 to cross-

*Goldberg v. Halle*, (1909) 34 App. Cas. (D. C.) 183.

**Dismissal of appeal.**—An appeal from the decision of the Commissioner of Patents will not be dismissed because the appellant has availed himself of all the time allowed by the rules for taking and perfecting his appeal, although by so doing he necessarily prevents the hearing of the appeal until after the summer recess of the court. *Jones v. Starr*, (1905) 26 App. Cas. (D. C.) 64.

Where the appellant does not appear when the case is called for argument and no brief has been filed in his behalf, a motion by the appellee to open the cause and affirm the decision of the Commissioner of Patents in an interference proceeding must be granted in accordance with rule 8, sec. 9. *Peckham v. Price*, (1906) 26 App. Cas. (D. C.) 556.

examine opposing witnesses by the introduction of the proofs taken in interference proceedings, unless a showing of necessity is made for their introduction as secondary evidence. *Dover v. Greenwood*, (1910) 177 Fed. 946.

**Refusal of Court of Appeals to consider testimony suppressed in Patent Office.**—Where, in an interference case, the Court of Appeals refused to consider the testimony of the appellant which had been suppressed in the Patent Office, and affirmed a decision of the commissioner awarding priority to the appellee on the record dates of the parties, the appellant still had a remedy in this section, and, if there successful, could invoke relief under section 4918. *Jones v. Starr*, (1905) 26 App. Cas. (D. C.) 64.

**Formal action refusing application.**—An applicant for a patent, against whom adverse decisions have been rendered in interference proceedings by the examiners and commissioner of the Patent Office and by the Court of Appeals of the District of Columbia on appeal, whose decision governs the further proceedings in the case in the Patent Office, may maintain a bill in equity in a Circuit Court without waiting for the formal action of the Patent Office refusing his application. *McKnight v. Metal Volatilization Co.*, (1904) 128 Fed. 51.

**Effect of decisions in Patent Office.**—Where the question which of two applicants for a patent for the same invention was the true inventor depends on questions of fact, the court, in a suit by the unsuccessful applicant to compel an issuance of the patent to him, must be very clearly satisfied that the decision of the Patent Office tribunals was erroneous before it will be justified in reversing the same. *Gillette v. Sendelbach*, (1906) 146 Fed. 758, 77 C. C. A. 55.

Where there has been a contest as to priority of invention between two applicants for patents before the Patent Office and the Court of Appeals, both of which tribunals have decided in favor of the same contestants, and the unsuccessful party has instituted a suit in equity to relitigate his right, he begins his

controversy in that court with a *prima facie* case against him which he must overcome by such a weight of evidence as to carry thorough conviction to the mind of the judge, and his right to a preliminary injunction in such suit to restrain the defendant from paying his final fee and obtaining a patent is seriously questionable; and in any event such an injunction should not be granted without a clear showing that irreparable injury will otherwise result to complainant. *Richards v. Meissner*, (1906) 158 Fed. 109.

In a suit under this section the decisions of the Patent Office and the Court of Appeals adjudging priority of invention to the defendant are presumptively correct only, and that presumption is destroyed by proof that they were based on false and perjured evidence. *Laas v. Scott*, (1908) 161 Fed. 122.

The decision of the Patent Office and the Court of Appeals of the District of Columbia in interference proceedings, awarding priority of invention to one of two applicants for a patent, is controlling as to such question of fact as between such parties in a subsequent suit brought under this section, unless the contrary is established by evidence which carries thorough conviction. *Richards v. Meissner*, (1908) 163 Fed. 957.

In a suit under this section by an unsuccessful applicant for a patent to establish his right, where in interference proceedings before the Patent Office between complainant and defendant all of the examiners who passed upon the matter, the commissioner, and the Court of Appeals for the District of Columbia concurred in adjudging priority of invention to defendant, who was awarded a patent, such judgments can only be overcome by clear and convincing proof, which strongly outweighs that of the other side in the interference proceedings. *Western Electric Co. v. Fowler*, (C. C. A. 1910) 177 Fed. 224.

**Unexplained laches and delay in filing bill.**—Allegations in a bill to obtain a patent, filed more than a year after the patent was refused, held insufficient to show that the delay was "unavoidable," within the meaning of R. S. sec. 4894, 5 Fed. Stat. Annot. 488. *Westinghouse Electric, etc., Co. v. Ohio Brass Co.*, (1911) 186 Fed. 518.

**Delay in prosecuting suit.**—Mere delay in the prosecution of a suit to obtain the issuance of a patent, incident to the death of the complainant and which is acquiesced in by the adverse party, will not operate as an abandonment or preclude the court from reviving and proceeding with the suit on application of complainant's administrator. *Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co.*, (1909) 168 Fed. 73.

**Citizenship as affecting jurisdiction.**—Under this section the Circuit Court has exclusive jurisdiction, regardless of the citizen-

ship of the parties or the amount in controversy, and such a suit may be brought in any district where valid service can be had on the defendant. *Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co.*, (1910) 181 Fed. 974.

**Jurisdiction where conflicting interests are united.**—The fact that pending a suit under this section between two applicants for patents, the interests of the two litigants is united, does not deprive the court of jurisdiction to proceed to a decree adjudging the right of the prior inventor to a patent. *Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co.*, (1909) 168 Fed. 73.

**Commissioner as party in interference case.**—A bill filed against an adverse party to obtain the issuance of a patent, and which also joins the Commissioner of Patents as a defendant to compel the granting of a reissue, which is an *ex parte* matter, is multifarious. *Gold v. Gold*, (1910) 181 Fed. 544.

**Assignee as complainant.**—Where an applicant for a patent has made an absolute assignment of his rights in the invention, the right to bring a suit in equity to obtain issuance of the patent is vested in the assignee. *Smith v. Thompson*, (1910) 177 Fed. 721.

**Averment of priority of invention.**—A bill which states the date of an application for a patent is not to be held to state that the invention was then first completed or reduced to practice unless nothing is alleged showing invention prior thereto, and a further allegation that the invention was made prior to such date covers the fact of reduction to practice, and is sufficient to carry the date back of the application. *Prindle v. Brown*, (C. C. A. 1907) 155 Fed. 531, *reversing* (1905) 136 Fed. 616.

**Power to annul a patent.**—A suit under this section is for the purpose of establishing complainant's right to a patent which has been refused by the Patent Office; and where such patent was granted to the defendant after interference proceedings complainant is not entitled in such suit to introduce evidence to prove that the patent is void for anticipation, an issue which was not, and could not have been, tendered by the bill. *Richards v. Meissner*, (1908) 162 Fed. 485, *disapproving* (1907) 155 Fed. 135.

**Right to decree on default.**—In a suit in equity to obtain a patent, application for which has been refused by the Patent Office and the appellate tribunal, the complainant is not entitled to a decree adjudging his right to a patent as a matter of course on default by the defendant, but must establish such right, including the patentability of his alleged invention by proofs, and where the defendant has entered an appearance although in default for want of pleading, he is entitled to notice before final decree is entered. *Davis v. Garrett*, (1907) 152 Fed. 723.

## Vol. V, p. 511, sec. 4916.

It is not the object of this statute to encourage or permit the insertion of claims in a reissue application which involve an impracticable mode of operation, or which are ob-

viously inserted for the sole purpose of appropriating claims of other inventors. *Otis v. Ingoldsby*, (1910) 35 App. Cas. (D. C.) 102.

**Protection of meritorious inventions.**—Where a patented device has won a position of unchallenged supremacy in the commercial world, a court should endeavor to sustain the patent rather than defeat it. *Consolidated Rubber Tire Co. v. Firestone Tire, etc., Co.*, (C. C. A. 1907) 151 Fed. 237, *affirming* (1906) 147 Fed. 739.

**Conclusiveness and effect of decision of Patent Office.**—Granting the reissue of a patent raises a presumption that proper ground therefor was shown, and the courts will not review the decision of the commissioner unless unsupported by the record. *Chicago R. Equipment Co. v. Perry Side Bearing Co.*, (1909) 170 Fed. 968.

Findings by the commissioner that a legal condition exists and is available to authorize the granting of a reissue are conclusive in so far as they depend upon credibility and weight of evidence, but in so far as they depend upon the legal interpretation and effect of admittedly genuine documents or other undisputed evidence they are reviewable in court. *General Electric Co. v. Richmond St., etc., R. Co.*, (C. C. A. 1909) 178 Fed. 84.

The ruling of the Patent Office on an application for reissue that the failure of the patentee to include certain features of his invention was due to accident, inadvertence, or mistake cannot be reviewed by the courts on the facts. *Asbestos Shingle, etc., Co. v. H. W. Johns-Manville Co.*, (1910) 184 Fed. 620.

**Effect of applicant's oath.**—The oath of an applicant, filed with his application for a reissue, should count for something, and cannot be entirely ignored, but must be traversed by the Patent Office. *In re Briede*, (1906) 27 App. Cas. (D. C.) 298.

**Unreasonable delay.**—A patentee who is entitled to a reissue is required to exercise his right promptly on the discovery of the error which renders such reissue necessary, and where he continues litigation for years in various courts on his original patent, after it has once been adjudged invalid, he will be deemed to have elected to stand on such patent as the measure of his rights, and cannot thereafter obtain a valid reissue. *Milloy Electric Co. v. Thomson-Houston Electric Co.*, (1906) 148 Fed. 843, 78 C. C. A. 533.

An application for a reissue with broader claims is properly rejected, when made six years after the grant of the patent, the claims of which were not difficult to be understood, during which period it was subject to several transfers, and when the only excuse for the delay is the uncorroborated statement of the applicant that he was unaware of the narrow scope of his claims until an infringement case was decided adversely to him. *In re Starkey*, (1903) 21 App. Cas. (D. C.) 519.

**Delay incident to nonresidence.**—The lapse of seven months between the issue of an ordinary patent and an application for a reissue does not constitute undue delay or laches on the part of the inventor, where both he and his attorney reside abroad and are unfamiliar with the English language and with the requirements of our patent laws. *In re Briede*, (1906) 27 App. Cas. (D. C.) 298.

**Discovery of defects.**—Where a patentee, on obtaining information of prior foreign patents and becoming convinced that some claims of his patent had inadvertently been made too broad, promptly applied for a reissue, which did not broaden the invention claimed, and no rights are shown to have intervened, the fact alone that the application was not made for seven years after the granting of the original does not render the reissue invalid. *Sirocco Engineering Co. v. B. F. Sturtevant Co.*, (1909) 173 Fed. 378.

A reissue patent on an application filed as soon as the patentee discovered that his original claims had inadvertently been made too broad, and which narrows them to his actual invention, is valid. *Geneva Mfg. Co. v. National Furniture Co.*, (1911) 188 Fed. 662.

**Waiting final result of litigation.**—The owner of a patent which has been declared void by the decision of a Circuit Court of Appeals cannot thereafter continue litigation thereon for years in other circuits, and, if finally defeated, then apply for and obtain a valid reissue. *Thomson-Houston Electric Co. v. Western Electric Co.*, (C. C. A. 1907) 158 Fed. 813.

Where a suit on a patent was commenced within fifteen months after its issue, and within ten days after it was adjudged invalid by the Circuit Court of Appeals a reissue was applied for which narrowed the scope of the original patent, and it appeared that a decision as to the validity of the original patent was reasonably necessary to establish the necessity for a reissue, the application therefor was made within a reasonable time. *Conroy v. Penn Electrical, etc., Co.*, (1909) 173 Fed. 299.

**Reissue held invalid for laches.**—*Thomson-Houston Electric Co. v. Sterling-Meaker Co.*, (1907) 150 Fed. 589 (three years after adjudication of invalidity of original patent).

**Identity of invention necessary.**—A reissue patent cannot be issued for an invention other than the one actually described in the original patent. *Morse Chain Co. v. Link Belt Co.*, (1910) 182 Fed. 825; *In re Briede*, (1906) 27 App. Cas. (D. C.) 298; *In re Hoey*, (1906) 28 App. Cas. (D. C.) 416.

A reissue patent must be for the same invention as the original patent, and cannot include a feature which was withdrawn on the original application to meet a requirement of the Patent Office, or in the rejection of which by the Patent Office the applicant acquiesced. *Franklin v. Illinois Moulding Co.*, (1904) 128 Fed. 48.

The Weston reissued patent, No. 11,250 (original No. 433,637), for an electrical measuring instrument used for measuring the difference of potential between the terminals of an alternating current circuit, while disclosing patentable invention in so proportioning the parts of the apparatus as to reduce the effect of self-induction to a negligible quantity, is invalid as a reissue because the description in the original patent fails to show such invention, or that it was intended to be secured thereby. *Weston Electrical Instrument Co. v. Stevens*, (1904) 134 Fed. 574, 67

C. C. A. 374, *reversing* (1902) 119 Fed. 181.

A patentee is not entitled to claim in a reissue a feature of the device not claimed in the original patent as a part of his invention, although it was incidentally shown or indicated in the drawings. *Marvel Buckle Co. v. Alma Mfg. Co.*, (1910) 180 Fed. 1002.

Authority to grant reissue patents is derived exclusively from this statute, and the commissioner goes beyond his jurisdiction if he grants a reissue for an invention other than the one disclosed and described in the original patent, which, by reason of inadvertence, accident, or mistake, is inoperative to secure the monopoly it shows on its face was intended to be secured. *Moneyweight Scale Co. v. Toledo Computing Scale Co.*, (C. C. A. 1911) 187 Fed. 826, *affirming* (1910) 178 Fed. 557.

The question whether two patents are for the same invention is one of law, to be determined by a comparison of the documents themselves, no extrinsic evidence being necessary, and hence the decision of a Circuit Court of Appeals holding the later patent void for double patenting, although rendered on an appeal from an interlocutory order granting a preliminary injunction, is in effect a final decision for the purpose of advising the owner of the invalidity of the patent, and any delay thereafter in applying for a reissue for the purpose of curing such invalidity is at his peril. *Thomson-Houston Electric Co. v. Western Electric Co.*, (C. C. A. 1907) 158 Fed. 813.

**Necessity of reissued patent.**—The Commissioner of Patents is without jurisdiction to grant a reissue in lieu of an original patent, unaltered save by the addition of enlarging claims, and where the original described and illustrated by its drawings an operative machine which was fully covered and protected by its claims. *McDowell v. Ideal Concrete Machinery Co.*, (C. C. A. 1911) 187 Fed. 814.

**For statutory defects only.**—To authorize the Commissioner of Patents to grant a reissue, either the original specification must be defective or insufficient, or the original claims must embrace more than the patentee had a right to claim as new. *General Electric Co. v. Richmond St., etc., R. Co.*, (C. C. A. 1909) 178 Fed. 84.

**Mistaken limitation of claims.**—The remedy for a mistaken limitation in the claims of a patent is by a reissue and not by construction. *Dey Time-Register Co. v. W. H. Bundy Recording Co.*, (1909) 169 Fed. 807.

**Adjudication of invalidity of patent.**—An adjudication of invalidity of a patent for lack of patentable invention held not to entitle the patentee to a reissue. *Penn. Electrical, etc., Co. v. Conroy*, (C. C. A. 1911) 185 Fed. 511, *reversing* (1910) 181 Fed. 697.

**Enlargement of invention.**—A reissue patent applied for, not for the purpose of narrowing the original patent because the patentee had claimed too much, but for the purpose of giving a broader monopoly, and the claims of which as recast have that effect, is unauthorized and void. *General Electric Co.*

*v. Richmond St., etc., R. Co.*, (C. C. A. 1909) 178 Fed. 84.

**Broadened claims.**—A patentee may extend his claims by a reissue, when the invention remains the same and there is no material change in the drawings and specification. *Universal Caster, etc., Co. v. M. B. Schenck Co.*, (1908) 165 Fed. 344.

Where the claims of a patent are narrower than the real invention, the error or mistake cannot be corrected by inserting the broader claims in a subsequent patent for improvements on the first, but only by a reissue. *Union Typewriter Co. v. L. C. Smith, etc., Typewriter Co.*, (C. C. A. 1910) 181 Fed. 966, *affirming* (1909) 173 Fed. 288.

On an application for a reissue of a patent on the ground that, by mistake, the claim of such patent does not fully cover the actual invention, where it appears that the same invention is set forth in the specifications and claims of the original patent, that the applicant has exercised due diligence in discovering his mistake and returning to the Patent Office, that there are not intervening rights, and that there is no fraud, a reissue with a broader claim is permissible. *In re Briede*, (1906) 27 App. Cas. (D. C.) 298.

To warrant new and broader claims in a reissue, such claims must not be merely suggested or indicated by the original specifications, drawings, or models; but it must further appear from the patent that they constitute parts of the invention which were intended to be covered by the patent. *Nelson v. Felsing*, (1909) 32 App. Cas. (D. C.) 420.

**Patent enlarged to correct mistakes.**—A patent will not be reissued for the mere purpose of enlarging a claim, unless there has been a clear mistake, inadvertently committed, in the wording of the claim. If the description in the reissue application finds no real support in the original application, a case for reissue is not made. *Otis v. Ingoldsby*, (1910) 35 App. Cas. (D. C.) 102.

**Omissions by mistake of solicitor.**—The failure of the solicitors for an applicant for a patent to present claims which adequately cover the invention disclosed by the specification and drawings is an inadvertence which may entitle him to a reissue. *Moneyweight Scale Co. v. Toledo Computing Scale Co.*, (C. C. A. 1911) 187 Fed. 826, *affirming* (1910) 178 Fed. 557.

**Inadvertence of solicitor.**—The inadvertence of the solicitors of an applicant for a patent is his inadvertence, and, on the other hand, their erroneous judgment in submitting to the rejection of claims is his erroneous judgment, and he is estopped from presenting any of such rejected claims in an application for a reissue. *Moneyweight Scale Co. v. Toledo Computing Scale Co.*, (C. C. A. 1911) 187 Fed. 826, *affirming* (1910) 178 Fed. 557.

**Parts described and not claimed in original.**—A reissued patent must be confined to the invention which was intended to be secured by the original patent. Devices or parts which, although described or shown in the specification or drawings of the original patent, were not a part of the invention, as there-in disclosed, cannot be covered by a reissue.



U. S. Whip Co. v. Hassler, (1905) 134 Fed. 398.

**Terms defined by patent.**—Where a term is defined in a patent, that is the construction to be given it, rather than the definition found in the dictionaries; and held, therefore, in a patent for the interior fire-finishing of the glass article which provides that it is to be subject to the fire blast when in a "plastic" condition, by this term according to the patent is meant before the imperfections imparted to the inner surface of the mold by the plunger have become permanent by the formation of a glaze. *Blair v. Jeannette-McKee Glass Works*, (1908) 161 Fed. 355.

**Process and product.**—A patent for the product of a process is for the same invention as the process itself, and a reissue of a process patent, containing a new claim for the product, is not a departure from the original invention. *Asbestos Shingle, etc., Co. v. H. W. Johns-Manville Co.*, (1910) 184 Fed. 620.

**Reissue for machine instead of product.**—Where an original patent was for a method and held invalid because broader than the invention, a reissue covering a machine by which such method, and only that, can be practiced, is not invalid as not for the same invention. *Conroy v. Penn Electrical, etc., Co.*, (1909) 173 Fed. 299.

**Validity of reissued patents.**—The presumption that new matter found in the specification of a reissue patent was omitted from the original through inadvertence or mistake, arising from the fact of the granting of the reissue, is *prima facie* only, and merely places the burden of proof upon a defendant contesting the validity of the reissue. *Franklin v. Illinois Moulding Co.*, (C. C. A. 1905) 138 Fed. 58, *affirming* (1904) 128 Fed. 48.

Even though the changes in description in the specification of a reissued patent are not material, and the claims are identical with some of those of the original patent, such facts do not impeach their validity. *Thomson-Houston Electric Co. v. Black River Traction Co.*, (1905) 135 Fed. 759, 68 C. C. A. 461, *reversing* (1903) 124 Fed. 495.

Unless the court can find that the invention of a reissue is described as the invention in the original patent, and that the patentee intended to secure it as his invention in the

original, the reissue is not for the same invention, and is invalid. *Chicago R. Equipment Co. v. Perry Side Bearing Co.*, (1909) 170 Fed. 968.

**Construction and operation generally.**—A reissued patent takes the place of the surrendered patent, and is a new grant for the unexpired part of the term of the original patent, which, from the time when its surrender takes effect, is extinguished and legally dead. No rights can be predicated on it. All pending suits brought on it fall. No judgment of any nature can thereafter be based on it. *Lattig v. Dean*, (1905) 25 App. Cas. (D. C.) 591.

Where the drawings and descriptions of a reissue patent are identical with those of the original, the validity of claims of the original, which are repeated and separately stated in the reissue, is not affected by the invalidity of other claims, nor by the fact that the reissue itself was unauthorized. *Rawson, etc., Mfg. Co. v. C. W. Hunt Co.*, (1906) 147 Fed. 239, 77 C. C. A. 381, *reversing* (1905) 140 Fed. 716.

Where a patentee, pending a suit for infringement, applies for a reissue on the ground that the specification of his patent is insufficient, and such reissue is granted, he is estopped to claim that the specification was sufficient, or to further maintain the suit for the infringement of the patent. *Coffield v. Fletcher Mfg. Co.*, (C. C. A. 1909) 167 Fed. 321.

Persons who after the date of a reissue patent sell the articles covered thereby become infringers, although they had lawfully sold them prior to the reissue by reason of an omission which was thereby corrected. *Coffield Motor Washer Co. v. A. D. Howe Co.*, (1909) 172 Fed. 668.

**Collateral attack.**—From the reissue of a patent it is to be presumed that the law was complied with, and the proceedings can only be impeached for fraud. *John Kitchen, Jr., Co. v. Levison*, (C. C. A. 1911) 188 Fed. 658.

**Effect of surrender generally.**—A patentee cannot claim rights under a patent which he has surrendered to obtain a reissue. *Franklin v. Illinois Moulding Co.*, (1904) 128 Fed. 48.

## Vol. V, p. 523, sec. 4917.

**Purpose of disclaimer.**—The purpose of a disclaimer after issue is to take out of a patent that which has been mistakenly or inadvertently included in it, by which it is made too broad. It must be of some distinctive and separable matters, and may be made use of to avoid the effect of having included more devices than could properly be the subject of one patent, or to remove an ambiguity. Matters so disclaimed cease to be a part of the invention, and the patent is to be construed as though they had never been included in it. They are not, however, to be taken as admitted to have been a part of the prior art. *Manhattan Gen. Constr. Co. v. Helios-Upton Co.*, (1906) 135 Fed. 785.

**Separable part of claim.**—A disclaimer cannot validate a claim of a patent except as to something of which the patentee was the inventor, and which was "a material and substantial part of the thing patented." A claim too broad in its terms cannot be rendered valid by a disclaimer of all except a particular form of construction which may or may not have been embraced in the broad language of the claim, but which, if so, was not in any way specified or suggested therein as distinguished from other forms of construction. *Westinghouse Air Brake Co. v. New York Air Brake Co.*, (1905) 139 Fed. 265.

**Patentable feature of structure.**—A patentee cannot patent a structure, and by a dis-

claimer withdraw the invention which makes the structure patentable. *Otis Elevator Co. v. Portland Co.*, (C. C. A. 1903) 127 Fed. 557, affirming 119 Fed. 928.

**Effect of failure to disclaim.**—Where, in a suit for infringement of a patent, one claim involved is held valid and infringed, and another void for lack of invention, while under

R. S. sec. 973 the complainant cannot recover costs unless a disclaimer is filed as to the claim adjudged invalid, such disclaimer will not be required as a condition precedent to the recovery of profits or damages for infringement of the valid claim. *Pleckner v. Poorman*, (1905) 147 Fed. 528.

## Vol. V, p. 526, sec. 4918.

**Power to annul patents confined to the courts.**—A patent duly issued cannot be made void by subsequent action of the Patent Office, but that power rests with the courts alone. The patentee's acquiescence in such subsequent action, however, when material, should be considered by the court in ascertaining what right he acquired by the grant. *Mica Insulator Co. v. Commercial Mica Co.*, (1907) 157 Fed. 90.

**Actual conflict.**—To make out a case under this section for adjudging a patent void for interference, there must be an actual conflict and not mere infringement, and in determining whether there is an interference the court cannot go beyond the claims as to which it is charged so as to consider the patent as a whole. *Donner v. American Sheet, etc., Co.*, (1908) 160 Fed. 971.

**Substantial identity of patents.**—This section gives the court jurisdiction only to adjudicate between patents, the claims of which are substantially identical, and, where such

identity is not shown, it cannot declare a later patent invalid for want of patentability. *Boston Pneumatic Power Co. v. Eureka Patents Co.*, (1905) 139 Fed. 29.

**Question of patentability not involved.**—The authority given the court by this section to "adjudge and declare either of the patents void in whole or in part," covers a wide range of investigation in such suits covering fraud, negligence, and inadvertence on the part of the Patent Office, and the court has power to determine the original question of patentability, and may declare both patents invalid. *Dittgen v. Racine Paper Goods Co.*, (1910) 181 Fed. 394.

**Matters determinable on demurrer.**—An interference suit brought under this section, in which the issues depend to some extent on the construction and scope of the claims of the earlier patent in view of the prior art will not be determined on demurrer. *Star Ball Retainer Co. v. Klahn*, (1906) 145 Fed. 834.

## Vol. V, p. 531, sec. 4898.

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### I. IN GENERAL.

**Title and rights of patentees in general.**—The patent statutes, in conferring on an inventor the exclusive right to make, use, and sell articles embodying his invention, create in him a new right and do not extend or continue a previously existing right. *Hartman v. John D. Park, etc., Co.*, (1906) 145 Fed. 383.

Where a contract for the assignment of certain patents included inventions of a similar nature which the patentee might thereafter complete, the assignee of a subsequent invention not conceived by the party at the time such contract was executed, though with

actual knowledge of such previous assignments, was not chargeable with notice that the word "complete" was intended to be given an extraordinary interpretation to include inventions not then conceived. *Davis, etc., Temperature Controlling Co. v. Tagliabue*, (C. C. A. 1908) 159 Fed. 712, reversing (1906) 150 Fed. 372.

**Ownership of a physical structure covered by a patent** does not necessarily include the incorporeal right to use the same, nor can such incorporeal right be foreclosed by the operation of state statutes. *Federal Constr. Co. v. Park Imp. Co.*, (1908) 166 Fed. 128.

**Inventor's rights dependent on patent laws.**—An invention or discovery does not, of itself, confer on the discoverer an exclusive property right against all the world, but can only be acquired under patent or similar laws. *Pomeroy Ink Co. v. Pomeroy*, (1910) 77 N. J. Eq. 293, 78 Atl. 698.

**Territorial operation of patents.**—Where defendant, owning a flue cleaner patented in the United States only, took no steps to protect its manufacture and sale in the dominion of Canada by securing letters patent there, defendant had no superior right to sell such article in Canada. *Herman v. William B. Pierce Co.*, (1905) 105 App. Div. 16, 93 N. Y. S. 413.

The monopoly of a patent does not extend beyond the jurisdiction of the government granting it, and whatever effect a patent

granted by one country has in another depends upon the status given to it by the laws of the latter. *Goodyear Tire, etc., Co. v. Rubber Tire Wheel Co.*, (1908) 164 Fed. 869.

**Situs of property.**—The owner of a patent has a personal privilege, which, while assignable and protected as a property right, has no situs separate from the individual holding it. *P. H. & F. M. Roots Co. v. Decker*, (1910) 111 Minn. 458, 127 N. W. 417.

**State license to make or sell patented article.**—The state can require a patentee or his assignee to take out a license before he can sell the right to make or sell the patented article. *Burns v. Sparks*, (1904) 82 S. W. 425, 26 Ky. L. Rep. 688.

**Assignment and license distinguished.**—A grant of the exclusive right to make and sell an invention under a patent, or a grant of an undivided part of these exclusive rights, or a grant of all these exclusive rights throughout a specified part of the country, is an assignment of an interest in the patent, and is more than a license. *Paulus v. M. M. Buck Mfg. Co.*, (C. C. A. 1904) 129 Fed. 594.

An instrument granting the sole and exclusive license to manufacture, sell, and use a patented article, but reserving to the grantor the exclusive right to manufacture, sell, and use certain specific apparatus only for certain purposes, although called a license, was in legal effect an assignment, with reservation of a license to the grantor. *Sirocco Engineering Co. v. Monarch Ventilator Co.*, (1910) 184 Fed. 84.

A grant by a patentee of the right to manufacture and sell under his patent, with a reservation to the patentee of the right to use, is the grant of a license, and not an assignment of the patent. *Mathy v. Republic Metalware Co.*, (1910) 35 App. Cas. (D. C.) 151.

Where the contract allows the defendants to use a patented device, and binds the claimant to disclose the formulae and to hold and save them harmless from and against the demands of all persons, and to furnish full information regarding the composition of compounds employed, and to impart to the defendants all information concerning future discoveries and inventions relating to the process, with the right to adopt and use them without further payment, the contract is much more than a license under a patent. *Harvey Steel Co. v. U. S.*, (1904) 39 Ct. Cl. 297.

A contract granting a license to manufacture and sell a patented device construed, and held not to give the licensee a right to an assignment of the title to part of the patent on the termination of the contract. *Copeland v. Eaton*, (Mass. 1911) 95 N. E. 291.

Complainant contracted to make defendant "the owner, within certain territory," of certain patent rights, and agreed to "procure H. to transfer" to defendant his inventions and discoveries with reference to certain wall coating, with patents on all inventions and improvements which he should make in the future, which should belong exclusively to defendant within the territory. The contract also provided that defendant should employ

complainant for five years, and that on the expiration of such period the stock of defendant company should be increased at the rate of one dollar for each ten cents of its average annual increased earnings during the five-year period, which increased stock should be divided equally between complainant and defendant. The provision for employment, however, was not connected with, and had no relation to, the provision relating to defendant's rights in the patents. Held that such contract rendered defendant the absolute owner of the patents so transferred, and did not constitute a mere license to use the same for a period of five years. *Church v. Anti-Kalsomine Co.*, (1904) 138 Mich. 211, 101 N. W. 230, 11 Detroit Leg. N. 534.

Where complainant conveyed absolutely his interest in the discovery of formulae for the preparation of certain proprietary medicines for a term of fifty years, and granted the exclusive use of his name as a trademark in connection with the preparations for the same time, the transferee was not a mere licensee, but was vested with complainant's entire estate and interest in the subject-matter. *Barclay v. Charles Roome Parmele Co.*, (1907) 71 Atl. 1133, *affirming* (1905) 70 N. J. Eq. 218, 61 Atl. 715.

Where the contract between a patentee and a manufacturer, providing that the latter was to make and sell the patented article, recited that the parties of the second part were to manufacture said implements and sell them, the party of the first part receiving ten cents for each one sold, the contract was in the nature of a license, and not an assignment; it being evident that the manufacturer was to make and sell the implement and pay the patentee a royalty, despite the fact that there was a provision for the sale of the patent by either party, and a division of the proceeds, and on a failure of the manufacturer or its assigns to perform their obligations the patentee could treat the contract as discharged; the provision as to a division of the profits of a sale of the patent existing only during the life of the contract. *Wildes v. Nelson*, (1911) 154 N. C. 590, 70 S. E. 940.

**Sale distinguished from conditional contract.**—A contract whereby plaintiffs stated that they were willing to give defendants the exclusive right to manufacture and sell certain machines, and full and exclusive license under any letters patent which might be granted for improvements made therein, and agreeing that they themselves would not make or sell any of the machines, and would not sell or assign any letters patent relating thereto or grant any rights thereunder, and that the contract should last for the full term for which any letters patent should be granted, and that, if no patent should be granted, then the contract should last twenty years from its date, was a sale of plaintiffs' good will in the business of manufacturing and selling machines of the type described, together with any patent rights which they might procure upon the machines, and an agreement not to make or sell the machines during the existence of the contract; but was not an agreement that plaintiffs would be

successful in obtaining patents, or that defendants would be excused from complying therewith, in case a fundamental patent was not obtained. *Bancroft v. Union Embossing Co.*, (1903) 72 N. H. 402, 57 Atl. 97.

## II. TITLE TO AND CO-OWNERSHIP OF PATENTS.

**No established market value or license fee.**—In an action at law to recover damages for the infringement of a patent, where there is no established market value or license fee, general evidence is admissible to show the extent of the plaintiff's damages from the infringement, and he is entitled to show the utility and advantages of the invention over old devices, as a basis from which the jury may estimate the extent of his loss. *McCune v. Baltimore, etc., R. Co.*, (C. C. A. 1907) 154 Fed. 63.

**Rights of joint owners.**—Joint owners of a patent are at the mercy of each other. *Copeland v. Eaton*, (Mass. 1911) 95 N. E. 291.

## III. ASSIGNMENTS.

### 1. Agreements to assign.

**Validity as against subsequent assignee.**—An executory agreement by patentees to transfer to a third person an interest in patents not identified therein does not operate as an assignment, and cannot be set up by defendants to impeach the title of an assignee of the patent in a suit for its infringement, to which such third person is not a party. *McMichael, etc., Mfg. Co. v. Ruth*, (C. C. A. 1904) 128 Fed. 706, *reversing* (1903) 123 Fed. 888.

Where defendant agreed to give complainant one-half interest in a patent, his subsequent wrongful transfer of such interest to another, who had knowledge of complainant's rights, was void. *McRae v. Smart*, (1908) 120 Tenn. 413, 114 S. W. 729.

**Assignment of future improvements.**—By contracts between defendant, an inventor, and two other persons, defendant assigned to each of such persons a one-third interest in inventions for which applications for patents were pending, and agreed to devote his best skill and energy to the making of improvements and further inventions in the same art, and to assign a like interest in all such inventions. Subsequently complainant corporation was organized by the three, to which the patents then issued were assigned, and defendant also assigned inventions covered by certain pending applications and "any and all inventions of like nature or similar thereto which I have already completed or which may hereafter be completed by me." Thereafter, while a stockholder in and an employee of complainant, he made other similar inventions which he assigned to complainant pursuant to such contracts, and also two similar inventions for which he subsequently obtained patents, which he assigned to his codefendant after leaving complainant's employ. Held that complainant was entitled to a decree as against both defendants requiring the assignment to it of such patents; it being shown that the second

defendant had knowledge of the terms of the contract at the time he took the assignments. *Davis, etc., Temperature Controlling Co. v. Tagliabue*, (1906) 148 Fed. 705.

A contract by an inventor, who has sold inventions, to disclose and assign to the purchaser any future inventions made by him for improvements thereon, is not contrary to public policy, but is valid and enforceable, if based on a valuable consideration. *Reece Folding Mach. Co. v. Fenwick*, (C. C. A. 1905) 140 Fed. 287.

**Assignment of all future inventions.**—An agreement by an employee to give his employer, who was a candy manufacturer, "the full benefit and enjoyment" of any and all inventions which he might make pertaining to the employer's business, imports an agreement for a shop right or license to use such inventions merely, and does not entitle the employer to an assignment of patents secured by the employee therefor. *Hildreth v. Duff*, (1906) 143 Fed. 139.

An assignment by an inventor of certain patents and inventions covered by pending applications, "and any and all inventions of like nature or similar thereto which I have already completed or which may hereafter be completed by me," does not charge a third person with notice that it was intended to cover inventions, which, though similar in character, were not then in existence or even conceived, so as to deprive him of protection as a *bona fide* purchaser of a patent for an invention made by the assignor afterward, and while in the employ of such third party. *Davis, etc., Temperature Controlling Co. v. Tagliabue*, (1906) 150 Fed. 372.

**Breach of agreement as defense to suit for infringement.**—The owner of a patent who agrees to assign it, but in violation of his agreement refuses to do so, cannot recover from his intended assignee for an infringement. *Schmitt v. Nelson Valve Co.*, (C. C. A. 1903) 125 Fed. 754.

**Preliminary injunction in suit for specific performance.**—In a suit to compel the assignment of patents under a contract, where, on the showing made, there is a reasonable probability that complainant may succeed on the merits, he is entitled to a preliminary injunction to maintain the *status quo* until a final hearing. *Ball, etc., Fastener Co. v. Patent Button Co.*, (1905) 136 Fed. 272.

### 2. Form and Requisites.

**No particular form of assignment of letters patent is prescribed by statute, and any written conveyance duly signed and sufficiently specific to identify the property is sufficient.** *American Tobacco Co. v. Ascot Tobacco Works*, (1908) 165 Fed. 207.

**Effect of state statutes.**—The regulation of the sale of patent rights made by Laws Kan. 1889, ch. 182, which compels one selling a patent right in any county in the state to file with the clerk of such county an authenticated copy of the letters patent, together with an affidavit of the genuineness of the letters patent and as to other matters, and provides that any written obligation given

for the purchase price of a patent right shall contain the words "given for a patent right," does not violate Const. U. S., art. 1, sec. 8, granting to Congress the right to secure to inventors the exclusive right to their discovery, nor R. S. sec. 4898, authorizing written assignments of patents or interests therein, which shall be void as against subsequent purchasers unless recorded in the Patent Office. *Allen v. Riley*, (1906) 203 U. S. 347, 27 S. Ct. 95, 51 U. S. (L. ed.) 216, *affirming* (1905) 71 Kan. 378, 80 Pac. 952.

The requirement of a state statute that a negotiable instrument taken on a sale of rights under a patent shall show on its face for what it was given, or be void, does not violate Const. U. S., art. 1, sec. 8, granting to Congress the right to secure to inventors the exclusive right to their discovery, nor R. S. sec. 4898, authorizing written assignments of patents or interests therein, which shall be void as against subsequent purchasers unless recorded in the Patent Office. *Woods v. Carl*, (1906) 203 U. S. 358, 27 S. Ct. 99, 51 U. S. (L. ed.) 219, *affirming* (1905) 75 Ark. 328, 87 S. W. 621; *Columbia County Bank v. Emerson*, (1908) 86 Ark. 155, 110 S. W. 214.

Patents are creatures of the federal statute, and an assignment is sufficient if it conforms to the requirements of this section, regardless of the state statutes. *Welsbach Light Co. v. Cohn*, (1910) 181 Fed. 122.

A lease of the exclusive right to sell a patented article in a specified territory and an agreement by the patent owners to protect lessees in the exclusive sale of the article for a specified term is a sale of a patent right within the Kansas statute regulating the sale of patent rights, and imposing a penalty for failure to comply therewith. *State v. Morey*, (1909) 81 Kan. 149, 105 Pac. 501. See *Tredick v. Walters*, (1910) 81 Kan. 828, 106 Pac. 1067.

The Wisconsin statute declaring that all promissory notes given for any patent, patent right, or interest therein, shall have written or printed thereon in red ink the words, "The consideration for this note is the sale of a patent, patent right, or interest therein," and providing that any person who shall sell a patent or patent right without complying with the statute shall be liable to a penalty equal to the face of the note, and that all notes or other evidences of indebtedness taken as required by the provisions of the statute shall be nonnegotiable and subject to all the defenses in the hands of an innocent holder that would exist if they had not been transferred, is void because in conflict with Const. U. S., art. 1, sec. 8, providing that Congress shall have power to secure to inventors for a limited time the exclusive right to their discoveries, and with R. S. sec. 4898, declaring that every patent or interest therein shall be assignable in law by an instrument in writing and that the patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under the patent to the whole or any specified part of the United States. *J. H. Clark Co. v. Rice*, (1906) 127 Wis. 451, 106 N. W. 231.

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**Filing patent required by state statute.**—A complaint, under the Kansas statute, charging that accused sold a patent right without complying with that statute, is not indefinite or uncertain because alleging that accused failed to file "his" letters patent, while the contract referred to the patent as being the property of a corporation, and purported to be executed by it, and not accused. *State v. Morey*, (1909) 81 Kan. 149, 105 Pac. 501.

**Conditional assignment.**—A contract between a patentee and complainant's assignors construed in the light of the correspondence between the parties, and held not to operate as an assignment of the legal title to patents, because of conditions therein which were precedent to the becoming absolute of the assignment, and which were neither performed by the assignee nor waived, so that complainant was without title to support a suit for infringement against subsequent licensees of the patentee. *Arnold Monophase Electric Co. v. Wagner Electric Mfg. Co.*, (1906) 148 Fed. 234.

**In writing.**—A patent monopoly can only be transferred in the manner prescribed by the statute, namely, by a written instrument signed by the owner of the patent and duly recorded. *Ball v. Coker*, (1909) 168 Fed. 304.

**Implied contract.**—The transfer of patent rights or rights under invention may be based on an implied as well as on an express contract. *Pomeroy Ink Co. v. Pomeroy*, (1910) 77 N. J. Eq. 293, 78 Atl. 698.

**Acknowledgment.**—The acknowledgment of an assignment of a patent relates to the date of the assignment. *Murray Co. v. Continental Gin Co.*, (1907) 149 Fed. 989, 79 C. C. A. 499.

**Sufficiency of language.**—An assignment by a sole patentee of all his right, title, and interest in the patent, "being an entire interest therein," is sufficient to vest the title in the assignees. *Canda v. Michigan Malleable Iron Co.*, (C. C. A. 1903) 124 Fed. 486, *modifying* (1902) 123 Fed. 95.

A conveyance by a corporation of all of its property, including its "good will, patents, trademarks," etc., is effective as an assignment of a patent then owned by it, although not described therein, and it is immaterial as against an alleged infringer that it was not eligible for record. *Delaware Seamless Tube Co. v. Shelby Steel Tube Co.*, (C. C. A. 1908) 160 Fed. 928, *affirming* (1907) 151 Fed. 64.

**Burden of proving worthlessness.**—In an action to foreclose a mortgage to secure the purchase price of certain patent rights, the defense being misrepresentations as to the value of the patented article, the issuance of the patent, and ownership and possession thereof by the seller, were *prima facie* evidence of its utility, and the burden was upon the mortgagor to show its uselessness by clear and strong evidence. *Waymire v. Shipley*, (1908) 52 Ore. 464, 97 Pac. 807.

**Worthless patent.**—In a suit on a note for price of patent right, the jury should find for plaintiff, unless the machines were not reasonably suited to the uses for which they were made. *Nettograph Mach. Co. v. Brown*, (1911) 28 Okla. 436, 114 Pac. 1102.

**Breach of warranty.**—A warranty of plaintiff to maintain defendant in the enjoyment of a leased patent was broken by a judgment holding that the patent leased by plaintiff was an infringement of a patent belonging to another. *American Machinery, etc., Co. v. Haas*, (1911) 127 La. 811, 54 So. 38.

**Territorial lease.**—A territorial lease and appointment of agency giving the party of the second part six sample machines and the agency for the sale of the same for a term of years, the company agreeing to furnish all machines ordered by the agent at a certain fixed price, is a contract for the sale of a patent right within Gen. Stat. 1901, secs. 4356-4358. *Nyhart v. Kubach*, (1907) 76 Kan. 154, 90 Pac. 796.

### 3. Recording.

**Assignment void unless recorded.**—An unrecorded grant of all the exclusive rights under a patent is an assignment, and void as against subsequent purchasers without notice. *Paulus v. M. M. Buck Mfg. Co.*, (C. C. A. 1904) 129 Fed. 594.

**Applicable to issued patents only.**—A written assignment of future inventions is not recordable in the Patent Office, and such record is not notice to a subsequent assignee. *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.*, (1908) 164 Fed. 47.

**Certified copy as evidence.**—A certified copy of a Patent Office record of a document purporting to be an assignment of a patent is not *prima facie* proof of the execution or genuineness of such assignment, nor is it made competent evidence by this section. *American Graphophone Co. v. Leeds, etc., Co.*, (1905) 140 Fed. 981; *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.*, (1908) 164 Fed. 47.

### 4. Nature and Effect.

**Later invention of similar device.**—Certain patent on a portable horse stall held, under the evidence, not a mere improvement of a former patent obtained by the same person on a portable stall, but a distinct and independent contrivance, so that no interest therein passed under an assignment by the patentee of an interest in the former patent. *Stitzer v. Withers*, (1906) 122 Ky. 181, 91 S. W. 277.

**Equitable interest of assignor.**—A resolution of corporate stockholders that the corporation assign all its assets to plaintiff, and authorizing its officers to execute all necessary papers for that purpose, and a formal assignment of all the property, including "interests in letters patent, . . . inventions, . . . and choses in action," to plaintiff, passed its equitable interest in letters patent in an invention useful in its business, but which its president had purchased for himself. *American Circular Loom Co. v. Wilson*, (1908) 198 Mass. 182, 84 N. E. 133.

**Title acquired by assignment.**—A patentee conveyed it with other interests to S., "his assignees and successors in trust," and directed that S. and his successors should have and hold the patent in trust, without power

to sell, encumber, or otherwise dispose of the patents, etc., for the benefit of three persons, S. being one of them. S. thereafter assigned the same interest, so far as he had any right to do so, to D., trustee. Held that, by such transfer, D. acquired title in trust for himself, and for the two other persons, for whose benefit S. had held the title, so that D. was entitled to convey a one-third interest in the patent, of which he was the absolute owner. *McDuffee v. Hestonville, etc., Pass. R. Co.*, (1908) 158 Fed. 827, *modifying* (1907) 154 Fed. 201.

**Nature of assignee's title.**—Where a patentee, alleging infringement, is shown not to have been a pioneer in the art, but merely an improver, he is entitled to such recognition as his contribution to the art warrants, and his assignees to protection to the same extent, subject, however, to such limitations, if any, as either permitted to be imposed on the grant, as disclosed by the file wrapper and contents of the application on which the patent issued. *Computing Scale Co. v. Automatic Scale Co.*, (1905) 26 App. Cas. (D. C.) 238, *affirmed* (1907) 204 U. S. 609, 27 S. Ct. 307, 51 U. S. (L. ed.) 645.

**Use of assignor's name.**—Mere assignments of patents for the manufacture of shoes having cushioned insoles did not carry the right to the assignee to use the patentee's name in connection with shoes manufactured under such assignments. *Dr. A. Reed Cushion Shoe Co. v. Frew*, (C. C. A. 1908) 162 Fed. 887, *reversing* 158 Fed. 552.

Where defendant corporation became the owner, or legally possessed, of patented Edison phonographs and kinetoscopes, it was entitled to use such machines for public entertainment, and to advertise that the machines used were in fact Edison machines, both under the rule authorizing a statement of the truth in the conduct of a business, and the law with reference to the use of patented articles. *Edison v. Mills-Edisonia*, (1908) 74 N. J. Eq. 521, 70 Atl. 191.

**Improvements on improvements.**—The words "all improvements thereon," in an assignment of original letters patent for an improvement in pulp-beating engines and "all improvements thereon," include all improvements on the improvement in engines for which the original letters patent were granted. *Marshall Engine Co. v. New Marshall Engine Co.*, (1908) 199 Mass. 546, 85 N. E. 741.

**Previous licenses.**—The assignment of a patent carries to the assignee the right to receive royalties under licenses previously granted by the assignor, and the government is liable to the assignee for such royalties, notwithstanding the provisions of section 3737, 6 Fed. Stat. Annot. 123. *Federal Mfg., etc., Co. v. U. S.*, (1907) 42 Ct. Cl. 479.

**Liability of assignee to licensee of assignor.**—Where complainant acquired the exclusive right to use, exhibit, and sell phonographs and graphophones, under a license from a corporation owning patents thereon, and such rights were wrongfully invaded by a subsequent corporation, which succeeded to the rights of the licensor with knowledge of the licensee, complainant was entitled to recover

against the latter in equity for breach of covenant. *New York Phonograph Co. v. Edison*, (1905) 136 Fed. 600.

**Laches of licensee in enforcing contract against assignee.**—Where complainant, a licensee of the exclusive right to use and sell patented phonographs and graphophones in a certain district, brought suit against defendant, a corporation which succeeded to the rights of the licensor, for breach of covenant in the license, within five years after defendant's incorporation, and within less than three years after the termination of fruitless negotiations to settle, and there was no evidence that complainant had acquiesced in defendant's intrusion into such field, complainant was not barred by laches. *New York Phonograph Co. v. Edison*, (1905) 136 Fed. 600.

**Estoppel by acquiescence in violations of contract.**—A contract assigned the legal title to a patent for a gas producer to a trustee for the benefit of a company, in consideration of the payment by the assignee of one-third of all royalties received from licensees. The company subsequently engaged in the building of the producers itself, granting licenses to those to whom they were sold. The contract contained no provision respecting such building operations, which were not at that time contemplated, but the patentee was fully advised of the company's action, and from time to time expressed his approval thereof. Held that, while such operations were outside of the contract, he was estopped by his acquiescence from claiming that they were in violation of it and entitled him to its cancellation, or from claiming a share of the profits of such business. *Duff v. Gilliland*, (C. C. A. 1905) 139 Fed. 16, *reversing* 135 Fed. 581.

**Liabilities of assignee to third persons.**—The assignee of a patent does not, in the absence of express contract, assume any obligation to perform a contract of his assignor with a licensee. *New York Phonograph Co. v. Davega*, (1908) 127 App. Div. 222, 111 N. Y. S. 363.

**Stipulation to put apparatus to practical use.**—A provision in a contract by which complainant agreed to assign certain patents relating to elevators to defendant, that defendant should test the patented apparatus with reasonable diligence, "and, if such test results satisfactorily, within such further reasonable time as is convenient to put such apparatus into practical use," bound the defendant absolutely, having accepted the test as satisfactory, to put the apparatus into some practical use within a reasonable time thereafter, and impliedly to put in all the patented elevators it reasonably could with due regard to its business interests. *Neenan v. Otis Elevator Co.*, (1910) 180 Fed. 997.

**Suit by lessee of territorial rights.**—A contract for the sale of patent rights, providing that the assignor guaranteed peaceable possession of the rights to said patent and invention in a certain county, and all expenses which may be incurred for suits for infringement or for ousting present contractors within said territory, does not stipulate for peace-

able possession of the territory named, but for peaceable possession of the "rights" to said patent, which means the rights which the assignor had; and hence the assignee could sue for infringement, or oust other contractors and recover his expenses therefor, but could not recover for profits made in the county through infringements by others than the assignor. *Bailey v. Miller*, (1910) 45 Ind. App. 475, 91 N. E. 24.

**Estoppel of assignor.**—The assignor of a patent is estopped to set up its invalidity as a defense to a suit for infringement brought against him by the assignee. *Frank v. Bernard*, (1905) 135 Fed. 1021, 68 C. C. A. 506, *affirming* (1904) 131 Fed. 269; *Hurwood Mfg. Co. v. Wood*, (1905) 138 Fed. 835; *Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co.*, (1905) 142 Fed. 157, 73 C. C. A. 375; *Wold v. Thayer*, (1906) 148 Fed. 227, 78 C. C. A. 350, *affirming* 142 Fed. 776.

If the assignor of a patent, who is estopped to deny its validity, enters into business with others, and all, availing themselves of his knowledge of the patented process or machine, enter upon a manufacture infringing the patent, all are bound by his estoppel when sued for infringement; and when individuals so estopped form a corporation to carry on the infringing manufacture, the corporation is also deemed in privity of estoppel with them, even though it has some stockholder who is more or less ignorant of the history of the patent and of the transactions which led to the incorporation. *Mellor v. Carroll*, (1905) 141 Fed. 992.

In a suit for infringement by the assignee of a patent against the assignor, where it is not shown that the assignor made any representations other than those necessarily involved in the assignment, he is estopped only to deny that the invention presented a sufficient degree of utility to justify the issuance of the patent, and with this limitation the court will apply the same rule of construction which would be applicable between the patentee and a stranger, and, on the question of infringement, the defendant may show the prior state of the art to limit the scope of the claims sued on. *Automatic Switch Co. v. Monitor Mfg. Co.*, (1910) 180 Fed. 983.

An assignor of a patent is not estopped to deny its infringement by a later invention of his own, nor to invoke the prior art for the purpose of showing that no infringement in fact exists. *Leather Grille, etc., Co. v. Christopherson*, (C. C. A. 1910) 182 Fed. 817.

**A corporation organized by a patentee, who had assigned his patents, and others having full knowledge of the facts, who are largely the owners of its stock, is estopped to deny the validity of the patents, or to limit their claims by the prior art, to the same extent as the patentee.** *Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co.*, (1905) 142 Fed. 157, 73 C. C. A. 375; *National Recording Safe Co. v. International Safe Co.*, (1908) 158 Fed. 824; *Johns-Pratt Co. v. Sachs Co.*, (C. C. A. 1909) 175 Fed. 70, *reversing* in part 168 Fed. 311; *Automatic Switch Co. v. Monitor Mfg. Co.*, (1910) 180 Fed. 983.

While a corporation organized by a pat-

entee who has assigned his patent for the purpose of carrying on business in violation of the rights of the assignee is estopped equally with the assignor to deny the validity of the patent when sued for infringement or to invoke an adjudication of invalidity made in a suit against its predecessor in business, no such estoppel arises where it was organized in good faith to take over and continue the business of its predecessor, and without any reference to the patent, merely because the assignor is one of its stockholders and officers. *Macey Co. v. Globe-Wernicke Co.*, (C. C. A. 1910) 180 Fed. 401.

One of the patentees of a device who joined in an assignment of the patent is estopped to deny the validity of any of its claims when sued by the assignee for its infringement, and the estoppel extends to a corporation which he was instrumental in forming and in which he is a stockholder. *Mathews Gravity Carrier Co. v. Lister*, (1906) 154 Fed. 490.

Where the assignor of a patent organized a corporation for the purpose of making and selling an article which is an infringement of the patent and an imitation of the patented article made and sold by his assignee, of which corporation he is manager, and in which he is interested, although he does not appear as a stockholder, the corporation equally with the assignor is estopped to deny the validity of the patent. *Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co.*, (1910) 182 Fed. 832.

One who becomes a stockholder in a corporation organized for the purpose of taking title to a patent, and selling the same, and who participates in such sale and receives his share of the profits, is estopped to attack the validity of the patent as against an innocent purchaser for value. *Welsbach Light Co. v. Cohn*, (1910) 181 Fed. 122.

**Corporation employing assignor.**—A corporation charged with infringement of a patent is not estopped to deny its validity merely because the patentee who sold and assigned it is a subordinate in its employment. *Babcock, etc., Co. v. Toledo Boiler Works Co.*, (C. C. A. 1909) 170 Fed. 81.

### 5. Rescission.

**Tender of patent.**—Where the purchaser of a patent right sold without compliance with the state statutes brings an action to rescind the contract of sale and to recover the consideration, and offers to return all benefits received, and defendant contends that the statute is invalid, plaintiff's right to the relief and a judgment for costs is not affected by the omission to tender the patent right before action brought. *Allen v. Riley*, (1905) 71 Kan. 378, 80 Pac. 952.

**Compensation for depreciation.**—Where one who had purchased a patent right, in reliance on false representations of the seller, sought, about a month later, to induce him to take back the patent, but he refused to do so, in a subsequent suit by the purchaser for rescission plaintiff should not be compelled

to make any compensation for depreciation in the value of the patent owing to lapse of time. *Lederer v. Yule*, (1904) 67 N. J. Eq. 65, 57 Atl. 309.

**Assignment canceled for fraud.**—One of the complainants obtained patents for an invention in this country and Europe, and assigned a half interest in the foreign patents to the complainant in the second suit. They afterwards became associated in the ownership of the foreign patents with defendants and others, each complainant retaining a fourth interest. A fund was raised, and a representative sent to England, who negotiated profitable license contracts. This fact was concealed from the complainants, and by means of representations to them that the efforts had so far been unsuccessful, and demands for further advances, at a time when large payments had been actually received under the foreign licenses, they were induced to transfer their property interests to defendants for a small sum. Held that such facts constituted a fraud on complainants, which entitled each of them to a cancellation of his assignment and to recover his share of the profits realized from the joint venture, with interest. *Goldsmith v. Koopman*, (1905) 140 Fed. 616.

**Misrepresentations by seller.**—A misrepresentation by a seller of a patent right will not entitle the purchaser to rescind, unless it amounts to an untrue statement of some present fact, and a mere promise or prediction is not sufficient. *Lederer v. Yule*, (1904) 67 N. J. Eq. 65, 57 Atl. 309.

**Evidence held insufficient to show fraud.**—In an action on a note given as part payment of the price of a patent right, evidence held insufficient to show fraud on the part of the vendor, invalidating the sale. *Eisenberg v. Lefkowitz*, (1911) 142 App. Div. 569, 127 N. Y. S. 595.

**Breach of conditions.**—Under a contract for assignment of patents, which provided for the payment of royalties to the assignor, a breach of the absolute undertaking to put the apparatus to some practical use, which would have been satisfied by any use, however small, is not ground for rescission of the contract, since such requirement does not go to the whole consideration, but, to entitle the assignor to a rescission in equity, he must show that the implied and substantial part of the stipulation has been violated, and that the assignee has failed to exert itself in good faith to install the patented apparatus whenever in reason it was feasible in view of its business and opportunities. *Neenan v. Otis Elevator Co.*, (1910) 180 Fed. 997.

**Refusal to permit seller to inspect buyer's books.**—A provision of the contract requiring the company to keep accounts showing the licenses granted which should be subject to the inspection of the patentee did not give him the right to inspection of the books covering the construction work, and a refusal to permit such inspection therefore constituted no ground for cancellation of the contract. *Duff v. Gilliland*, (1905) 135 Fed. 581, reversed (C. C. A.) 139 Fed. 16.



## IV. LICENSES.

1. *Nature and Requisites.*

**Parties.**—Owner of an undivided part of a patent right may, without the consent of his co-owners, grant a valid license. *Paulus v. M. M. Buck Mfg. Co.*, (C. C. A. 1904) 129 Fed. 594.

**Reserved right to use.**—A grant by a patentee of the right to manufacture and sell under his patent, with a reservation to the patentee of the right to use, does not deprive the patentee, as against the licensee, of the right to register a trade-mark as applied to the patented articles. *Mathy v. Republic Metalware Co.*, (1910) 35 App. Cas. (D. C.) 151.

**License prior to patent.**—The facts that a license to use a patented device is oral and that it was granted after the application, but before the issuance of the patent, do not render it invalid. *St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co.*, (C. C. A. 1910) 178 Fed. 923.

**Implied license.**—Where a company is licensed by one patentee to make and sell a patented article, and the president of the company, owning another patent for a device used in and as a part of the same patented article, sells a large number of such articles made under and in accordance with such patents, with the statement that the company is duly licensed, there is an actual license as to the one patent and an implied license as to the other which will protect the users from the charge of infringement of either. *O'Rourke Engineering Constr. Co. v. McMullen*, (1907) 150 Fed. 338.

Evidence considered and held sufficient to show an implied license to use machines invented and patented by plaintiff while in defendant's employ and at its expense. *Wilson v. American Circular Loom Co.*, (C. C. A. 1911) 187 Fed. 840.

**License implied from relation of parties.**—The fact that the patentee of a furnace was at the time president of a corporation engaged in making furnaces does not entitle the company to the right to use the invention. *American Stoker Co. v. Underfeed Stoker Co.*, (1910) 182 Fed. 642.

2. *Assignability.*

**The right to assign in general.**—A license to use a patented invention that does not contain words importing assignability is a grant of a mere personal right to the licensee, which does not pass to the licensee's heirs or representatives, and which cannot be transferred to another without the express consent of the licensor. *Bowers v. Lake Superior Contracting, etc., Co.*, (1906) 149 Fed. 983, 79 C. C. A. 493.

**Implied right to assign.**—A continuing assignable quality may be given to a license to use a patented invention originally unassignable, by facts and circumstances and the conduct of the parties during the continuance of the license. *Bowers v. Lake Superior Contracting, etc., Co.*, (1906) 149 Fed. 983, 79 C. C. A. 493.

**Sale of all property and effects by one corporation to another.**—A corporation which took from another corporation, afterward dissolved, all of its property, contracts, and good will, by a bill of sale which warranted title, and without assuming any of the liabilities of the grantor, was not the legal successor of such grantor and did not succeed to its rights under a contract granting it a license under a patent which by its terms was not assignable without the consent of the patentee. *Niagara Fire Extinguisher Co. v. Hibbard*, (C. C. A. 1910) 179 Fed. 844.

3. *Construction.*

**Conditions imposed.**—The exclusive licensee for the sale of articles embodying the patented invention or discovery has and controls to that extent the monopoly granted by the letters patent, and may attach such conditions as he sees fit to sales made under his license; and a contract binding a purchaser not to resell for less than certain named prices, or to any other dealer who does not sign a similar agreement, and which makes a compliance with such requirements a condition of the license to use or vend the patented article implied from its sale, is valid and enforceable. *National Phonograph Co. v. Schlegel*, (C. C. A. 1904) 128 Fed. 733, *reversing* (1902) 117 Fed. 624.

Use of a patented invention cannot be had except on the inventor's terms, and the requirement that a licensee join other licensees in a combination or pool to control the prices and output of an innocuous patented article is not in violation of the Sherman Anti-Trust Act of July 2, 1890, 26 Stat. L. 209, ch. 647, § 1, 7 Fed. St. Annot. 336. Patented articles, unless and until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states within the meaning of such Act, because they are not articles in which the people are entitled to freedom of trade. *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, (C. C. A. 1907) 154 Fed. 358, *reversing* (1906) 142 Fed. 531.

**Exemption of licensor from liability for infringement.**—One acquiring a right to manufacture and sell a patented article under a contract stipulating that the patentee shall not be responsible for any damages from an infringement of the patent, etc., takes the risk of infringements. *Alexander v. American Encaustic Tiling Co.*, (1908) 61 Misc. 190, 113 N. Y. S. 261.

**License as grant of monopoly.**—A license to manufacture and sell a patented article which stipulates that it shall not be an exclusive license, but that the patentee may license others to manufacture and sell the article, etc., does not grant a monopoly so as to be against public policy. *Alexander v. American Encaustic Tiling Co.*, (1908) 61 Misc. 190, 113 N. Y. S. 261; *Alexander v. Mosaic Tile Co.*, (1908) 113 N. Y. S. 265.

**Damages for exceeding terms of license.**—Where a contract giving defendant the right to use a patented construction in the erection

of fireproof flooring provided that the defendant should not use or sell any construction similar to that granted by the contract for the purpose of evading the same, and further provided that defendant should in good faith construct flooring according to such patent, defendant was liable in damages for inducing the owners of a building, who had contracted with it to build the flooring mentioned in the contract, to substitute another system, for no other reason than that of saving to itself the royalties which it would have been obliged to pay under the system, and to make greater profits on the work. *Standard Fireproofing Co. v. St. Louis Expanded Metal Fireproofing Co.*, (1903) 177 Mo. 659, 76 S. W. 1008.

**Unauthorized use by licensee as infringement.**—A suit by the owner of patents to enjoin a licensee from using any of the patented devices except on the terms imposed by the licensee contract is not one for the specific performance of the contract, but is one to enjoin infringement of the patents by excluding defendant from that part of the patent domain not granted by the contract, and is maintainable in a federal court of equity irrespective of the validity of the contract. *Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co.*, (C. C. A. 1907) 164 Fed. 365.

**Conditions as to manufacture.**—A contract for the sale of territorial rights for the manufacture of patent burial vaults contained an agreement by the second party to manufacture 300 vaults before Jan. 1, 1904, and to pay a fixed royalty for every vault made, and to pay the royalty on the first 300 in four equal payments on dates specified, and to pay the royalty on vaults in excess of that number made during that time on Jan. 1, 1904, and after such date to make returns on sworn statements and make payment semiannually. Held that the second party agreed absolutely to manufacture 300 vaults before Jan. 1, 1904, and pay the royalty on them. *Lyons Burial Vault Co. v. Taylor*, (1908) 198 Mass. 63, 84 N. E. 320.

**Extent of license to make and sell.**—A license to "operate under a patent" does not authorize the licensee to buy up infringing articles made by others, who have been adjudged infringers, and resell them under its own name. *Victor Talking Mach. Co. v. American Graphophone Co.*, (1910) 178 Fed. 577.

**Right of licensee as to similar devices not covered by patent.**—Where a contract for the manufacture of a patented automatic feed attachment for a cottonseed linter referred explicitly to the attachment patented, and provided for the manufacture and sale of such attachments for the entire unexpired term of the patent, such contract did not deprive the licensee of the right to make and sell any machine not covered by the patent. *Strong v. Carver Cotton Gin Co.*, (1907) 197 Mass. 53, 83 N. E. 328.

An agreement made by the owner of a patent for a hose clamp, in settlement of a suit for infringement, that he would not trouble the defendant so long as it made only

brass clamps, the complainant being then making them of steel, must be construed to apply only to clamps covered by the patent; and the making by the defendant of steel clamps of a different kind, not within the patent, was not a violation of the license which would render a user of its brass clamps subject to a suit for infringement. *Clancy v. Troy Belting, etc., Co.*, (C. C. A. 1907) 157 Fed. 554, reversing 152 Fed. 188.

An exclusive license to sell phonographs granted by an assignee of the patentee, with the right to improvement patents granted to him within fifteen years, covered only phonographs containing patented inventions and improvements owned by the licensor. *New York Phonograph Co. v. National Phonograph Co.*, (1908) 163 Fed. 534.

**Covenants against infringement.**—Where defendant procured a license to operate a machine under a patent, the licensor agreeing to defend him against any action for infringement brought against him by a certain company, and parties owning other patents, who had established an infringement by the first patent in an action against others than defendant, formed a company and took over the conflicting patents, the new company could require defendant to procure a license from it to use the machine under the other patents which it controlled. *Ferry-Hallock Co. v. Zipfel*, (N. J. 1909) 74 Atl. 299.

**Invalidity of patent as defense to action for royalties.**—It is competent for one to agree to pay a patentee a royalty for a license to manufacture a particular machine, when such manufacturer is uncertain whether it is covered by a patent or not, so that, in a suit for royalties under such agreement, it is no defense that the patent is invalid or that the machine manufactured is not covered by it. *Strong v. Carver Cotton Gin Co.*, (1907) 197 Mass. 53, 83 N. E. 328.

#### 4. Operation and Effect.

**Limited license.**—A limited license under a patent conveys only the rights defined therein, and if the licensee makes any other or different use, either as to time or place, than that authorized by the license, he becomes an infringer, and his limited license is no justification. *St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co.*, (C. C. A. 1910) 178 Fed. 923.

**Estoppel of licensee.**—Where a contract granting a license to make and use a patented printing press is for one press, and a second contract is for five presses, and a third for six, and a fourth for six, the contracts are limited to these eighteen presses, and do not preclude the defendants, if they build and use additional presses, from contesting the validity of the patent. *Federal Mfg., etc., Co. v. U. S.*, (1907) 42 Ct. Cl. 479.

One acquiring a license to manufacture and sell a patented article under a contract stipulating that, on the patent being declared invalid by any final judgment of any court of competent jurisdiction of last resort, the agreement shall terminate, and that the licensee will recognize the validity of

the patent and will take no action impairing the interests of the patentee, etc., cannot, so long as the patent has not been declared invalid by a court of competent jurisdiction of last resort, collaterally attack its validity. *Alexander v. American Encaustic Tiling Co.*, (1908) 61 Misc. 190, 113 N. Y. S. 261.

**Estoppel of licensor.**—A grantor of an exclusive license under patents and its successors are estopped, as against the licensee, to deny the validity of such patents, or that they expired before the term for which they were granted by reason of the expiration of prior foreign patents. *New York Phonograph Co. v. National Phonograph Co.*, (1908) 163 Fed. 534.

**Licensee under invalid patent.**—An invalid patent can create no rights in favor of the patentee against one who in no way recognizes its validity or a license to use it, and it cannot furnish any protection to a licensee thereunder, and hence there is a failure of consideration for the license. *Ross v. Dowden Mfg. Co.*, (1909) 147 Ia. 180, 123 N. W. 182.

**Estoppel of mortgage trustee.**—Mortgage trustees of a corporation licensed under a patent, who have taken possession of the property on default, and through their agents have continued the business and to manufacture and sell the patented article, placing the patent stamp thereon, are estopped to deny the validity of the patent when sued for the infringement. *Regina Music Box Co. v. Newell*, (1904) 131 Fed. 606.

##### 5. Duration, Expiration, and Renewal.

**Provision for termination not exclusive.**—Where a contract allowing defendant to make and sell machines containing plaintiff's inventions required defendant to pay royalties on at least 1,000 machines in each year during the life of the contract, and provided that the agreement should terminate if defendant failed to pay the minimum royalties, the provision for the termination of the contract was not exclusive, and by electing to terminate for failure to make the minimum payment plaintiff did not waive payment according to the contract during its continuance. *Cummings v. Standard Harrow Co.*, (1908) 124 App. Div. 915, 108 N. Y. S. 1128, *affirming* (1907) 55 Misc. 601, 105 N. Y. S. 646.

**Forfeiture of license.**—A contract giving a license to manufacture and sell patented saws required quarterly reports by licensee, under oath, of all saws sold during the previous quarter, and provided that the royalty to be paid should be estimated on the amount collected, and that for a failure to make reports or payments as required the contract might be terminated. The requirement that the reports be sworn to was not enforced by the owner of the patent, the quarterly payments of royalty being made on unverified reports prepared by licensee and submitted to the owner. During a quarter licensee had a settlement with the owner through its president, and paid all royalty then due, and also royalty in advance to the following quarter, whereupon the president and secretary of the owner, who held its stock, sold the same. The

purchasers of the stock during the same quarter asked licensee to make a report on the first of the following quarter, and licensee informing them that the royalty had been paid, and declining to show his books, thereafter, during the following quarter, the purchasers notified licensee that the contract was terminated because of his failure to comply therewith. Held that purchasers, under such circumstances, should not be permitted to forfeit the license. *Jones, etc., Co. v. Cray*, (1908) 234 Ill. 26, 84 N. E. 651.

A breach of covenant contained in an exclusive license to use and sell patented phonographs and graphophones in a specified territory did not work a forfeiture of the license *per se*, no condition to that effect being inserted in the license. *New York Phonograph Co. v. Edison*, (1905) 136 Fed. 600.

**Equitable relief against forfeiture.**—A provision in a license to manufacture under a patent, that in case of default in the payment of royalties the contract may be terminated by a notice, is valid and effective in so far that the licensor may forfeit the license without resort to a court of equity, but does not preclude a court of equity from relieving against a forfeiture at the instance of the licensee, and, under general equitable principles, it should do so where the default is merely in delay in payment of royalties, and their payment with interest will fully compensate the licensor. *Foster Hose Supp. Co. v. Taylor*, (C. C. A. 1911) 184 Fed. 71, *affirming* (1910) 180 Fed. 994.

**Mode of termination in general.**—A license under a patent cannot be terminated except by mutual agreement of the parties or the decree of a court. *American Graphophone Co. v. Victor Talking Mach. Co.*, (1911) 188 Fed. 431, *affirmed* (C. C. A.) 188 Fed. 428.

Where a contract provides for an exchange of licenses to manufacture under specified patents severally owned by the respective parties, the consideration being such mutual agreements, one party cannot elect to abrogate or rescind it with respect to a single license while retaining it in effect as to the others. *American Graphophone Co. v. Victor Talking Mach. Co.*, (1911) 188 Fed. 431, *affirmed* (C. C. A.) 188 Fed. 428.

**Right to revoke license.**—A patentee of certain street car advertising racks wrote defendants a letter demanding payment of three dollars a car for alleged infringement in the building of such racks in certain cars, with an offer to make arrangements at the same rate for cars to be subsequently built. Defendants paid such rate for cars in question, and in answer to a letter from the patentee they sent a check for other cars at the rate of two dollars per car. The patentee accepted the same in payment for cars at the rate of three dollars and stated that he could not make the rate less and that it was not to his interest to have the racks built into the cars. Shortly thereafter he wrote another letter, demanding a statement of all cars built with such racks therein, and notified defendants to discontinue building such racks except at the rate of five dollars per car, to which letter defendants did not reply. Held that the let-

ters prior to the last did not amount to an irrevocable license for the life of the patent, and hence defendants, after receiving the letter of revocation, was relieved from further liability to account for or pay royalties. *American St. Car Advertising Co. v. Jones*, (C. C. A. 1905) 142 Fed. 974, *reversing* (1903) 122 Fed. 803.

A contract licensing the use of a particular patent and providing a royalty cannot be rescinded unless it appears that the terms of such contract have been violated by the licensee. *Crary v. Jones, etc., Co.*, (1907) 138 Ill. App. 225, *affirmed* (1908) 234 Ill. 26, 84 N. E. 651.

**Cancellation in equity.**—Where the decision of a court of equity is necessary to cancel a license to use patented structures or with respect to the sale thereof, equity may enjoin the manufacture or sale *pendente lite*, or until the contract has been annulled by judicial decree. *Schalkenbach v. National Ventilating Co.*, (1908) 129 App. Div. 389, 113 N. Y. S. 352.

**Rescission for misrepresentations by licensor.**—Where plaintiff, a physician, after having been afforded ample opportunity to test a patented formula and apparatus to relieve neuralgia, headache, and other superficial pain by means of a counter irritant, purchased a license for the sale thereof in two states, and thereafter used and recommended the medicine, sold a number of the appliances, and assisted his licensors in disposing of other licenses, he was not entitled to rescind the contract in equity for alleged fraudulent representations of the licensors with reference to the efficacy and harmless character of the medicine, or because he was not furnished with the proper formula as agreed. *Landon v. Tucker*, (1908) 130 Mo. App. 704, 107 S. W. 1037.

**Rescission for lack of novelty.**—The vendee in a contract for the sale of an invention cannot rescind for failure of consideration because of the rejection of patents for some of the claims, without returning to the vendor those parts of the supposed invention for which patents were allowed. *Eclipse Bicycle Co. v. Farrow*, (1905) 199 U. S. 581, 26 S. Ct. 150, 50 U. S. (L. ed.) 317, *reversing* (1904) 24 App. Cas. (D. C.) 311.

**Repudiation by attacking validity of patent.**—The fact that a licensee under a patent for the full term of its life, under a contract which he has fully executed by payment of the agreed consideration, although he was to pay further royalties if the patent was sustained

in an infringement suit brought by the licensor against a third party, by leave appeared by counsel in the appellate court in such suit and filed a brief in aid of the defendant, attacking the validity of the patent, did not constitute a repudiation of the licensee contract which entitles the licensor to its cancellation. *Comptograph Co. v. Burroughs Adding Mach. Co.*, (C. C. A. 1910) 183 Fed. 321, *affirming* (1910) 175 Fed. 787, (1909) 175 Fed. 792.

**Extension of terms of patent.**—An extension of the term of a patent does not inure to the transferee of a license, in the absence of language expressing such intention. *New York Phonograph Co. v. Edison*, (1905) 136 Fed. 600.

**Forfeiture of option to renew.**—Plaintiffs contracted for the exclusive right to sell defendant's patented flue cleaner in the United States, west of Ohio, for a term of two years, the contract also providing that, if plaintiffs should have fully performed its conditions at the end of two years, they should have the right at their option to a renewal on the same terms for a further period of three years. Plaintiffs at great expense built up a large and profitable trade for these machines during the two years, but during such time prepared to assist another to sell such machines in Canada, where defendant had no patent or business, but, before the project was consummated, plaintiffs withdrew and sold only four machines in Canada. Held that such transaction and sales did not constitute a breach of plaintiffs' contract, entitling defendant to refuse to renew the same at plaintiffs' option. *Herman v. William B. Pierce Co.*, (1905) 105 App. Div. 16, 93 N. Y. S. 413.

**Waiver of notice of election to renew.**—A license to use patented phonographs and graphophones provided for a renewal until March 26, 1903, and for a second renewal after such date for "such further time, at the option" of the licensee, as the licensor was authorized to extend the license. Prior to the date specified the licensor had invaded the licensee's territory and refused to recognize the latter's exclusive rights granted, and had obstructed the licensee's efforts to obtain supplies, and a suit had been brought by the licensee to compel recognition of its rights. Held that such acts on the part of the licensor constituted a waiver of the obligation of the licensee, if any, to give notice of its election to exercise its option to take a renewal of the license. *New York Phonograph Co. v. Edison*, (1905) 136 Fed. 600.

## Vol. V, p. 547, sec. 4900.

Where put in issue, the complainant in a suit for infringement of a patent for a machine is required to prove affirmatively that machines made thereunder were marked as required by this section, or that notice of infringement was given to the defendant, to entitle complainant to recover damages for infringement prior to the filing of the bill. *American Caramel Co. v. Mills*, (C. C. A. 1907) 162 Fed. 147.

**Process patent.**—This section is not applicable to the case of a process patent, and the omission is not a bar to recovery for infringement where the defendant has been notified, and continues the infringement in disregard of such notice. *U. S. Mitis Co. v. Midvale Steel Co.*, (1904) 135 Fed. 103.

**Direct notice.**—Where direct notice of a patent is given to one who is infringing the same, neither damages nor profits are recover-

able except for infringements after such notice was given. *Lorain Steel Co. v. New York Switch, etc., Co.*, (1907) 153 Fed. 205.

**Marking thing to which patented article is attached.**—Notice of a design patent for a hatband on women's sailor hats is not sufficiently given by printing the words "Lichtenstein Pennant Sailor, Pat. Jan. 15th, 1907," upon the lining in the inside of the hats, there being nothing to indicate that such notice refers to the band. *Lichtenstein v. Phipps*, (C. C. A. 1909) 168 Fed. 61, *reversing* (1908) 161 Fed. 578.

**When notice is necessary.**—To entitle the owner of a design patent to recover the statutory penalty for its infringement, he must have duly marked the patented articles made or sold by him, where there is no proof of infringement by defendant after notice. *Crier v. Innes*, (C. C. A. 1909) 170 Fed. 324, *modifying and affirming* (1908) 160 Fed. 103.

The burden rests on the complainant, in a suit for infringement, to allege and prove such notice either to the public generally by

such marking of the patented article, or by direct notice to the defendant. *Lorain Steel Co. v. New York Switch, etc., Co.*, (1907) 153 Fed. 205.

An admission of notice by defendant by failing to deny it in the answer did not relieve complainant from the burden of proving the date, and where that question was not adjudicated by an interlocutory decree finding infringement and directing an accounting, such date must be proved before the master to afford any basis for an accounting. *Lorain Steel Co. v. New York Switch, etc., Co.*, (1907) 153 Fed. 205.

**Right to accounting.**—In a suit in equity for infringement of a patent by a party who failed to mark the articles made thereunder as required by R. S. sec. 4900, he may nevertheless be decreed an accounting on account of infringement committed by defendant after notice given by the filing of the bill. *Maimen v. Union Special Mach. Co.*, (C. C. A. 1908) 165 Fed. 440, *affirming* 161 Fed. 748.

## Vol. V, p. 549, sec. 4901.

**Intent to deceive.**—To authorize the recovery of the penalty for marking upon or affixing to an unpatented article a word importing that the same is patented for the purpose of deceiving the public, such purpose must be proved, and where the article is sufficiently like that described in a patent to permit of an honest belief that it is within the patent, although on a construction of the patent the court is required to rule that it is not, the question of the intent of defendant in marking it as covered by the patent is one

for the jury. *Star Mfg. Co. v. Crescent Forge, etc., Co.*, (C. C. A. 1910) 179 Fed. 856.

A corporation is a "person," within the meaning of this section, which imposes a penalty on "every person" who marks an unpatented article with any word importing that the same is patented for the purpose of deceiving the public, and may be convicted of such offense. *Star Mfg. Co. v. Crescent Forge, etc., Co.*, (C. C. A. 1910) 179 Fed. 856.

## Vol. V, p. 552, sec. 4919.

### I. WHO MAY SUE FOR INFRINGEMENT, 1625.

### II. WHO LIABLE FOR INFRINGEMENT, 1626.

### III. PLEADING, 1627.

### IV. RECOVERY, 1627.

#### I. WHO MAY SUE FOR INFRINGEMENT.

**Applicant for patent.**—An applicant for a patent, while his application is pending in the Patent Office, has no exclusive right to the invention which will sustain a suit in equity by him to enjoin another from using the same and for an accounting, although it is shown that while he was the original inventor, defendant wrongfully and by fraud has secured a patent to himself for the invention. The patent laws contemplate that the right to a patent shall in all cases be determined in the first instance by the Patent Office. *Standard Scale, etc., Co. v. McDonald*, (1904) 127 Fed. 709.

**Equitable owner.**—A suit for infringement of a patent may be maintained by the equitable owner against the patentee. *Prest-O-Lite Co. v. Avery Portable Lighting Co.*, (1908) 164 Fed. 60.

**Assignees.**—A bill of sale executed by a corporation, shown to have been at the time the owner of certain patents, conveying all of its stock in trade, assets, and property, specifically including "the patent properties which are held by the party of the first part," vested the purchaser with title to such patents, which will support a suit for their infringement, although no patents were specifically described therein. *Æolian Co. v. Hallett, etc., Piano Co.*, (1905) 134 Fed. 872.

**Assignee pendente lite.**—A suit for infringement may be prosecuted by an assignee *pendente lite*, even though the patent may have expired after suit begun. *Interlocking Steel Sheeting Co. v. Friestedt Interlocking Channel Bar Co.*, (1910) 182 Fed. 398.

**License amounting to assignment.**—From the nature of a patent right, which is purely statutory, and by R. S. sec. 4884 is "a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention," a company having the exclusive right under a contract to make, use, and vend a patent brake beam was for all practical purposes the assignee thereof, and at all events was the ex-

clusive licensee, and entitled to enjoin an infringement and to all the profits received by the infringer and to all accruing damages. *National Hollow Brake Beam Co. v. Bakewell*, (1909) 224 Mo. 203, 123 S. W. 561.

**Assignment amounting to license.**—An allegation that a patentee assigned to complainant the exclusive right to make, use, and sell for use within the United States and its territories and foreign possessions, "in connection with wireless telephone work and wireless telephonic communication only, apparatus and equipment embodying said methods and apparatus under the patents hereinabove mentioned, or any other patent or patents now or hereafter owned or controlled" by the assignor or his assignee, did not show a conveyance to the assignee of the entire monopoly granted by the government to the patentee, but a mere license; and hence the licensee had no capacity to sue in his own name to restrain infringers. *De Forest v. Collins Wireless Telephone Co.*, (1909) 174 Fed. 821.

**Assignment amounting to mortgage.**—The owner of a patent made an absolute assignment of the same, which was duly recorded. At the same time the assignee executed a paper showing that the assignment was as collateral security for a debt, and agreeing that the assignor should retain the exclusive right to manufacture and sell under the patent, and to license others thereunder. This agreement was not recorded. Subsequently the debt was paid, and a reassignment made, which expressly covered the sole and exclusive right to all causes of action for past infringements. Held that the original assignment and the paper executed at the same time constituted a single contract, under which the assignor retained the right to sue at law for infringement of the patent; the fact that the agreement was not recorded being immaterial as against this infringer. *Ormsby v. Connors*, (1904) 133 Fed. 548.

**Right of assignor to sue.**—Where the owners of nearly the entire interest in a patent united in an assignment of the same to a corporation, purporting to convey the full title, which assignment was duly recorded, such assignors could not thereafter maintain a suit for infringement without making the corporation a party, or alleging and proving affirmatively either that the assignment never took effect or that the title had in some way reverted; the corporation, although it had ceased to do business, not having been dissolved, and being still capable of suing and being sued under the law of the state of its organization. *Snead v. Scheble*, (C. C. A. 1909) 175 Fed. 570.

**Action by licensee in name of patentee.**—A license granting to one the exclusive right to make and sell in specified territory a patented article vests in him sufficient title to the patent to sue for an infringement thereof under the federal statutes in the name of the patentee. *Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co.*, (1910) 141 Wis. 199, 124 N. W. 291.

## II. WHO LIABLE FOR INFRINGEMENT.

**County commissioners.**—A bill to restrain the infringement of a patent for a ventilating device will not lie against county commissioners, merely because a contractor for a public building has placed an infringing device in such building, without its having been specified in the contract and without knowledge on their part of the patent, which device has not been used. *McCreery Engineering Co. v. Massachusetts Fan Co.*, (1910) 180 Fed. 115.

**Liability of agent.**—An agent is not properly joined with his principal as a defendant in a suit for infringement because of acts done in his capacity as such agent, in the absence of special circumstances. *Westinghouse Electric, etc., Co. v. Mutual L. Ins. Co.*, (1904) 129 Fed. 213.

**Action against licensee.**—In an action for infringement of a patent, a written contract between the parties by which it was agreed that defendants might use the patented invention, subject to the payment of a royalty, if plaintiffs' right thereto should be established by the judgment of a court, was admissible in evidence, as tending to show that the use was by plaintiffs' consent, and was therefore not an infringement. *Holmes v. Kirkpatrick*, (1904) 133 Fed. 232, 66 C. C. A. 286.

A licensor under a patent cannot declare a forfeiture and sue the licensee for infringement. *American Graphophone Co. v. Victor Talking Mach. Co.*, (1911) 188 Fed. 431, *affirmed* (C. C. A.) 188 Fed. 428.

**Directors of corporation.**—Infringement by a corporation gives no right of action against one of its officers individually, unless he has acted beyond the ordinary scope of his office. *Cazier v. Mackie-Lovejoy Mfg. Co.*, (C. C. A. 1905) 138 Fed. 654.

Stockholders of a corporation alleged to have infringed a patent are not liable in the absence of proof of individual acts of infringement. *Johns-Pratt Co. v. Sachs Co.*, (C. C. A. 1909) 175 Fed. 70, *reversing* in part 168 Fed. 311.

**Action against stockholders.**—The owner of a majority of the stock of a corporation, who controlled its affairs and who transferred to it certain patents in violation of a trust under which they had been conveyed to him by the owners, is equally liable with the corporation for its infringement of the patents by the use of the patented devices. *Harrington v. Atlantic, etc., Tel. Co.*, (1906) 143 Fed. 329.

**Acts of officers before organization.**—A corporation held not liable for infringement of a patent by reason of the building and sale of infringing machines by its president before it was organized, the bills for which were assigned to and collected by it. *Palmer v. Jordan Mach. Co.*, (1911) 186 Fed. 496.

**Individual doing business in name of corporation.**—An individual person cannot avoid liability for infringement by conducting his business in the name of a corporation. *Calculagraph Co. v. Wilson*, (1904) 132 Fed. 20.

## III. PLEADING.

**Averment of marking.**—The complaint in an action for infringement of a patent must allege that the article as made thereunder was marked with notice of the patent, or that notice of the infringement was given to the defendant. *Streat v. Finch*, (1904) 154 Fed. 378.

The complaint in an action to recover damages for infringement of a patent must show on its face that plaintiff has complied with the requirements of R. S. sec. 4900, by causing the patented article, or the package in which it is contained, to be marked in some suitable manner with the word "Patented." *Sprague v. Bramhall-Deane Co.*, (1904) 133 Fed. 738.

**Profits not accruing within statutory period.**—R. S. sec. 4921 as amended by Act March 3, 1897, providing that in any suit or action for infringement of a patent, there shall be no recovery of profits or damages for any infringement committed more than six years before the filing of the bill or the issuing of the writ in such suit or action, applies not only to suits in equity under said section 4921, but also to actions on the case to recover damages for infringement, brought under section 4919. The amendment is not a statute of limitation, but a qualification on the right of recovery, and need not, therefore, be specially pleaded by defendant in an action under section 4919. *Peters v. Hanger*, (1904) 134 Fed. 586, 67 C. C. A. 386, *reversing* 127 Fed. 820, 62 C. C. A. 498.

**Questioning validity of patent by demurrer.**—The question of the validity of a patent on its face may be raised by demurrer in an action at law for its infringement. *Thomas v. St. Louis, etc., R. Co.*, (1907) 149 Fed. 753, 79 C. C. A. 89.

The question whether or not the subject-matter of a patent is within one of the classes of things which are patentable under the statute is purely one of law, and may be determined on demurrer in an action for its in-

fringement. *American Disappearing Bed Co. v. Arnaelsteen*, (C. C. A. 1910) 182 Fed. 324.

**Averment of prior suit in equity.**—The declaration in an action for infringement of a patent alleged the proper issuance of the patent. Defendant filed a plea, setting up in bar a decree entered in a prior suit in equity between the parties for infringement of the same patent dismissing the bill for want of equity, and alleging that the device relied on as an infringement was the same in both suits. The latter allegation was denied by a replication. Held that the sustaining of a motion by defendant for judgment on the pleadings was error, since the court could not know without proof that the decree determined the invalidity of the patent, and the plea was met and an issue of fact raised as to the identity of the causes of action by the replication. *Robinson v. American Car, etc., Co.*, (C. C. A. 1907) 150 Fed. 331, *reversing* (1906) 142 Fed. 170.

## IV. RECOVERY.

**Measure of damages.**—Where the owners of a patent granted an exclusive license thereunder, authorizing the licensee to grant licenses to others on such terms as it saw fit, reserving as a royalty a certain per cent of the profits realized by the licensee, in a joint suit by the owners and licensee for infringement which interfered with sales by the licensee and the granting of licenses, the license fee established, charged, and received by the licensee may properly be taken as a basis for the computation of damages and profits recoverable from the infringer. *Fox v. Knickerbocker Engraving Co.*, (1908) 158 Fed. 422.

**Action solely to recover profits.**—An action at law cannot be maintained for the sole purpose of recovering the profits which an infringer of a patent has made. *Brown v. Lanyon*, (1906) 148 Fed. 838, 78 C. C. A. 528.

## Vol. V, p. 566. [Act of March 3, 1897, ch. 395.]

**Suits against aliens.**—This statute applies only to defendants who are inhabitants of some district within the United States, and does not affect patent suits against aliens, which may be brought in any district where the defendant may be found. *United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co.*, (1904) 133 Fed. 930.

**Characterizing place of business.**—It is not essential under this Act that the bill should use the words, "regular and established," in characterizing defendant's place of business, if it appears that it is such from the facts alleged. *Thomson-Houston Electric Co. v. Electrode Mfg. Co.*, (1907) 155 Fed. 543.

**Place from which goods are sold.**—This statute gives jurisdiction in a district where defendant has an established place of business from which it sold the alleged infringing articles, and in which it also assembled the different parts of such articles. *American*

*Stoker Co. v. Underfeed Stoker Co.*, (1910) 182 Fed. 642.

**Individuals sued with corporation.**—In a bill for infringement of a patent against a corporation and an individual, which charges that the corporation has a regular and established place of business within the district where its business is conducted by its co-defendant as its president and general manager, and where they have committed joint acts of infringement, it is not necessary to allege affirmatively that the individual defendant is either an inhabitant of the district or has a regular and established place of business therein. *Thomson-Houston Electric Co. v. Electrode Mfg. Co.*, (1907) 155 Fed. 543.

**Averment of sale in district.**—A bill for infringement of a patent filed against a foreign corporation, in order to confer jurisdiction on the court, must allege both acts of infringement in the district where filed, and that the defendant has at the time of suit a

regular and established place of business there. *Underwood Typewriter Co. v. Fox Typewriter Co.*, (1908) 158 Fed. 476.

**Infringement within the district of suit** (Southern District of New York) required to sustain the suit is not made out by proof that an infringing article sold in another state bore a label with the name of defendant and the words "New York" thereon, in the absence of evidence that defendant made, used, or sold the article, or attached the label, or was engaged in the manufacture of

similar articles in New York. *Rumford Chemical Works v. Egg Baking Powder Co.*, (1906) 145 Fed. 953.

**Place of business at time of bringing suit.**—To confer jurisdiction it is not necessary that the defendant should have had a regular and established place of business within the district at the time the alleged acts of infringement were committed therein, but it is sufficient if it had such place at the time of bringing suit. *Underwood Typewriter Co. v. Fox Typewriter Co.*, (1908) 158 Fed. 476.

## Vol. V, p. 567, sec. 4920.

- I. PLEADING AND PROOF IN GENERAL, 1628.
- II. STATUTORY DEFENSES, 1630.

### I. PLEADING AND PROOF IN GENERAL.

**Pleading license.**—A plea to a bill for infringement of a patent alleged that complainant was employed by defendant, a corporation engaged in the manufacture of carbons, as a mechanical engineer, and agreed to give his time, skill, and attention and inventive ability to the service of defendant in and about the cheapening and improving of the process of electroplating, and other processes in the manufacture of carbons; that while so employed, and at defendant's expense, he made the inventions covered by the patent, which consist of a process and machine for electroplating; that such inventions and improvements "belong" to defendant; that "said defendant is entitled to the perpetual use of the same, and that, by reason of the facts hereinbefore stated, . . . complainant is not entitled to any relief prayed for in said bill of complaint, but that said defendant . . . is entitled and has the right to the perpetual use in its business for its purposes" of said inventions. Held that such plea should be construed as a plea of license only, which was all that was required to constitute a defense to the bill. *Barber v. National Carbon Co.*, (C. C. A. 1904) 129 Fed. 370.

**Defense of license and noninfringement.**—A defense of noninfringement pleaded in the answer in an infringement suit is not waived by a further defense of license, but raises an issue of fact under which complainant has the burden of proof, and defendant is not estopped by pleading the license from contesting such issue. *Niagara Fire Extinguisher Co. v. Hibbard*, (C. C. A. 1910) 179 Fed. 844.

**Decree against defendant's vendor.**—It is not a defense to a suit for infringement against a user that a decree has previously been obtained against the maker, from whom the defendant bought the infringing article. *Westinghouse Electric, etc., Co. v. Mutual L. Ins. Co.*, (1904) 129 Fed. 213.

**Right to plead generally.**—In patent cases pleas should not be allowed unless they reduce the controversy to a single point or issue, except in very special cases, nor should the question of infringement be tried on a plea, even though it goes to the jurisdiction in the case of a suit against a nonresident, since

that question can be raised on a motion to dismiss at the close of complainant's proofs. *Underwood Typewriter Co. v. Fox Typewriter Co.*, (1908) 158 Fed. 476.

It is the office of a plea in equity to present some one single and well-defined ground of defense, which, if sustained, will dispose of the case and avoid the expense and delay of a hearing; and in a suit for infringement of a patent the defense of noninfringement cannot properly be presented by a plea, at least where it involves a consideration of evidence extrinsic to the patent itself. *American Sulphite Pulp Co. v. Bayless Pulp, etc., Co.*, (1908) 163 Fed. 843.

**Discontinuance of infringement before suit brought.**—In a suit for infringement, a plea setting out that defendant abandoned the manufacture and sale of the infringing article before the commencement of the suit will be stricken out where such statement is contradicted by evidence already in the record. *Silver v. J. P. Eustis Mfg. Co.*, (1904) 130 Fed. 348.

To a bill alleging infringement of certain letters patent, the defendant filed a plea setting up that from a certain date, which was fifteen days before the filing of the bill of complaint, it had not infringed the complainant's devices, and that it had on the day named leased and surrendered all its plant, tools, machinery, stock on hand, and good will to another, without stating to whom they were leased or the length of the demise, and further stating that on the day named it had in good faith ceased the manufacture, sale, and use of the alleged infringing devices, and since that time had had no intention, "and now has no intention," of manufacturing, using, or selling the same. Held that the plea was insufficient in view of the uncertainty of the lease, and of the fact that the defendant had infringed, and that the bill alleged that "the defendant now continues, and threatens to continue, to make, use, and sell" the alleged infringing devices. Held, further, that the complainant is entitled to greater security against a confessed infringer than the mere statement that it has no present intention of further infringement, or even the statement that it will not further infringe. *General Electric Co. v. Bullock Electric Mfg. Co.*, (1905) 138 Fed. 412.

**Sufficiency of plea in general.**—If a plea is to be allowed in a suit for infringement of a patent in any case, it should reduce the



issue to a single point, so that, conceding the facts to be as settled by the bill and plea, a full and final determination may be had, and unless it does so, and fully meets the equities of the bill, it will be overruled. *Schnauffer v. Aste*, (1906) 148 Fed. 867.

**Duplicity of plea.**—In a suit in equity for infringement of a patent, a plea alleging that prior to the alleged invention by complainant of the device covered by the patent another invented and disclosed the device made and used by defendant which is claimed to infringe, and with reasonable diligence made an application for a patent therefor, which is still pending, is bad, since it does not go to a single point, nor reduce the case to one point, but to two points, viz., possible prior invention, if the two devices should be shown to be the same, and possible noninfringement, if they should be shown not to be the same. *Thresher v. General Electric Co.*, (1906) 143 Fed. 337.

**Lack of invention and noninfringement.**—In a suit in equity for infringement of a patent the defenses of lack of invention and noninfringement cannot be made by plea, but only by answer. *Western Electric Co. v. North Electric Co.*, (1905) 135 Fed. 79, 67 C. C. A. 553.

**Plea of noninfringement.**—In a suit in equity for infringement of a patent, the defense of noninfringement cannot be made by plea, except under extraordinary or very special circumstances, and while it may be within the discretion of the court to permit the defense of prior invention to be raised by plea to justify such practice, it should appear with reasonable certainty that the determination of the plea will end the case. *Thresher v. General Electric Co.*, (1906) 143 Fed. 337.

In a suit in equity for infringement of a patent, a plea which sets up the single defense of noninfringement is not a good plea, such defense being one which should be taken by answer, and the plea will either be stricken out or ordered to stand as an answer, as in the judgment of the court will best subserve the ends of justice. *Glucose Sugar Refining Co. v. Douglass*, (1906) 145 Fed. 949.

**Presumption of validity.**—Where, in a suit for infringement of a patent, the only defenses pleaded were that complainant's alleged original invention was in extensive use throughout the United States for more than two years prior to the dates pleaded as those on which the applications for patents were made, and a denial of infringement, the court will be concluded as to the validity of the patent, in view of the prior state of the art, by the presumption in its favor arising from the grant of the patent. *Campbell v. New Idea Arc Light Co.*, (1909) 175 Fed. 115.

**Reissued patent invalid on its face.**—The defense that a reissue is void on its face when compared with the original patent may be raised and determined on demurrer where both patents are properly before the court. *Edison v. American Mutoscope, etc., Co.*, (1904) 127 Fed. 361.

**Patent dated more than six months after allowance.**—A defense to a suit for infringement on the ground that the patent bears date

more than six months later than the notice given to the applicant of the allowance of the application may properly be taken by plea. *Western Electric Co. v. North Electric Co.*, (1905) 135 Fed. 79, 67 C. C. A. 553.

**Denial that patentee was first inventor.**—A denial in the answer in a suit for infringement of a patent that the patentee was the first inventor of the improvement described in the patent named in the bill, specifying it by number, is sufficient to raise the issue of invention, although the title of the patent as stated in the answer may be technically inaccurate. *Robinson v. American Car, etc., Co.*, (1905) 135 Fed. 693, 68 C. C. A. 331, *affirming* (1904) 132 Fed. 165.

**Prior patents as anticipations.**—Prior patents not pleaded cannot be availed of as anticipations, but they are admissible in evidence as showing the prior art, and are to be considered in determining whether, in view of such art, the patent in suit discloses invention. *Jones v. Cyphers*, (C. C. A. 1903) 126 Fed. 753, *affirming* (1902) 115 Fed. 324.

A prior patent, although not pleaded as an anticipation, may be shown and considered on the question of infringement as a part of the prior art to limit the claims of the patent in suit. *Parsons v. New Home Sewing Mach. Co.*, (1903) 125 Fed. 386.

**Insufficient denial of infringement.**—Where a defendant charged with infringement of a process patent admits that his product is the same, and that in making it the same materials are used and steps taken as called for by the patent, a mere denial that the process followed is the same, without disclosing the one claimed to be used, is insufficient to negative infringement. *Hemolin Co. v. Harway Dyewood, etc., Mfg. Co.*, (1904) 131 Fed. 483.

**Mere denial of infringement insufficient.**—Where a defendant charged with infringement of a process patent admits that his product is the same, and that in making it the same materials are used and steps taken as called for by the patent, a mere denial that the process followed is the same, without disclosing the one claimed to be used, is insufficient to negative infringement. *Hemolin Co. v. Harway Dyewood, etc., Mfg. Co.*, (1904) 131 Fed. 483.

**Admission of infringement.**—Where the answer to a bill charging infringement of a patent admitted that defendant had during the time alleged made and used articles conforming to the claims of the patent, no further proof is required from complainant on the issue of infringement. *Fox v. Knickerbocker Engraving Co.*, (C. C. A. 1908) 165 Fed. 442, *affirming* 158 Fed. 422.

**Abandonment of manufacture of infringing article.**—In a suit for infringement, a plea setting out that defendant had abandoned the manufacture and sale of the infringing article before the commencement of the suit will be stricken out where such statement is contradicted by evidence already in the record. *Silver v. J. P. Eustis Mfg. Co.*, (1904) 130 Fed. 348.

**Necessity to set up defense of nonpatentability.**—It is the duty of the court to dis-

miss a suit brought to restrain infringement of a patent where the structure is not patentable, even though the defense be not set up in the answer. *Conderman v. Clements*, (1906) 147 Fed. 915, 78 C. C. A. 51.

**Allegation of nonmarking.**—In a suit for infringement of a patent, where the bill does not show that the patented article was marked as required by R. S. sec. 4900, it must clearly allege that explicit notice of infringement was given to defendant, otherwise damages are not recoverable except for infringement after the suit was commenced. An allegation that defendant was informed or had knowledge of the infringement is insufficient. *Westinghouse Electric, etc., Co. v. Condit Electrical Mfg. Co.*, (1908) 159 Fed. 154.

**Waiver of failure to prove marking.**—Where a bill for infringement of a patent properly alleged that the patented machine of complainant was marked in accordance with the requirement of R. S. sec. 4900, which allegation was not denied in the answer, and no objection was made on the hearing to the failure of complainant to prove it, such objection is waived, and cannot be taken for the first time on entry of the decree. *Pettibone v. Pennsylvania Steel Co.*, (1905) 134 Fed. 889.

**Amendment of answer.**—Under the authority given the court to permit amendments by equity rule 60, a defendant in a suit for infringement of a patent, who has set up prior invention, knowledge, or use, will be given leave to amend his answer, even after replication filed, by adding the name of another witness, giving his place of residence, as required by this section, where satisfied that the application is not made for delay, and that the amendment is in furtherance of justice. *Standard Elevator Interlock Co. v. Ramsey*, (1904) 130 Fed. 151.

**Disclaimer of intention to continue infringement.**—The assertion in the answer of a defendant, sued for infringement of a right to make the devices complained of as an infringement, in the absence of a very express denial of a purpose to exercise the right claimed, justifies the presumption that further infringement is to be apprehended, if that device shall prove to be an infringement and the coupling with such assertion of a general averment that defendant does not intend to employ the patented device or to interfere with the rights of complainant cannot be construed as a disclaimer of an intention to continue to make the infringing device. *Johnson v. Foos Mfg. Co.*, (1906) 141 Fed. 73, 72 C. C. A. 105.

**Demurrer on ground of invalidity of patent.**—A demurrer to a patent may be sustained, but only when the question of invention is free from doubt and there is an absolute conviction in the mind of the court of the lack of invention. *General Electric Co. v. Campbell*, (1905) 137 Fed. 600; *Jackes-Evans Mfg. Co. v. Hemp*, (C. C. A. 1905) 140 Fed. 254; *Peters v. Chicago Biscuit Co.*, (1906) 142 Fed. 779; *Kuhn v. Lock-Stub Check Co.*, (C. C. A. 1908) 165 Fed. 445, *affirming* (1907) 157 Fed. 235; *Sanitary Metal Tile Co. v. New York Metal Ceiling Co.*, (1910) 188 Fed. 441.

A patent will not be adjudged void on demurrer, where the precise points raised have been previously decided in other suits in the district in favor of the complainant. *Regensberg v. American Exch. Cigar Co.*, (1904) 130 Fed. 549.

By profert of a patent in a suit for its infringement it is carried into the bill, and, if it is plainly devoid of invention on its face, a demurrer to the bill on that ground is well taken, and must be sustained. *Hogan v. Westmoreland Specialty Co.*, (1906) 145 Fed. 199.

A bill for infringement of a patent is not demurrable because of its failure to allege that the invention was not patented in a foreign country more than seven months prior to the filing of the application in this country; the provision of Rev. St., § 4887, as amended by Act March 3, 1897, c. 391, § 3, denying the right to a patent in case of such foreign patenting more than seven months prior to the application, being a matter of defense to be pleaded by answer. *American Cereal Co. v. Oriental Food Co.*, (1906) 145 Fed. 649.

## II. STATUTORY DEFENSES.

**Purpose of statute.**—The purpose of this section making it a defense to an action for infringement of a patent that the patented invention had been in public use or on sale in this country for more than two years before the application for the patent, is to require a patentee to act promptly in securing his patent. *National Cash Register Co. v. American Cash Register Co.*, (C. C. A. 1910) 178 Fed. 79.

**Necessity of notice.**—The defendant in a suit for infringement of a patent must give notice in his answer of any defense by way of prior patents, publications, or public use relied on to show want of novelty or invention, otherwise such evidence is receivable only to show the state of the art, and to aid in the proper construction of the patent in suit. *Morton v. Llewellyn*, (C. C. A. 1908) 164 Fed. 693.

**Estoppel to contest validity of patent.**—The settlement by a licensee under a patent of a suit brought against it for infringement of another patent does not estop its licensor, who was not a party, and did not participate in the settlement, from subsequently contesting the validity of the patent sued on. *Automatic Racking Mach. Co. v. White Racker Co.*, (1906) 145 Fed. 643.

Even if the assignor of a patent be estopped as against the assignee to deny its validity, it is open to him in a suit for infringement to show the prior state of the art as bearing on the construction and scope of the patent, and to show that the acts alleged are not violations. *Aberthaw Constr. Co. v. Ransome*, (1906) 192 Mass. 434, 78 N. E. 485.

**Unauthorized issuance of patent.**—In a suit for infringement of a patent the want of legal authority in the Commissioner of Patents to issue the same may be pleaded as a defense. *Weston Electrical Instrument Co. v. Empire Electrical Instrument Co.*,

(1905) 136 Fed. 599, 69 C. C. A. 329, *affirming* (1904) 131 Fed. 90.

**Fraudulent procurement of patent.**—It is not open to an alleged infringer to collaterally attack a patent on the ground of fraud in its procurement, as that the patentee's solicitor contributed a substantial part of the invention and embodied it in the application after the patentee had made oath to the same. *Eastern Paper Bag Co. v. Continental Paper Bag Co.*, (1906) 142 Fed. 479.

A patent procured by fraud and collusion, or by illegal procedure, either in the Patent Office or in a suit to procure its issuance under R. S. sec. 4915, can be attacked only by the government, and such matters cannot be set up as a defense in a suit for infringement. *Western Glass Co. v. Schmertz Wire-Glass Co.*, (C. C. A. 1911) 185 Fed. 788, *modifying* (1910) 178 Fed. 977.

**Patent void on its face.**—The defense that a reissue is void on its face when compared with the original patent may be raised and determined on demurrer where both patents are properly before the court. *Edison v. American Mutoscope, etc., Co.*, (1904) 127 Fed. 361.

**Want of novelty apparent on face of patent.**—Where the want of novelty of a device is manifestly apparent on the face of

the patent, the issue may properly be determined at the threshold of the case on demurrer. *American Salesbook Co. v. Carter-Crume Co.*, (1903) 125 Fed. 499.

**Evidence of prior patents to show state of art.**—A prior patent, although not pleaded as an anticipation, may be shown and considered on the question of infringement as a part of the prior art to limit the claims of the patent in suit. *Parsons v. New Home Sewing Mach. Co.*, (1903) 125 Fed. 386.

**Prior invention not pleaded.**—In a suit for infringement of a patent, where defendant manufactures under a patent of prior date, but complainant undertakes to carry the date of his invention back to a still earlier date, although no such issue is tendered by his pleading, defendant may meet such proof by the defense of laches or abandonment, without pleading the same, since, if pleaded, it would not be responsive to anything in the bill. *Curtain Supply Co. v. National Lock Washer Co.*, (1909) 174 Fed. 45.

**Proof of prior use.**—That the device of a patent was publicly used and exhibited in actual use for two years is sufficient to sustain a suit for infringement without a showing that it has been in constant use since that time. *Los Angeles Art Organ Co. v. Æolian Co.*, (C. C. A. 1906) 143 Fed. 880.

## Vol. V, p. 577, sec. 4921.

- I. GENERAL EQUITABLE JURISDICTION, 1631.
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- VII. LIMITATIONS AND LACHES, 1642.

### I. GENERAL EQUITABLE JURISDICTION.

**Action for damages maintainable only at law.**—An action to recover damages and royalty for the infringement of a patent can only be maintained at law. *De Forest v. Collins Wireless Telephone Co.*, (1909) 174 Fed. 821.

**Adequate remedy at law.**—Where, on the hearing of a suit in equity for infringement of a patent, in which an injunction and accounting were asked, it was shown that defendant made and used but one of the patented articles about which there was any dispute as to complainant's consent, and that a royalty for its use was agreed on, which defendant promised to pay, and there was no evidence of defendant's insolvency, or of any profits to be accounted for, or tending to show any threat or intention to use the patented article without complainant's consent, the bill was properly dismissed, on the ground that no case was shown for the exercise of equitable jurisdiction. *Plotts v. Central Oil Co.*, (C. C. A. 1906) 143 Fed. 901.

Allegations in a bill for infringement that complainant derives his benefit from his patent through limited granting of licenses does not deprive equity of jurisdiction by showing

that he has an adequate remedy at law where it does not appear that there is a fixed license fee for all users. *Peters v. Chicago Biscuit Co.*, (1906) 142 Fed. 779.

A bill for infringement of a patent which charges past infringement only and contains no allegation of present or threatened infringement, does not state a case within the jurisdiction of a court of equity, when taken in connection with a plea denying any infringement since more than a year prior to the filing of the bill, and with the fact that the patent expired before the hearing. *Weston Electrical Instrument Co. v. Vallee Bros. Electrical Co.*, (1906) 145 Fed. 534.

**Demand for injunction.**—Where a bill alleging infringement of an unexpired patent demands damages and a permanent injunction, equity has jurisdiction. *Victor Talking Mach. Co. v. American Graphophone Co.*, (1905) 140 Fed. 860, *affirmed* (C. C. A. 1906) 145 Fed. 350.

**Recovery of profits as ground for equitable jurisdiction.**—The fact that profits are recoverable in a suit in equity for infringement of a patent under this section and not in an action at law, while not in itself any basis for equitable jurisdiction, is a reason why that jurisdiction should not be relinquished when it may be upheld on other grounds. *Thomson-Houston Electric Co. v. Electrode Mfg. Co.*, (1907) 155 Fed. 543.

**Effect of assignment during suit.**—A court of equity, which has acquired jurisdiction of a suit by the owner of a patent to enjoin its infringement and to recover damages for past infringement, does not lose such juris-

diction because, pending the suit, the patent is assigned to another, who is brought in by a supplemental bill under equity rule 57, and may proceed, not only to grant an injunction, but to award damages to both the original complainant and his assignee for infringement proved during the time of their respective ownership. *Leadam v. Ringgold*, (1905) 140 Fed. 611.

## II. JOINDER OF CAUSES OF ACTION.

**Infringement and unfair trade.**—There being diversity of citizenship, it was proper to join in one bill of action for infringement of a design patent and for unfair competition in trade. *Havens v. Burns*, (1911) 188 Fed. 441.

**Infringement and compelling transfer of patent.**—A bill by the equitable owner of a patent against the holder of the legal title to compel a transfer of the patent and for infringement is not multifarious. *Prest-O-Lite Co. v. Avery Portable Lighting Co.*, (1908) 164 Fed. 60.

**Infringement of several patents.**—A bill for the infringement of two patents is multifarious, unless it alleges that they are capable of conjoint use, and have been so used by defendant in what is practically a single device. *Robinson v. Chicago R. Co.*, (C. C. A. 1909) 174 Fed. 40.

A bill for the infringement of an expired and an unexpired patent, alleging that the infringement consists in the use by defendant of a machine which embodies the devices of both patents, so conjoined as to render it practically impossible to apportion the damages and profits resulting from the use of each element of the machine, is not multifarious as joining a legal with an equitable demand, since the recovery sought is not separable with respect to the two patents, and a court of equity, having acquired jurisdiction, will grant all appropriate relief in connection with the use of the alleged infringing machine. *Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co.*, (1904) 130 Fed. 558.

**Uniting patents not used together.**—Where the defendant, pending a suit for infringement of a patent, begins the use of another alleged infringing device, separate and distinct from that complained of in the bill, although such fact does not render the suit defective, within the meaning of equity rule 57, but constitutes ground for an independent suit, the court may nevertheless, in the interest of saving delay and expense by the needless duplication of proofs, permit the question of the second infringement to be brought into the case by a supplemental bill. *Chicago Grain Door Co. v. Chicago, etc., R. Co.*, (1905) 137 Fed. 101.

**Original patent and patent for improvement.**—While a bill for infringement of two separate patents must show that the inventions are capable of conjoint use it is sufficiently shown where one patent shows on its face that it is for an improvement on the invention of the other. *Moss v. McConway-Torley Co.*, (1906) 144 Fed. 128.

**Infringement of product and process.**—A bill for the infringement of two patents, although one is for a process and the other for a product, is not multifarious, where both relate to the same article and are capable of being conjointly infringed, as it is alleged in the bill they are by the defendant. *American Graphophone Co. v. Leeds, etc., Co.*, (1904) 131 Fed. 281.

**Infringement by different persons.**—A bill for infringement against a corporation and an individual described as its president and general manager, which charges that defendants have and each of them has committed certain acts of infringement, sufficiently alleges a joint infringement, and is not demurrable for multifariousness. *Thomson-Houston Electric Co. v. Electroacoustic Mfg. Co.*, (1907) 155 Fed. 543.

Complainant obtained a decree against an Illinois corporation for an injunction and accounting for infringement of a patent, and thereafter filed a petition, in the nature of a supplemental bill, against a New Jersey corporation having the same name as the original defendant, alleging that, pending the suit, the latter had transferred to it all of its property and good will, receiving payment partly in cash, but principally in the stock and bonds of the purchasing company. It also alleged that the latter company, after the transfer, conducted the defense in the suit, and prayed that it be brought under the injunction, and also be adjudged to pay whatever damages should be recovered on account of its own and its predecessor's infringement. Held that, while the petition stated ground for the injunctive relief, it showed no right to the other relief prayed for, and was, moreover, multifarious, being in its latter aspect essentially a creditor's bill. *Western Telephone Mfg. Co. v. American Electric Telephone Co.*, (1905) 137 Fed. 603.

## III. PLEADINGS.

The form and requisites of bills in suits for infringement of patents have been settled by repeated decisions, and the practice can only be changed by an amendment of the equity rules or of the rules of the Circuit Courts. *American Graphophone Co. v. National Phonograph Co.*, (1904) 127 Fed. 349.

**Validity of patent.**—A bill for infringement must show the facts which are by statute made essential to the validity of the patent sued on—such as original invention, that the invention had not been previously patented or described in a printed publication, or used for more than two years prior to the application—as requisite conditions precedent to the right to sue. *American Graphophone Co. v. National Phonograph Co.*, (1904) 127 Fed. 349.

A bill for infringement of a patent in order to state a case must allege the facts which are essential to the validity of the patent under R. S. secs. 4886, 4887, as amended by Act March 3, 1897, c. 391, and negative those the existence of which would defeat it. *Moss v. McConway-Torley Co.*, (1906) 144 Fed. 128.

A bill for infringement of a patent must specifically allege all of the facts necessary to show the validity of the patent under the statutes, and a failure to allege that it was issued in the name of the United States or under the seal of the Patent Office, or that it was signed by the Commissioner of Patents, renders the bill demurrable. *Eastwood v. Cutler-Hammer Mfg. Co.*, (1906) 148 Fed. 718.

Under the weight of authority, a bill for infringement must allege the facts which are by statute made essential to the validity of the patent sued on, as that no application for a foreign patent for the invention was filed more than seven months before the filing of the application in this country, which would render the patent invalid under R. S. sec. 4887, as amended by Act March 3, 1897, c. 391, § 3. *Victor Talking Mach. Co. v. Leeds, etc., Co.*, (1908) 165 Fed. 931.

**Averment of diligence.**—A bill for infringement of a patent which alleges acts of infringement within six years need not specifically allege that complainant has been diligent. *Thomson-Houston Electric Co. v. Electrose Mfg. Co.*, (1907) 155 Fed. 543.

**Averment of due proceedings in patent office.**—A bill for infringement of a patent makes a *prima facie* case where it alleges the invention, the issue of letters patent, ownership by complainant, infringement by defendant, and damages sustained. The filing of an application in due form commensurate with the grant is presumed from the issuance of the patent, and need not be alleged, any defect therein affecting the validity of the patent being matter of defense. *Bowers v. Bucyrus Co.*, (1904) 132 Fed. 39.

**Allegation as to prior patent or published description.**—A bill for infringement of a patent applied for after Act March 3, 1897, c. 391, took effect is bad on demurrer where it fails to allege that the invention was not patented or described in any printed publication in this or any foreign country more than two years prior to the application for the patent, or whether or not it was patented in any foreign country, and, if so, that application was made within seven months thereafter for the United States patent. *Moss v. McConway-Torley Co.*, (1906) 144 Fed. 128.

**Patent made part of bill by reference.**—Where a bill for infringement of a reissued patent makes profert of such reissue, and recites that it was founded on the original patent, giving its date and number, such original is essentially incorporated into the bill, and may be examined and compared with the reissue on demurrer to the bill. *Edison v. American Mutoscope, etc., Co.*, (1904) 127 Fed. 361.

**Averments on information and belief.**—A bill for infringement of a patent is not demurrable because material facts are alleged on information and belief. *Thomson-Houston Electric Co. v. Electrose Mfg. Co.*, (1907) 155 Fed. 543.

**Expired patents.**—A suit for an infringement may be prosecuted, even though the patent may have expired after suit begun.

*Interlocking Steel Sheeting Co. v. Friestedt Interlocking Channel Bar Co.*, (1910) 182 Fed. 398. See also *Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co.*, (1904) 130 Fed. 558.

**Patent void on its face.**—Where the invalidity of a patent for lack of invention is clear on its face, the court may so declare it *sua sponte*, although the question is not raised by the pleadings, and may dismiss a bill for its infringement. *Wills v. Scranton Cold Storage, etc., Co.*, (C. C. A. 1907) 153 Fed. 181, *affirming* (1906) 147 Fed. 525.

**Averments of litigation and sustained validity of patent.**—In a bill to enjoin infringement of a patent, allegations setting out proceedings in other courts with reference to the patent, the granting of foreign patents thereon, and acquiescence therein in this and other countries, are proper, as going to the question of acquiescence, and are material, as tending to establish a presumptive right on an application for a preliminary injunction. *Peters v. Chicago Biscuit Co.*, (1906) 142 Fed. 779.

**Enumeration of claim relied on.**—A bill for infringement of a patent containing a number of claims must specifically enumerate the claims to be relied on, and where it does not the objection may properly be raised by demurrer on the ground that it is inequitable and unconscionable. *Eastwood v. Cutler-Hammer Mfg. Co.*, (1906) 148 Fed. 718.

**Averments of title or ownership.**—A bill for infringement must allege complainant's title and its source, and it is not sufficient merely to attach a copy of the patent as an exhibit showing its issuance to complainant as assignee. *American Graphophone Co. v. National Phonograph Co.*, (1904) 127 Fed. 349.

**Sufficient averment of title.**—A bill for infringement of a patent, alleging title in complainant, based on an instrument of transfer of several patents and containing reservations, if it does not appear that such reservations apply to the patent in suit, is not demurrable for want of title in complainant. *Sirocco Engineering Co. v. Monarch Ventilator Co.*, (1910) 184 Fed. 84.

**Ownership of assignee.**—A bill to recover damages and profits for infringement of a patent, which merely alleges that it was issued in due form of law on application "to the proper department of the government," and while alleging title in complainant by assignment does not show the date of such assignment, nor that it carried the right to past damages, is insufficient. *Vant Woud Rubber Co. v. Sternau*, (1906) 145 Fed. 197.

**Description of invention or profert of patent.**—The mention in a bill for infringement, of prior patents to the same patentee, does not amount to a profert of such patents so as to bring them before the court for consideration on a demurrer to the bill. *Bowers v. Bucyrus Co.*, (1904) 132 Fed. 39.

A bill for infringement of a patent, which makes profert of the patent, is not demurrable because it gives only a general description of the patented device. *Hildreth v. Bee Candy Mfg. Co.*, (1908) 162 Fed. 40.

**Denial of prior use or sale.**—A bill for infringement of a patent must allege that the invention of the patent had not been in public use or on sale in this country for more than two years prior to the application for the patent. *Hayes-Young Tie Plate Co. v. St. Louis Transit Co.*, (1904) 130 Fed. 900.

**Infringement of material part of invention.**—A bill for infringement of a patent must charge the infringement of a material part of the invention to entitle the complainant to relief in equity. *Moss v. McConway-Torley Co.*, (1906) 144 Fed. 128.

**General charge of infringement.**—Where a bill charges infringement of a patent generally, in accordance with the approved practice, it may be construed to charge infringement of all the claims; and, unless under very exceptional circumstances, the complainant cannot be required to amend by specifying the claims with respect to which infringement is claimed and the parts of defendant's structure which are claimed to infringe. *Morton Trust Co. v. American Car, etc., Co.*, (C. C. A. 1904) 129 Fed. 916, *reversing* (1903) 121 Fed. 132.

**Charging infringement on information and belief.**—Where a bill of complaint charges infringement of letters patent, the averment of infringement under the form, "Your orator further shows, on information and belief, that," etc., is sufficient; the fact of infringement not being necessarily within the knowledge of the complainant. *Murray Co. v. Continental Gin Co.*, (1903) 126 Fed. 533.

**Extent of complainant's loss or damage.**—The failure of a bill for infringement to allege the extent of complainant's loss or damage is not ground for demurrer. *American Graphophone Co. v. National Phonograph Co.*, (1904) 127 Fed. 349.

**Amendment of bill.**—In a suit for infringement by an exclusive licensee, the failure of the bill to allege that the license includes the exclusive right to make the patented article may be cured by amendment, where the evidence shows a license to make, as well as to use and vend. *Fox v. Knickerbocker Engraving Co.*, (1905) 140 Fed. 714.

**Cross-bill setting up interference.**—Conceding that the defendant in a suit for infringement of a reissue patent may by cross-bill set up an interfering patent, and obtain a decree canceling complainant's reissue for fraud, such cross-bill must at least set out the specific facts relied on to constitute the fraud. *Coffield Motor Washer Co. v. A. D. Howe Co.*, (1909) 172 Fed. 668.

**Supplemental bill to set up new infringements.**—Where a patent has been adjudged valid and infringed and an accounting ordered, it is the better practice to require the complainant to set up any alleged new infringements by supplemental bill, which can be disposed of and the order of reference modified as required, rather than to extend the accounting to devices which have not been adjudged to infringe and entail costs upon the parties which may prove unnecessary. *Murray v. Orr, etc.*, *Hardware Co.*, (C. C. A. 1907) 153 Fed. 369.

**Supplemental bill to meet modification of infringing structure.**—The fact that, pending a suit for the infringement of a patent, the defendant modifies the alleged infringing structure, affords no ground for a supplemental bill alleging infringement by the new structure. If the original structure infringed, full relief may be obtained as to the new structure under the original bill, while if it did not a new case, based on infringement subsequent to the commencement of the suit, cannot be made by a supplemental bill. *Westinghouse Air Brake Co. v. Christensen Engineering Co.*, (1904) 126 Fed. 764.

#### IV. INJUNCTIONS.

**Necessity for special prayer for preliminary injunction.**—Where a preliminary injunction is sought, it must be specially asked for in the prayer of the bill in conformity to equity rule 21, otherwise the bill is demurrable. *American Graphophone Co. v. National Phonograph Co.*, (1904) 127 Fed. 349.

**Discretion of court as to preliminary injunction.**—A motion for a preliminary injunction to restrain infringement of a patent is addressed to the sound discretion of the court, and, to justify the granting of such an injunction, complainant's case must exhibit a right free from doubt or reasonable dispute by showing either, first, a prior adjudication sustaining the patent after a *bona fide* and vigorous contest, or, second, a continuous public acquiescence of such character as to be the equivalent of an adjudication, or, third, by clear and satisfactory evidence that the patent is valid. *Hartford v. Western Mfg. Co.*, (1909) 172 Fed. 676.

**Limiting injunction to acts injurious to complainant.**—A preliminary injunction to restrain contributory infringement of patents covering a piano player by the sale to purchasers of such players of music rolls to be used therewith, in violation of the license contracts under which the instruments were sold by complainant, held properly granted, although the rolls made and sold by defendant were also adapted to be used with other instruments, where the injunction was carefully limited by its terms so as to prohibit only sales of rolls "intended to be used" in players covered by the patents in suit and sold subject to such restrictions. *Aolian Co. v. Harry H. Juelg Co.*, (C. C. A. 1907) 155 Fed. 119, *affirming* (1906) 145 Fed. 939.

**Nonuser of patent.**—Nonuser of a patent for an improvement in paper bag machines, in order to save the expense of changing or altering the old machines, will not justify a court of equity in withholding injunctive relief against infringement. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, (1908) 210 U. S. 405, 28 S. Ct. 748, 52 U. S. (L. ed.) 1122, *affirming* (1906) 150 Fed. 741, 80 C. C. A. 407.

The fact that no machine has ever been made and shown to work successfully under a patent does not prevent the owner of the patent, if it is valid, from restraining infringement of it. *Hoe v. Miehle Printing Press, etc., Co.*, (1905) 141 Fed. 112.

Where a patented device is obviously operative and useful, the fact that it has never been manufactured by the owner of the patent does not affect his right to maintain a suit for infringement. *U. S. Fastener Co. v. Bradley*, (1906) 149 Fed. 222, 79 C. C. A. 180, affirming 143 Fed. 523.

**Patent held merely to prevent business competition.**—Quære, whether a suit in equity may be maintained for an injunction to restrain infringement of a patent, as well as for an accounting, although the owner of the patent has never constructed a machine thereunder for practical use, and apparently does not intend to do so, but merely to hold the patent to prevent the use of the invention by competitors in business. *Eastern Paper Bag Co. v. Continental Paper Bag Co.*, (1905) 142 Fed. 479.

**Patent near expiration.**—Complainant filed a bill for infringement of a patent, praying for an injunction and for an accounting of profits and damages. The bill was filed the day prior to the expiration of the patent, and averred that during the six years next prior to the filing of the bill complainant had not made, used, nor sold his process, nor any part thereof, that he had obtained no financial advantage from his invention, nor had he sustained any actual damage during such period by the enjoyment of the invention by others. Held that, since the bill was sufficient to sustain an *ad interim* restraining order, and complainant had no adequate remedy at law, the bill was not demurrable because filed so short a time before the expiration of the patent that no motion for an injunction could have been regularly made. *Tompkins v. International Paper Co.*, (C. C. A. 1910) 183 Fed. 773.

**Conjoint use of expired and unexpired patents.**—Courts must refuse a preliminary injunction on affidavits against the conjoint use of two patents, one of which has expired because originally taken out both at home and abroad and its life has expired with the terms of the foreign patent, and the broader of which has not been adjudicated in the courts as to its features of invention. *National Phonograph Co. v. American Graphophone Co.*, (1905) 136 Fed. 231.

**Extent of infringement immaterial.**—The fact that a defendant, sued for infringement of a patent by making and selling the patented machine, has made and sold but one such machine, and that pending the suit the purchaser was licensed by complainant, does not deprive a court of equity of jurisdiction to award an injunction, unless it further appears clearly that there is no reason to apprehend the making by defendant of other infringing machines. *Johnson v. Foos Mfg. Co.*, (1906) 141 Fed. 73, 72 C. C. A. 105.

**Single sale.**—The sale of an infringing article to an agent of the owner of the patent, while it may not afford a basis for the recovery of damages or profits, constitutes an infringement, which entitles such owner to an injunction; and where two such sales are proved, made at different times from a stock on hand, the seller apparently supposing that the purchaser was buying in the regular

course of business, it is sufficient to support an inference that other similar sales were made, and to warrant a decree for an accounting, in the absence of any evidence to contradict or explain the transactions. *Badische Anilin, etc., Fabrik v. Klipstein*, (1903) 125 Fed. 543.

Where, on an application to punish defendant for contempt in violating an injunction restraining the sale of meters infringing complainants' patent, it appeared that but a single sale had been made by defendant since the injunction, and that was of a meter differing in form, if not in principle, from the one established by the decree as an infringement, and that complainant's object was to obtain an adjudication that the meter so sold was in fact an infringement, and such question could be fully litigated on the taking of the account, the motion to punish for contempt would be denied. *Westinghouse Electric, etc., Co. v. Sangamo Electric Co.*, (1904) 128 Fed. 747.

**Unfair conduct of complainant.**—Motions for preliminary injunctions restraining infringement of a patent for a milk can by a large number of users, based on a decision of the Circuit Court finding infringement by the manufacturer, must be denied where it appears that only a small number of the cans used by the defendants and claimed to infringe were of the pattern which was held to infringe by the court, and also that complainant had misrepresented the scope of the decision to defendants for the purpose of obtaining from them large license fees. *Ironclad Mfg. Co. v. Sugar Loaf Dairy Co.*, (1905) 140 Fed. 108.

**Threatened or continued infringement.**—Defendant bought an infringing machine, which it commenced using after suit brought, but with such alterations that it did not infringe. It denied the validity of the patent, however, and throughout the suit asserted its right to use the machine in the manner its construction contemplated, and could have put it in shape for such use in a short time and with little expense. Held that complainant was entitled to an injunction notwithstanding the fact that there had been no actual infringement. *Westinghouse Mach. Co. v. Press Pub. Co.*, (1904) 127 Fed. 822.

Preparations or threats to infringe a patent shown by *ex parte* affidavits only are not sufficient to warrant the granting of a preliminary injunction. *American Graphophone Co. v. Leeds, etc., Co.*, (1907) 155 Fed. 427.

A court of equity may enjoin a threatened infringement of a patent, although no act of infringement had been committed when the bill was filed. *Tindel-Morris Co. v. Chester Forging, etc., Co.*, (1908) 163 Fed. 304.

A federal court of equity may entertain a suit to enjoin infringement of a patent where it is threatened, although no act of infringement had been completed when the bill was filed. *Chester Forging, etc., Co. v. Tindel-Morris Co.*, (C. C. A. 1908) 165 Fed. 899, affirming 163 Fed. 304.

**Ceasing infringement and promising to abstain.**—That the defendant in a suit for infringement had ceased infringement before

the suit was brought does not deprive equity of jurisdiction, where the defendant denies the validity of the patent, and does not set up that he has abandoned the manufacture and sale of the alleged infringing article, and does not intend further infringement. *Cayuta Wheel, etc., Co. v. Kennedy Valve Mfg. Co.*, (1903) 127 Fed. 355.

Where it is not shown that a complainant has suffered or is threatened with any serious injury from the alleged infringement of his patent by defendant, and defendant denies infringement since the commencement of the suit, and states that he abandoned the manufacture and sale of the alleged infringing article, and does not intend to and will not further infringe, such irreparable injury does not appear as to require the granting of a preliminary injunction. The effect of such injunction in deterring others from infringement cannot be considered on such an application. *Silver v. J. P. Eustis Mfg. Co.*, (1904) 130 Fed. 348.

The fact that a defendant shown to have used an infringing device in the past disclaims any intention of using it in the future does not affect complainant's right to an injunction. *Brookfield v. Elmer Glassworks*, (1904) 132 Fed. 312.

A preliminary injunction to restrain infringement of a patent will not be issued, where defendant admits the use of the alleged infringing device, without knowledge of complainant's rights, but alleges that such use has ceased, and the court is assured that it will not be resumed. *General Electric Co. v. Pittsburg-Buffalo Co.*, (1906) 144 Fed. 439.

Where an answer in a suit in equity for infringement of a patent denies the validity of the patent, and asserts the right of defendant to make and vend the machine covered thereby, and also by implication admits an allegation of the bill that it has on hand and is offering for sale a large number of infringing machines, a mere averment that it ceased selling an alleged infringing machine prior to the commencement of the suit, and has no intention of using or selling any machines embodying the features of the patent, not supported by any clear proof, is not such a disclaimer as will deprive the complainant of the right to an injunction. *Deere, etc., Co. v. Dowagiac Mfg. Co.*, (C. C. A. 1907) 153 Fed. 177.

Where a defendant had ceased infringement of a patent before suit brought, which fact complainant had full opportunity to learn, and the court is satisfied that defendant acted in good faith, and that no further infringement is reasonably to be apprehended, it may properly refuse an injunction and dismiss the bill. *Kennicott Water Softener Co. v. Bain*, (C. C. A. 1911) 185 Fed. 520.

**More use of infringing device.**—A preliminary injunction should not be granted where the defendant in a suit for infringement is merely a user of the alleged infringing device, and it is not shown that irreparable injury or any special injury will result to complainant from its continued use, and where the preliminary proofs on a defense of *res judicata* pleaded leave the question in

serious doubt. *Jefferson Electric Light, etc., Co. v. Westinghouse Electric, etc., Co.*, (1908) 184 Fed. 892, 87 C. C. A. 189.

**Proof of validity of patent and infringement.**—Unless a patent is supported by public acquiescence, or prior adjudication, or some other peculiar condition, the complainant's rights must be free from doubt to entitle him to a preliminary injunction. *Parsons Non-Skid Co. v. Victor Tire Grip Co.*, (1908) 164 Fed. 617.

In suits for infringement the rule is that the patent must be supported by public acquiescence or prior adjudication to entitle complainant to a preliminary injunction, unless there are some peculiar conditions which call for the exercise of the court's discretion in granting the injunction. It is also incumbent on complainant to show that the threatened injury will be irreparable. *Silver v. J. P. Eustis Mfg. Co.*, (1904) 130 Fed. 348.

A court is not required to grant a preliminary injunction against the infringement of a patent because its validity has been sustained by a decision in another circuit, but is at liberty to exercise its independent judgment on the proofs, and will the more readily do so where it appears that before the hearing in the prior suit the defendant therein had ceased to have any interest in defending it. *Diamond Match Co. v. Union Match Co.*, (1904) 129 Fed. 602.

**Effect of decree in prior litigation.**—The presumption in favor of the validity of a patent created by a decision of the Circuit Court of Appeals sustaining it cannot be overcome on a motion for a preliminary injunction in a subsequent case by *ex parte* affidavits relating to matters occurring several years previously. *American Graphophone Co. v. International Retord Co.*, (1907) 155 Fed. 427.

**Validity of patent adjudicated in another circuit.**—Where a patent has been held valid and infringed by a court of another circuit after a contested hearing, it is the practice to grant a preliminary injunction on such decision unless new evidence is produced which is of such character that it may fairly be supposed that it would have changed the decision if it had been before the court in the prior suit. *Brill v. Peckham Mfg. Co.*, (1904) 129 Fed. 139.

**Presumption as to validity of patent.**—The fact alone that a patent is unadjudicated will not defeat the right to a preliminary injunction against its infringement; but unless it also appears from common knowledge, or from the prior art shown, that there is reasonable ground for doubt as to its validity, the presumption arising from its issuance by the Patent Office is sufficient to warrant injunctive relief against an infringer. *Palmer v. Wilcox Mfg. Co.*, (1905) 141 Fed. 376.

**Doubt as to validity of patent or infringement.**—Where the complainant's right, on the proofs, is doubtful, and there is a substantial controversy between the parties as to the validity of a patent, which cannot well be determined without a full hearing, the court will not grant a preliminary injunction which would work great financial injury to a defendant able to respond in damages if in-



fringement should be found on the final hearing. *Diamond Match Co. v. Union Match Co.*, (1904) 129 Fed. 602.

An application for a preliminary injunction against infringement of the Custodis patent, No. 512,504, for a chimney, denied in view of the fact that the patent had not been adjudicated, and that the showing made raised a serious question as to its validity. *Alphons Custodis Chimney Constr. Co. v. Heinicke*, (1904) 135 Fed. 552.

Infringement of the Hoggson patent, No. 520,429, for an electric battery, by a battery in which the cells are not connected by the spring clamp specified in the patent, and which is an important, if not an essential, feature of the invention, nor by any equivalent therefor, is too doubtful to warrant the granting of a preliminary injunction. *American Electrical Novelty, etc., Co. v. Stanley*, (C. C. A. 1905) 142 Fed. 754, reversing 140 Fed. 444.

A preliminary injunction should not be granted to restrain an alleged infringement of a paper patent issued more than sixteen years before suit, the validity of which has not been established by adjudication or public acquiescence, and where there is a strong showing of anticipation. *Standard Roller Bearing Co. v. Hess-Bright Mfg. Co.*, (1903) 145 Fed. 356.

**Previous adjudication of validity.**—Where the validity of a patent has been sustained after protracted litigation, the only question open on motion for a preliminary injunction in a subsequent suit against another defendant is the question of infringement, unless evidence of invalidity is introduced of such conclusive character that, if introduced in the former case, it would probably have led to a different conclusion. *Thomson-Houston Electric Co. v. Sterling-Meaker Co.*, (1906) 140 Fed. 554.

The fact that a patent has not been adjudicated is not sufficient ground for refusing a preliminary injunction against its infringement, where that is clear, unless there is a substantial question as to its validity. *Lambert Snyder Vibrator Co. v. Marvel Vibrator Co.*, (1905) 138 Fed. 82.

Where the validity of a reissue patent has been adjudged by the Circuit Court of Appeals, a defense of laches in applying for the reissue, set up by a defendant in a subsequent suit for its infringement, is not sufficient ground for refusing a preliminary injunction, where infringement is not denied. *Thomson-Houston Electric Co. v. International Trolley Controller Co.*, (1905) 141 Fed. 128.

Where a patent has been sustained by a Circuit Court of Appeals, the only question open on an application for a preliminary injunction in a subsequent suit in the same circuit is that of infringement, unless new evidence of invalidity of a conclusive character is produced. *Cohen v. Stephenson*, (1906) 142 Fed. 467, 73 C. C. A. 583.

A preliminary injunction should not be granted to restrain infringement of a patent which has not been adjudicated, where the proofs leave the question of its validity in doubt, especially when it appears that defend-

ants are financially responsible. *Bristol Oil, etc., Co. v. Beacom*, (1905) 143 Fed. 550.

Where a patent has been sustained on a motion for a preliminary injunction, and the order affirmed on appeal, it comes before another court on a similar application as a sustained patent, and the ruling may properly be followed, in the absence of any contrary decision, unless there is some new question raised, and so far sustained as to make a *prima facie* defense against validity. *Thomson-Houston Electric Co. v. Jeffrey Mfg. Co.*, (1897) 144 Fed. 130.

On an application for a preliminary injunction to restrain infringement of a patent, by a defendant over whom complainant prevailed in interference proceedings in the Patent Office and in the Supreme Court of the District of Columbia on appeal therefrom, the judgment of such court creates a presumption in complainant's favor as to the question of priority of invention, and, where that is the only question in issue, entitles him to the injunction, unless overcome by proof establishing defendant's contention beyond a reasonable doubt. *Laas v. Scott*, (1906) 145 Fed. 195.

The owner of a patent, who has obtained an interlocutory decree adjudging its validity and infringement, is not required to wait until it has become final before bringing suit against the defendant for infringement by the same service in another district; nor is he precluded, by the fact that evidence has been taken in the second suit, from pleading therein the final decree when obtained in the first suit as an adjudication. *Bredin v. National Metal Weatherstrip Co.*, (1906) 147 Fed. 741.

Where a bill for infringement of patents alleged that defendant had obtained the parts of the patented machines from complainant by fraud, and was engaged in putting them together with the intent to use the machines in infringement of the patents, and the proofs on a motion for a preliminary injunction clearly sustained such allegation, the fact that the validity of the patents had not been adjudicated did not require the court to refuse the injunction. *Chester Forging, etc., Co. v. Tindel-Morris Co.*, (C. C. A. 1908) 165 Fed. 809, affirming 163 Fed. 304.

A preliminary injunction against an alleged infringer of an unadjudicated patent should not be granted where the question of infringement is concededly one of fact as to the operation of defendant's device, and the showing is entirely by *ex parte* affidavits, which are conflicting. *Wright Co. v. Herring-Curtiss Co.*, (C. C. A. 1910) 180 Fed. 110, reversing 177 Fed. 257.

Where there has been a prior adjudication sustaining a patent and the infringement thereof in the same or in another circuit, where its validity was contested on full proofs, a Circuit Court should, on motion for preliminary injunction, sustain the patent, and leave the determination of its validity to the final hearing. *Interurban R., etc., Co. v. Westinghouse Electric, etc., Co.*, (C. C. A. 1911) 186 Fed. 166.

Prior adjudication sustaining a patent held sufficient to justify the granting of a pre-

liminary injunction against its infringement. Walker Patent Pivoted Bin Co. v. Bernard Gloekler Co., (1909) 188 Fed. 435.

**Decision of Patent Office as adjudication of validity.**—Ordinarily a decision of the Patent Office in interference proceedings, awarding a patent to one of two applicants, does not constitute a prior adjudication of the validity of the patent, which will warrant the granting of a preliminary injunction to restrain its infringement even against the unsuccessful applicant, nor estop him from contesting its validity, except on the ground of his own priority of invention. Turner Brass Works v. Appliance Mfg. Co., (1908) 164 Fed. 195.

The fact that an applicant for a patent was successful in interference proceedings in the Patent Office is presumptive evidence of the validity of his patent, on a motion for a preliminary injunction, as against the other party to the proceedings, only so far as concerns the question of priority of invention. Perfection Cooler Co. v. Rose Mfg. Co., (1909) 175 Fed. 120.

**Extent of injury by granting or refusing injunction.**—Where the complainant has made a *prima facie* case for injunction against infringement, the right is not to be denied on the ground that the injunction would be inconvenient to defendant or seriously interfere with the success of his business. Thomson-Houston Electric Co. v. Jeffrey Mfg. Co., (1897) 144 Fed. 130.

When special circumstances are known which would render the granting of an injunction to restrain the infringement of a patent proper, but it also appears that the granting of the injunction would cause irreparable injury to defendants if they should finally succeed in the suit, the better practice is to permit them to give security to pay any damages which complainant may recover, and, on this being given, to refuse the injunction. Karfiol v. Rothner, (1907) 151 Fed. 777.

A preliminary injunction will not be granted to restrain alleged infringement of an unadjudicated patent of recent date, where the defenses involve issues of fact, and where complainant cannot in any event be subjected to more than a small amount of damages before the case can be heard on the merits. Meyers v. Skinner, (1910) 179 Fed. 860.

**Determining validity of patent.**—It is the general rule that a preliminary injunction will not be granted to restrain the alleged infringement of patents which have not been adjudicated, and in which there has been no such public acquiescence as to establish their validity, unless special circumstances are shown which would render it necessary to protect complainant's rights. Karfiol v. Rothner, (1907) 151 Fed. 777.

A preliminary injunction against infringement of a patent will usually be denied, where its validity is denied and has not been established by prior adjudication or by long acquiescence. Earll v. Rochester, etc., R. Co., (1907) 167 Fed. 241.

Where a patent has been adjudged valid and infringed by the Circuit Court of Appeals, a Circuit Court within the circuit may

properly grant a preliminary injunction against infringement by another on a showing that the two alleged infringing devices are not materially different. Consolidated Rubber Tire Co. v. Diamond Rubber Co., (C. C. A. 1907) 157 Fed. 677.

The owner of a patent, who has obtained an interlocutory decree adjudging its validity and infringement, is not required to wait until it has become final before bringing suit against the defendant for infringement by the same device in another district; nor is he precluded, by the fact that evidence has been taken in the second suit, from pleading therein in the final decree when obtained in the first suit as an adjudication. National Metal Weather Strip Co. v. Bredin, (C. C. A. 1907) 157 Fed. 1003, *affirming* (1906) 147 Fed. 741.

**Doubtful infringement.**—Where, in a proceeding for contempt against a defendant for infringing a patent in violation of the court's injunction, the question whether the article sold by defendant is an infringement is in dispute and doubtful, it will not be determined on *ex parte* affidavits, but only after a regular and orderly hearing. *In re Hennis*, (1903) 125 Fed. 655.

The complainant in a suit for infringement of a patent is not entitled to a preliminary injunction where, on the showing made, there is a substantial doubt of infringement. Brookfield v. Elmer Glassworks, (1904) 132 Fed. 312.

The showing on a motion for a preliminary injunction to restrain infringement, of a number of unadjudicated patents relating to electric railway signals, held to present too many elements of doubt to warrant the granting of an injunction. Hall Signal Co. v. General R. Signal Co., (C. C. A. 1907) 153 Fed. 907.

A preliminary injunction against infringement of the Sachs patent, No. 660,341, for an electric safety fuse, denied, where on the showing made there was a serious question whether the article made and sold by defendants embodied the invention of the patent and it also appeared that similar articles were generally made by others and for sale in the open market, and that the injunction, if granted, would cause serious loss to defendants. Johns-Pratt Co. v. Sachs Co., (1907) 155 Fed. 129.

A motion for a preliminary injunction against infringement of a patent denied where the patent was new and unadjudicated and not a pioneer, and infringement was denied and in doubt on the showing made. Sharp v. Bellingier, (1907) 155 Fed. 130.

**Previous adjudication of noninfringement.**—An application to a Circuit Court for a preliminary injunction to restrain infringement of a patent will not be granted, where it has been adjudged by a Circuit Court of Appeals of another circuit, after full consideration and upon substantially the same record, that defendant's device does not infringe. If the record on such application contains important new matter, the court will exercise its own judgment on the whole record. Calculagraph Co. v. Automatic Time Stamp Co., (1906) 149 Fed. 436.

**Acquiescence in infringement** may debar the owner of a patent from the right to a preliminary injunction, but will not prevent the granting on final hearing of such relief as may be equitable. *Empire Cream Separator Co. v. Sears*, (1907) 157 Fed. 238.

**Right to preliminary injunction involving issue in case.**—A preliminary injunction against infringement of a patent will not be granted where it involves the determination by the court on affidavits of the very issue in the case; nor will it be granted in a doubtful case on the theory that defendant, if not an infringer, will not be injured thereby. *Motion Picture Patents Co. v. New York Motion Picture Co.*, (1909) 174 Fed. 51.

**Infringement dependent on identity of compounds.**—A patentee of a composition is not at liberty to prove that a part of the compound described in his claim for a patent is not essential or material to its operation; and, therefore, a temporary restraining order granted on a bill to enjoin an infringement of a patent for a composition for use as a furniture polish is improperly granted, where it is shown in the bill that the defendant's alleged infringing composition contains no coal oil, while that substance is one of the ingredients of complainant's composition as described in his specification and claims, and an essential ingredient according to the statements of the primary examiner in a preliminary rejection of complainant's application, though the bill alleges that the coal oil is no essential part of the complainant's invention, not affecting the quality of the composition as a polishing fluid, but being intended to thin a coloring ingredient. *Lane v. Levi*, (1903) 21 App. Cas. (D. C.) 168.

**Ability of defendant to respond in damages.**—A preliminary injunction against infringement will not be granted when defendant is responsible, and a substantial doubt of his infringement exists, or when the complainant's right is doubtful. *Hallock v. Babcock Mfg. Co.*, (1903) 124 Fed. 228.

Where defendant had been manufacturing, selling, and advertising the motor claimed to be an infringement of complainant's motor, with the constant claim of right to do so, for six years, and had built up an established business, having expended large sums of money therein, and was amply able to respond in damages for any injury to complainant, whose patent was about to expire, a preliminary injunction was not justified. *Thomson-Houston Electric Co. v. Wagner Electric Mfg. Co.*, (1904) 130 Fed. 802.

**Scope and extent of injunction.**—An injunction against infringement of a patent should not be made so broad as to prevent the defendant from making and selling a device which it had added to that of the patent and designed to be used with it. *Thomson-Houston Electric Co. v. Holland*, (1906) 143 Fed. 903.

**Security in place of injunction.**—Where a patent in suit has only a very short time to run, and the interruption to defendant's business may be seriously affected by the granting of a preliminary injunction, it may be properly refused, on the giving of a suffi-

cient bond by defendant. *Interurban R., etc., Co. v. Westinghouse Electric, etc., Mfg. Co.*, (C. C. A. 1911) 186 Fed. 166.

**Conditions of bond.**—The conditions of a bond to be given on the granting of a preliminary injunction, the necessary effect of which would be to stop a business then being established, determined. *Commercial Acetylene Co. v. Acme Acetylene Appliance Co.*, (1911) 188 Fed. 89.

**Dissolution for improper conduct of complainant.**—The wrongful use by a complainant of a preliminary injunction against infringement of a patent held to afford ground for its dissolution. *Meyers v. Skinner*, (1911) 186 Fed. 347.

**Damages to defendant on dissolution of injunction.**—Where, on application for preliminary injunction, complainant fails to disclose to the court that one of the patents sued on has expired, it is sufficient ground on dissolution for giving actual damages to the defendant for injuries to its business. *National Phonograph Co. v. American Graphophone Co.*, (1905) 136 Fed. 231.

#### V. DECREE AND AWARD.

**Estimated advantage gained over other modes.**—On an accounting for infringement of patents for a process of making prism plate glass and a machine for practicing such process, the measure of defendant's liability for profits is the saving or advantage secured by the use of the infringing process and machines. To ascertain such saving comparison is to be made with other processes open to defendant which were capable of producing an article of similar character and value if there were such, the measure of liability being the saving in the cost of manufacture by the use of the infringing process, and the amount depending on the quantity made which was fit for market, without regard to what was actually done with it. If there was no other process open to defendant's use which would produce an article of equal value in the market, the difference in the market value of the article as made by the patented process and that made by that nearest in character may be considered, and may be taken as the measure of liability, where the cost of manufacture by the two processes is substantially the same. *Pressed Prism Glass Co. v. Continuous Glass Prism Co.*, (1910) 181 Fed. 151.

Where a patent for certain improvements in machines for making paper bags was found to be infringed by machines made and used, but not sold, by defendant, and it appears that the product of such machines has no superiority which gives it an enhanced price over that of noninfringing machines, the only profits recoverable are the savings in the cost of construction and maintenance of the machines, or in the cost of the product due to the use of the infringing devices. *Eastern Paper Bag Co. v. Continental Paper Bag Co.*, (1905) 142 Fed. 517.

**Profits that complainant might have made.**—On an accounting for infringement of a patent, complainant is entitled to recover the

amount of the profits he would have realized, if he had made the sales which were made by defendant, where he was prepared to supply the demand, although it may exceed the profits made by defendant. *Westinghouse v. New York Air Brake Co.*, (1904) 131 Fed. 607.

**Articles supplied to customers without charge.**—On an accounting, in a suit for infringement of a patent for a machine, complainant is not entitled to an allowance for profits on parts furnished by defendants to replace those of machines previously sold, and for which it does not appear that any charge was made. *Paxton v. Brinton*, (1903) 126 Fed. 541.

**Profits actually realized although business unprofitable.**—A corporation organized and owned entirely by persons who joined in the sale and assignment of a patent to complainant, and which subsequently engaged in the manufacture and sale of an infringing article, cannot avoid an accounting for profits made on the ground that by reason of its having also made and sold other articles the cost of the infringing articles cannot be definitely ascertained, nor because it lost money on its entire business, where it does not appear that it lost on the infringement. In such case the cost of the article as made by complainant where shown may be made the basis for the accounting. *Force v. Sawyer-Boss Mfg. Co.*, (1904) 131 Fed. 884.

**Manufacture of machines for maker of infringing articles.**—On an accounting for damages and profits for infringement of a patent for a manufactured article, defendants cannot be required to account for the profits on machines manufactured and sold by them, to be used by others in making the infringing article, since, while they may be liable as contributory infringers on account of such sales, the infringement itself consisted in the manufacture and sale of the article made on such machines by the purchasers, and the damages recoverable therefor cannot be measured by the profits made on the machines. *Diamond Drill, etc., Co. v. Kelley*, (1904) 131 Fed. 89.

**Entire device not covered by patent.**—In determining the profits and damages recoverable for infringement of a patent for a device which constitutes only one feature of the machine or structure sold by defendant, it is the settled rule that the burden of proof rests on the complainant to separate or apportion defendant's profits between the patented and unpatented features, and by evidence which is reliable and tangible, or he must show by equally satisfactory evidence that profits and damages should be calculated on the whole machine, for the reason that its entire value as a marketable article is properly and legally attributable to the patented feature. *Westinghouse v. New York Air Brake Co.*, (C. C. A. 1905) 140 Fed. 545.

**Patent merely an improvement.**—Where it appears that the improvements covered by complainant's patent constituted the chief value of the infringing articles sold by defendant, and that without them no sales would probably have been made, complainant is entitled to recover the entire profits real-

ized from the sale. *Force v. Sawyer-Boss Mfg. Co.*, (1904) 131 Fed. 884.

Where the devices covered by a patent were mere improvements in the line of simplicity of construction and consequent saving in cost of manufacture, and there is no satisfactory evidence that they rendered the machine as a whole more salable, an infringer is only liable for profits realized from the use of the patented parts which were new and wrongfully appropriated by him, and the complainant must furnish evidence from which the profits may be thus apportioned. *Force v. Sawyer-Boss Mfg. Co.*, (C. C. A. 1906) 143 Fed. 804, reversing in part (1904) 131 Fed. 884.

The only invention disclosed by the Ottogy patent, No. 795,059, for a street flushing cart, is in the combination with other elements, all of which are old, of a nozzle of such construction and position as to throw the water in a flat sheet nearly parallel with the surface of the street in a forward and lateral direction so as to loosen up the dirt and force it away to the sides of the street, and on an accounting an infringer is liable only for the profits realized from the use of such improved nozzle, over what he might have made by the use of other nozzles that did not infringe. *American Street Flushing Mach. Co. v. St. Louis Street Flushing Mach. Co.*, (1910) 180 Fed. 759.

**Improvement constituting entire commercial value.**—Owner of a patent held entitled to recover as profits from an infringer the entire profits made by defendant on machines sold embodying the patented feature. *Maimin v. Union Special Mach. Co.*, (C. C. A. 1911) 187 Fed. 123, affirming 185 Fed. 120.

**Liability not limited to profits on particular element.**—The liability of an infringer who has appropriated the combination under the Hoyt patent, No. 446,230, for a grain drill, as a whole is not limited to the profit made on any particular element, but extends to the profit made on the entire machine. *Brennan v. Dowagiac Mfg. Co.*, (C. C. A. 1908) 162 Fed. 472.

The Murray patent, No. 442,531, for a store service ladder, is for an entire new article, and the patentee is entitled to recover from an infringer the entire net profits made by the latter on the infringing ladders in the absence of proof that some portion of such profits was the result of something else than the patented device. *Orr, etc., Hardware Co. v. Murray*, (C. C. A. 1908) 163 Fed. 54.

**Profits distinguished from damages.**—On an accounting for infringement of a patent the defendant's profits and complainant's damages are distinct from and independent of each other and are governed by different principles, and one cannot be said to be the measure of the other, nor the allowance of one to preclude recovery of the other. *Beach v. Hatch*, (1907) 153 Fed. 763.

**How computed.**—On an accounting as to profits, made by an infringer of a patent, covering a part of a machine which had practically superseded all devices to produce a similar result previously in use, it was proper, in determining the cost of manufacture, to

compare the cost of making the machine with the patented device with that of making the one which was the nearest approach to it in the market and in common use. *Mast v. Superior Drill Co.*, (C. C. A. 1907) 154 Fed. 45.

**Award of arbitrary amount.**—A court has no power to award an arbitrary sum as profits or damages recoverable for the infringement of a patent, not based on any finding made by the master on the accounting nor upon the evidence. *Mast v. Superior Drill Co.*, (C. C. A. 1907) 154 Fed. 45.

**Deduction of losses.**—On an accounting for profits for infringement of a patent, the infringer is not entitled to deduct from the profits made during a certain period of time a loss subsequently incurred in a separate transaction; on such accounting only losses occurring concurrently with the making of profits and directly resulting from the particular transactions on which the profits are allowed may be considered in diminution of profits. *Canda v. Michigan Malleable Iron Co.*, (C. C. A. 1907) 152 Fed. 178.

**Saving from use of infringing device.**—The owner of a patent may recover from the user of an infringing device as profits the amount saved by defendant by the substitution of such device for one previously used, although the saving resulted from the fact that the devices previously used were frequently broken through accident or the carelessness or miscalculation of employees or others having to do with their use, while the patented device was not subject to such breakage, where the accident and carelessness are recognized to be appreciable sources of danger to employers in like case, and where there is evidence from which the amount of the saving can be estimated with reasonable accuracy. *Doten v. Boston*, (C. C. A. 1905) 138 Fed. 406.

**Assignment of patent pending suit.**—Where, in a suit for infringement of letters patent, an injunction was granted, and the complainant assigned its entire interest in the patent and took from the assignees a non-assignable license, it could not, in the suit as it then stood with respect to the parties, recover profits or damages from an infringement occurring after the execution of the assignment. *Goss Printing Press Co. v. Scott*, (1905) 134 Fed. 880.

**Effect of decree for defendant.**—A final decree of a federal Circuit Court in favor of defendant in a patent infringement suit entitles him to continue the business of manufacturing and selling throughout the United States the alleged infringing article, free from all interference by the complainant by virtue of the patent alleged to have been infringed. *Kessler v. Eldred*, (1907) 206 U. S. 285, 27 S. Ct. 611, 51 U. S. (L. ed.) 1065.

**Effect of decree as res judicata.**—Where a suit for infringement against a dealer in the alleged infringing article was defended by the manufacturer of such article at his own cost, and on appeal it was adjudged that complainant was not the original inventor, and that his patent was void, such adjudication is a bar to a subsequent suit directly against the manufacturer on the same patent. *Sacks v. Kupferle*, (1904) 127 Fed. 569.

**Reference to ascertain damages and profits.**—*Seem* that, on a reference for an accounting by defendant under a decree finding infringement of a patent, the defendant is the only "party accounting" within the meaning of equity rule 79, and complainant cannot be required to bring in an account as therein provided. *Goss Printing Press Co. v. Scott*, (1906) 148 Fed. 393.

Where, on a reference for an accounting as to damages for infringement of a patent, the master by his rulings limits the scope of the inquiry, the matter may properly be presented to the court for decision by a motion for instructions to the master. *Walker Patent Pivoted Bin Co. v. Miller*, (1906) 146 Fed. 249.

Where in a suit for infringement the validity of a patent has been sustained, the general principles and scope of the invention determined, and certain structures made by defendants held to infringe, on an accounting for damages and profits the complainant is not limited to an inquiry as to the number of such particular constructions made and sold by defendants, but, except as concluded by the decree, and provided the differences be not so great and the question of infringement in such doubt that the complainant should be put to a supplemental, if not a new, bill, the whole question of infringement and its extent are generally open for consideration by the master. *Walker Patent Pivoted Bin Co. v. Miller*, (1906) 146 Fed. 249.

Where it is alleged and proved by defendant that the patented machine was not marked as required by the statute, the complainant will be confined in the accounting to infringement after the bill was filed. No other notice being shown, the bill itself is notice. *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.*, (1908) 164 Fed. 47.

**Established license fee as liquidated damages.**—Damages for infringement of a patent can be considered as liquidated where an established license fee renders such damages easily determinable, but an infringer is liable for interest on such damages only from the dates when he incurred the obligation to pay damages, and not from the date when the license fee became payable. *Diamond Stone Sawing Mach. Co. v. Brown*, (1907) 155 Fed. 753.

**Damages for partial infringement.**—Where a part of a machine made and sold by defendant is found to infringe complainant's patent, the court will not undertake to determine, in reduction of damages, the collateral question whether or not such part also infringes another patent, the validity and scope of which are not directly put in issue. *Brinton v. Paxton*, (1904) 134 Fed. 78, 67 C. C. A. 204.

**Interest on damages.**—Interest on damages awarded for infringement by final decree allowed, under the circumstances of the case, from the date of the master's report, by which the damages as finally awarded were practically liquidated. *Westinghouse v. New York Air Brake Co.*, (1904) 133 Fed. 936.

**Assignment of patent pending suit.**—A court of equity, which has acquired jurisdiction of a suit by the owner of a patent to enjoin its infringement and to recover dam-

ages for past infringement, does not lose such jurisdiction because, pending the suit, the patent is assigned to another, who is brought in by a supplemental bill under equity rule 57, and may proceed, not only to grant an injunction, but to award damages to both the original complainant and his assignee for infringement proved during the time of their respective ownership. *Leadam v. Ringgold*, (1905) 140 Fed. 811.

**Nominal damages.**—A complainant is entitled to recover only nominal damages on account of the competition of defendant by the sale of an infringing article, where on the accounting it does not furnish evidence showing the amount of its loss on that account, or even the profit it made on the patented article when sold. *Force v. Sawyer-Boss Mfg. Co.*, (C. C. A. 1906) 143 Fed. 894, *reversing* (1904) 131 Fed. 884.

**Both profits and damages are recoverable** in a suit for infringement in a proper case. *Fox v. Knickerbocker Engraving Co.*, (1905) 140 Fed. 714.

**Grounds for increasing damages.**—A court is warranted in exercising the discretionary power to increase the damages found to have been sustained by a complainant by the infringement of a patent, where the infringement was palpable, and defendant persisted in it after full knowledge of the patent and an opportunity to settle, and has shown a determination to litigate to the end, and to cause all the delay and expense possible. *National Folding Box, etc., Co. v. Robertson*, (1903) 125 Fed. 524.

**Treble damages.**—The conduct of defendants in a suit in equity for infringement of a patent held to have been such, in deliberately and intentionally infringing, in purposely protracting the litigation, and in transferring the property of the corporation, which was the principal defendant, for the purpose of rendering a recovery nugatory, as to warrant the court in imposing triple damages under this section. *Weston Electrical Instrument Co. v. Empire Electrical Instrument Co.*, (1907) 155 Fed. 301.

Where a defendant knowingly infringed a patent and continued such infringement after suit brought, taking business away from licensees by cutting prices, the case is a proper one for the court in the exercise of its discretion, to award the complainant treble damages. *Fox v. Knickerbocker Engraving Co.*, (1908) 158 Fed. 422.

**Award to joint owners.**—In a suit by joint owners of a patent for its infringement, profits cannot be recovered which accrued from infringements prior to the date of the joint ownership, and when the patent was the sole property of one of the complainants. *Canda v. Michigan Malleable Iron Co.*, (C. C. A. 1907) 152 Fed. 178.

## VI. COSTS.

**Costs on award of nominal damages.**—Where, on an accounting in an infringement suit, complainant is awarded only nominal damages, it may properly be taxed with all

the costs of the accounting, including the hearing on exceptions to the master's report. *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.*, (C. C. A. 1910) 183 Fed. 314.

The general rule is that, where a complainant recovers only nominal damages and profits on an accounting for infringement, the costs of the reference are taxed against him; but, like other matters of costs in suits in equity, the rule is subject to modification in a particular case, in the discretion of the court, as may be equitable under the circumstances. *Kansas City Hay Press Co. v. Devol*, (1904) 127 Fed. 363.

**Joint infringers.**—In a suit against joint wrongdoers, it is only in rare and exceptional cases that the court will exercise its discretion to relieve one from full liability for the costs. *Vrooman v. Penhollow*, (C. C. A. 1911) 186 Fed. 495, *denying rehearing and modifying* (1910) 179 Fed. 296, 102 C. C. A. 484.

**Decree against defendant by consent.**—Where defendant in a suit for infringement, before any testimony has been taken, offers before the referee to consent to a decree as prayed in the bill, and his counsel makes no further appearance, no costs will be taxed against him for the subsequent taking of testimony, nor for the printing of the record, both of which the offer rendered unnecessary. *Brunswick-Balke-Collender Co. v. Klump*, (1904) 131 Fed. 93.

## VII. LIMITATIONS AND LACHES.

**Mere delay.**—A demurrer to a bill for infringement on the ground of laches cannot be sustained, where the only facts to support it appearing from the bill are that the suit was not commenced until a short time before the patent expired and that it had previously been sustained. *Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co.*, (1904) 130 Fed. 558.

**Delay amounting to acquiescence in infringement.**—Where a patentee, with knowledge of a device made by defendant, made no claim of infringement for five years, he will be held estopped thereafter to place a different construction on his patent, just before its expiration, for the purpose of making out a case of infringement. *McGill v. Whitehead, etc., Co.*, (1905) 137 Fed. 97.

A device relating to automatic music-playing instruments was used generally by manufacturers of such instruments for more than twelve years after the issuance of a patent therefor without notice or objection from the owners of the patent, and in many cases without knowledge of it on the part of the users, and during such time large capital was invested in the business, and instruments embodying the device aggregating several millions of dollars in value were sold. Complainant, which was one of the manufacturers so using the device without right under the patent, became the owner of the patent some five years after it was issued, and continued the use of the device without marking the same patented or giving any notice of its alleged exclusive right to its competitors in business.

Held that it was estopped by its laches from maintaining a suit for infringement against another, who, in the meantime, had established the manufacture of instruments in which the device was used without knowledge of the patent. *Wilcox, etc., Co. v. Farrand Organ Co.*, (1905) 139 Fed. 46.

Unexcused and unexplained delay in bringing suit for infringement of a patent for eleven or twelve years after notice of such infringement, and when in the meantime the business of the alleged infringer had been transferred to another, constitutes acquiescence in the infringement, if any, or culpable laches, and estops the complainant from relief in equity. *National Cash Register Co. v. Union Computing Mach. Co.*, (1906) 143 Fed. 342.

A bill to restrain the infringement of a patent was verified June 27, 1906, and was accompanied by a motion for a preliminary injunction returnable July 12th. The bill was filed June 28, 1906, and the subpoena served July 29th following. The patent was dated July 9, 1889, and expired July 9, 1906. The bill did not fix the date of the alleged infringement, beyond the allegation that it occurred within six years prior to the filing of the bill, complainant knowing at the time the bill was filed that it could not be brought to the attention of the court in time to obtain injunctive relief; and the only proffered excuse for complainant's laches was that there was no appointed sitting of the court at which complainant could be heard until three days after the patent expired. Held that, the sole practical purpose of the bill being to collect damages, it would be dismissed for laches. *Beid-Archer Co. v. North American Chemical, etc., Co.*, (1906) 147 Fed. 746.

Defendants obtained a patent and entered into an arrangement with complainants by which the latter, as well as defendants, manu-

factured under it for several years, and then complainants purchased a prior patent for a similar article. After the lapse of two years more, and within less than a year prior to the expiration of their patent, complainants brought suit against defendants for infringement. Held that, the delay having been with full knowledge of defendants' device, they were barred by laches from maintaining such suit. *Germer Stove Co. v. Twentieth Century Heating, etc., Co.*, (1907) 157 Fed. 842.

**Long unexplained delay.**—An unexplained delay of twelve years after alleged infringement was commenced before bringing suit constitutes such laches as precludes the recovery of profits or damages. *Safety Car Heating, etc., Co. v. Consolidated Car Heating Co.*, (C. C. A. 1909) 174 Fed. 658, *affirming* (1908) 160 Fed. 476.

**Pendency of other suits.**—The owner of a patent is not subject to a plea of estoppel, laches, or implied license because of delay in bringing suit against an infringer during the pendency of a test suit in which the validity of the patent was involved. *Hutter v. Koscherak*, (1905) 137 Fed. 92.

The owner of a patent is not barred by laches from maintaining a suit in equity for its infringement because of a delay of six years, in bringing such suit after the alleged infringement commences, where it appears that during such time another suit was pending for infringement by a machine substantially the same as defendant's. *Plecker v. Poorman*, (1905) 147 Fed. 528.

**Poverty of plaintiff.**—Mere delay in the bringing of a suit for infringement of a patent, where it was because of the inability of the owner to bear the expense of the litigation, is not such laches as will defeat the suit. *Davis v. A. H. Reid Creamery, etc., Supply Co.*, (1911) 187 Fed. 157.

## Vol. V, p. 598, sec. 4922.

**Application of statute.**—This section applies to a suit in which certain claims of a patent are held valid and infringed, while other independent claims infringement of which is alleged are held invalid, and in such case the complainant is not entitled to recover costs. *General Electric Co. v. Crouse-Hinds Electric Co.*, (1906) 147 Fed. 718.

**When disclaimer may be made.**—Under this section the better practice is to require such disclaimer to be filed before final decree. *Suddard v. American Motor Co.*, (1908) 163 Fed. 852.

**Costs in trial court only.**—The provision of this section and R. S. sec. 973, 2 Fed. Stat. Annot. 289, that when judgment or decree is rendered for the plaintiff or complainant in any suit at law or in equity for infringement of part of a patent, etc., no costs shall be recovered unless the proper disclaimer was entered in the Patent Office before the suit was brought, applies only to costs in the trial court, and not to costs on appeal, the allow-

ance or refusal of which is to be determined by the appellate court in view of the special circumstances of the case. Where the court below denied all relief and dismissed the bill, which action was reversed on appeal as to certain claims of the patent, complainant will be awarded costs in the appellate court. *Kahn v. Starrels*, (1905) 136 Fed. 597, 69 C. C. A. 371; *Johnson v. Foos Mfg. Co.*, (1906) 141 Fed. 73, 72 C. C. A. 105.

**Necessity of disclaimer.**—R. S. sec. 973, providing that costs shall not be recoverable when a decree is entered for infringement of part of a patent, where the patentee has claimed to be the inventor of a material part of the thing patented, of which he was not the inventor unless a disclaimer was entered prior to the bringing of the suit, applies only where a disclaimer is necessary to save the patent. *National Electric Signaling Co. v. De Forest Wireless Tel. Co.*, (1905) 140 Fed. 449.

## Vol. V, p. 600, sec. 4929.

**Necessity of invention.**—In order to decide that a design is unpatentable, it is not necessary to find that it infringes an earlier one; for, to entitle an applicant to the benefit of the Design Act, there must be an exercise of the inventive faculty. *In re Schraubstadter*, (1905) 26 App. Cas. (D. C.) 331.

Originality and the exercise of the inventive faculty are as essential to give validity to a patent for a design as for a mechanical invention. *General Gaslight Co. v. Matchless Mfg. Co.*, (1904) 129 Fed. 137.

**Successive patents to same person.**—A design patent will operate as an anticipation of a subsequent patent to the same inventor, just as though issued to another person, where everything to be found in the one is portrayed in the other. *Williams Calk Co. v. Neverslip Mfg. Co.*, (1905) 136 Fed. 210.

**Novelty.**—Originality and the exercise of the inventive faculty are as essential to give validity to a patent for a design as for a mechanical invention. *General Gaslight Co. v. Matchless Mfg. Co.*, (1904) 129 Fed. 137; *Weisgerber v. Clowney*, (1904) 131 Fed. 477.

This requirement, however, does not preclude the selection and adaptation of an existing form, provided it is more than the exercise of the imitative faculty and the result is in effect a new creation producing a different effect on the eye of the ordinary observer. *Phoenix Knitting Works v. Grushlaw*, (1910) 181 Fed. 160.

**Amount of novelty.**—Unlike the case of mechanical contrivances, the change or omission or addition of a few minor details of ornamentation in a design, even though ornamentation may depend on the harmonious blending of numerous details, will not justify the multiplication of design patents, even though one design may readily be distinguished from another by some one or more features. *In re Freeman*, (1904) 23 App. Cas. (D. C.) 226.

**Substantial difference** is required to render two several devices patentable as designs. *In re Freeman*, (1904) 23 App. Cas. (D. C.) 226.

**Test of novelty.**—A design is patentable if it presents to the eye of the ordinary observer a different effect from anything that preceded it, and renders the article to which it is applied pleasing, attractive, and popular, even if it is simple, and does not show a wide departure from other designs, or if it is a combination of old forms. *Phoenix Knitting Works v. Bradley Knitting Co.*, (1910) 181 Fed. 163.

The novelty of a design is to be determined by the comparative appearance of the designs to the eyes of average observers, and not to the eyes of experts. *In re Schraubstadter*, (1905) 26 App. Cas. (D. C.) 331.

**Utility.**—The utility intended by the statute in employing the word "useful," as it did before the amendment of 1902, is artistic, and not practical. What is meant is that the design shall constitute something which is artistically worth the while, and is not

frivolous or hurtful. *Williams Calk Co. v. Neverslip Mfg. Co.*, (1905) 136 Fed. 210, *affirmed* (C. C. A. 1906) 145 Fed. 928.

Design patents are granted for appearance, and not with reference to mechanical usefulness. *West Disinfecting Co. v. Frank*, (C. C. A. 1906) 146 Fed. 388; *affirmed* 149 Fed. 423, 79 C. C. A. 359.

**Æsthetic value.**—A design patent is addressed to the eye, and is to be judged by its ability to please, and, while there is no objection to the article to which it relates being useful as well as ornamental, such a patent cannot be made to cover a mechanical function or construction. *Weisgerber v. Clowney*, (1904) 131 Fed. 477.

An article to be a proper subject for a design patent must be one which by artistic treatment in form and configuration may be given value from an æsthetic point of view. *Williams Calk Co. v. Kettnerer*, (1908) 145 Fed. 928, 76 C. C. A. 466, *affirming* (1905) 136 Fed. 210.

The patentability of a design does not depend on its æsthetic value. The Design Act, as construed by the courts, intends that the patentability of a design shall be determined by its appeal to the eyes of the ordinary man; and not to the eyes of a jury of artists. *In re Schraubstadter*, (1905) 26 App. Cas. (D. C.) 331.

**Articles not intended for display.**—A washer for thill-coupling, adapted to be used around the spherical knuckle of the thill-iron, as a packing between that and the draft-eye, where it is concealed from sight, is useful, but not ornamental; and therefore cannot be made the subject of a design patent. *Bradley v. Eccles*, (C. C. A. 1903) 126 Fed. 945; *affirming* 122 Fed. 867, and *reversing* 122 Fed. 871.

**New combinations of old forms in designs.**—Whenever ingenuity is displayed in producing a new design which imparts to the eye a pleasing impression; even though it be the result of uniting old forms and parts, such production is patentable. *General Gaslight Co. v. Matchless Mfg. Co.*, (1904) 129 Fed. 137.

Where it appears that, by uniting old elements perceivable in other lamp designs, a new lamp of different contour and construction is produced, and where the collocated elements also impart an ornamental and graceful appearance, not possessed by prior lamp designs, the conception is beyond what an ordinarily skilled workman is able to achieve. *General Gaslight Co. v. Matchless Mfg. Co.*, (1904) 129 Fed. 137.

**Mere assembling of old parts.**—The mere assembling of old parts to make a structure of a new design, although new lines and curves and a harmonious and novel whole are produced, does not involve invention so as to render the design patentable. *Crier v. Innes*, (1908) 160 Fed. 103, *affirmed* (C. C. A. 1909) 170 Fed. 824.

**Ancient ornamentation.**—In a font of type, the addition of an old waved outline to common forms of letters does not amount to in-



vention. *In re Schraubstadter*, (1905) 26 App. Cas. (D. C.) 331.

**Design for sarcophagus.** — A sarcophagus monument is a "manufacture" within the meaning of this section and a proper subject for a design patent. *Crier v. Innes*, (C. C. A. 1909) 170 Fed. 324, *affirming* (1908) 160 Fed. 103.

**Design for head of nail.** — A design is not patentable which consists of an iron nail having a mushroom-shaped head and a circular protuberance on the convex side of the

head. *In re Sherman*, (1910) 35 App. Cas. (D. C.) 100.

**Anticipation of mechanical invention.** — A design patent will render void a mechanical patent subsequently issued to the same inventor within two years, as a matter of double patenting, where the two are indistinguishable in their characteristics and are manifestly the outcome of the same inventive idea. *Williams Calk Co. v. Neverslip Mfg. Co.*, (1905) 136 Fed. 210.

## Vol. V, p. 602, sec. 4930.

**Necessity of detailed description.** — While a claim for a design patent, reciting, "substantially as shown," or, "as shown and described," and accompanied by a drawing, is in a large class of cases sufficient, and is, in most cases, better in form than a detailed description, yet there are cases where such detailed description is not only permissible, but necessary. *In re Mygatt*, (1905) 26 App. Cas. (D. C.) 366.

**Description by drawings.** — In an application for a design patent for a font of type, it is sufficient to furnish the conventional drawing accepted for years by the Patent Office, and it is not necessary, under the Patent Office rules relating to designs, to show or describe the type itself. *In re Schraubstadter*, (1905) 26 App. Cas. (D. C.) 331.

## Vol. X, p. 250, sec. 1.

**Amendment not retrospective.** — This amendment does not operate retroactively, and therefore does not apply to applications pending at the date of its passage. *Gueniffet v. Wictorsohn*, (1908) 30 App. Cas. (D. C.) 432.

This amendment did not operate retrospectively, and therefore the rights of an applicant whose application was pending at the time of the passage of the amendment are to be governed by the original and not by the amendatory Act, and his priority of invention will relate only from the date of the filing of his application here, and not from the date of the filing of his foreign application. *De Ferranti v. Lyndmark*, (1908) 30 App. Cas. (D. C.) 417.

Under this amendment an application relates back to the date of the filing of the foreign application, and gives the applicant priority of invention as of that date, while under the original Act the applicant's priority dated only from the filing of his application in the Patent Office here. *De Ferranti v. Lyndmark*, (1908) 30 App. Cas. (D. C.) 417.

**Application prior to international convention.** — A German inventor who filed his application for a patent in this country prior to the date when Germany agreed to the in-

ternational convention for the protection of industrial property is not entitled to his filing date in that country as the date of disclosure and constructive reduction to practice, under this amendment. *Winter v. Latour*, (1910) 35 App. Cas. (D. C.) 415.

**Term as affected by foreign patent.** — This amendment does not affect the term of patents for inventions previously patented in a foreign country, but only their validity, and did not operate to revive such a patent which had previously expired under the provisions of the section as it originally stood. *Sawyer Spindle Co. v. Carpenter*, (C. C. A. 1906) 143 Fed. 976, *affirming* (1904) 133 Fed. 238.

**Acceptance of convention by foreign government.** — A finding by the Commissioner of Patents in an interference case that the Interior Department was duly advised that Germany had adhered to the international convention, to take effect May 1, 1903, is a sufficient showing that subsequent to that date Germany was affording citizens of the United States applying for patents there the privileges accorded citizens of foreign countries applying for patents here, under this amendment. *National Metallurgic Co. v. Whitman*, (1910) 35 App. Cas. (D. C.) 420.

## PENAL LAWS.

### 1909 Supp., p. 408, sec. 11.

**Right of United States to control proceeding.**—Proceedings for the enforcement of the neutrality laws are necessarily under the control of the United States, and a proceeding against a vessel seized on complaint of an informer for violation of this section

cannot be continued if the United States disavows and declines to ratify the seizure. *Chamberlin Metal Weather-Strip Co. v. Peace Metal Weather-Strip Co.*, (1911) 186 Fed. 843.

### 1909 Supp., p. 414, sec. 35.

**Constitutionality.**—This section which authorizes the imposition of a maximum fine of five hundred dollars and imprisonment for not more than two years upon a civilian for knowingly purchasing or receiving in pledge any public property from a soldier, is not unconstitutional as providing for an excessive fine or a cruel and unusual punishment, nor as providing for the taking of property without due process of law. *Ontai v. U. S.*, (C. C. A. 1911) 188 Fed. 310.

**Clothing furnished to a soldier by the United States under a clothing allowance**

does not become his private property which he has a right to dispose of, while in the service, but is "public property" within this section, which makes it a criminal offense to knowingly purchase or receive in pledge from any soldier "any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier . . . under a clothing allowance or otherwise, such soldier . . . not having the lawful right to pledge or sell the same." *Ontai v. U. S.*, (C. C. A. 1911) 188 Fed. 310.

### 1909 Supp., p. 462, sec. 211.

**Construction of statute.**—This section prohibiting the mailing of obscene and filthy matter, has been held not limited to publications or writings relating to sexuality, but to include every filthy communication. *U. S. v. Dempsey*, (1911) 188 Fed. 450.

**Question for jury.**—Whether a letter was "filthy," and thus nonmailable, within this section, is a question for the jury. *U. S. v. Dempsey*, (1911) 188 Fed. 450.

### 1909 Supp., p. 473, sec. 240.

**"Consignee."**—This section provides that whoever shall knowingly ship from one state into another any package containing intoxicating liquor, unless the package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of the contents, and the quantity contained therein, shall be fined and the liquor forfeited. It has been held that the term "consignee" was so used in its primary legal sense to describe the person to whom the liquor was to be delivered at destination in accordance with the contract of carriage, and hence where wholesale merchants in California,

after collecting enough orders from purchasers in New England to make car load shipments, labeled each package with its own name, the character and quantity of the liquor, and the name of the purchaser, and consigned the entire car to itself or to its own order with directions to the carrier to notify designated persons, the shipper was also the consignee within the statute; the names of the purchasers being regarded as surplusage, so that there was no violation of the Act. *U. S. v. Eighty-Seven Barrels, etc., of Wine*, (1910) 180 Fed. 215.

# PENSIONS.

## Vol. V, p. 618, sec. 4.

**Conviction of infamous crime.**—In *Garitee v. Bond*, (1905) 102 Md. 379, 62 Atl. 631, it was held that one convicted of making an overcharge for prosecuting a pension claim, in violation of this section, and subject to imprisonment in the discretion of the court, had not been convicted of a "crime rendering him infamous according to law," within the

Maryland statute (Code Pub. Gen. Laws, art. 93, sec. 51) making one convicted of a "crime rendering him infamous according to law," disqualified from acting as executor, though it be assumed that in the contemplation of the federal jurisdiction the offense be deemed an infamous one.

## Vol. V, p. 663, sec. 3.

**Scope of investigation.**—A special pension examiner has neither power nor right to extort a confession of violations of the criminal provisions of the pension laws by a witness at a special examination, though there is no intention of prosecuting the witness therefor. *In re O'Shea*, (1908) 166 Fed. 180.

**Presence of attorney.**—A special pension examination authorized by this section is not a secret proceeding, and hence a witness subpoenaed to testify is entitled to have her attorney present at the examination so long as he conducts himself properly and does not

unlawfully interfere with the examination. *In re O'Shea*, (1908) 166 Fed. 180.

**Notice to claimants.**—Special examinations as to the merits of pension claims, authorized by this section, can only be held on notice to the claimants. *In re O'Shea*, (1908) 166 Fed. 180.

**Cross-examination.**—Witnesses subpoenaed for examination as to the merits of pension claims, as authorized by this section, are subject both to examination and cross-examination. *In re O'Shea*, (1908) 166 Fed. 180.

## Vol. V, p. 664, sec. 4745.

The language "any pledge, mortgage, sale, assignment, or transfer," etc., found in this section, refers to the pension before it has been reduced to the possession of the pen-

sioner and taken into his custody and control. *Omans v. Beeman*, (1910) 66 Misc. 625, 124 N. Y. S. 166.

## Vol. V, p. 665, sec. 4746.

**Effect of amendment.**—Making and presenting false, fictitious, and fraudulent papers in connection with entry of coal lands is not made criminal by this section, as amended by the Act of July 7, 1898, because such amendatory statute, in repeating the original words, "concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions," adds the words "or of the Secretary of the Interior," since such section as originally enacted related exclusively to pension or bounty land claims, and every enumeration or description of new acts or papers in addition to those embraced in the section prior to the amendment, alone concerns pension or bounty land claims. *U. S. v. Keitel*, (1908) 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230; *U. S. v. Herr*, (1908) 211 U. S. 404, 29 S. Ct. 134, 53 U. S. (L. ed.) 251; *U. S. v. Herr*, (1908) 211 U. S. 406, 29 S. Ct. 135, 53 U. S. (L. ed.) 252; *London v. U. S.*, (C. C. A. 1909) 171 Fed. 82.

**Indictment.**—An indictment under this section, as amended by Act July 7, 1898, which charges that the defendants "did knowingly and wilfully procure the presentation to the Commissioner of Pensions of a false and fraudulent paper writing," etc., is insufficient where it does not state the manner of presentation, or the name of the person procured to present it, or that his name is unknown. *Miller v. U. S.*, (1905) 136 Fed. 581, 69 C. C. A. 355.

Under this section as amended which penalizes the making of a false or fraudulent affidavit, it is not sufficient simply to allege that the affidavit was false. There must be a clear averment of the respect in which it is false equivalent to the assignment in perjury cases. *U. S. v. Medina*, (1909) 15 N. M. 204, 103 Pac. 976.

**Swearing witness.**—Under this section as amended which subjects to punishment one who knowingly certifies, when not true, that a witness has been sworn to an affidavit to be used in a pension case, administering the

oath immediately before the taking down of the statement thereunder, equally with administering it after taking down such statement, is swearing the witness to such affidavit within the statute. *U. S. v. Medina*, (1909) 15 N. M. 204, 103 Pac. 976.

**Recovery by United States from bank on pension checks bearing false indorsement.** — The right of the United States to recover back moneys paid to a bank on pension checks bearing the forged indorsements of the payees is not conditioned either upon de-

mand or the giving of notice of the discovery of the forgeries, since the bank, by presenting the checks for payment, warrants their genuineness, and the United States cannot, especially in view of the provision of R. S. secs. 4746, 4865, contemplating departmental regulations for establishing the identity of pensioners, be charged with knowledge of their signatures. *U. S. v. National Exch. Bank*, (1909) 214 U. S. 302, 29 S. Ct. 665, 53 U. S. (L. ed.) 1006, *reversing* (1907) 151 Fed. 402, 80 C. C. A. 632.

## Vol. V, p. 667, sec. 4747.

**General rule of exemptions.** — To the same effect as the original note, *In re Ferguson*, (1909) 140 Wis. 583, 123 N. W. 123.

**Exemption only before received by pensioner.** — Of similar effect to the original note, *Omans v. Beeman*, (1910) 66 Misc. 625, 124 N. Y. S. 166.

**Property purchased with pension money.** — Of similar effect to the original note, *In re Ferguson*, (1909) 140 Wis. 583, 123 N. W. 123.

The words "inure wholly to the benefit of such pensioner" as used in this section mean only that the pension funds should be protected until they had come safely into the hands of the pensioner, after which they were liable for his debts; and hence pension money, in the hands of a bankrupt at the time of the adjudication, neither invested nor mingled with other funds, was not exempt. *In re Jones*, (1909) 166 Fed. 337.

Pension money paid to the guardian of an insane pensioner, and by him loaned, is in

process of transmission to the pensioner, and still under control of the federal government, and is so exempt from taxation. *Manning v. Spry*, (1903) 121 Ia. 191, 96 N. W. 873.

**Interest on pension money.** — Under this section providing that no pension money due to any pensioner shall be liable to seizure under process while in the course of transmission to the pensioner, and the Iowa statute (Code, secs. 1309, 4009) providing that the term "credit" in the chapter relating to assessment of taxes shall include every claim or demand due or to become due for money, and every annuity or sum of money receivable at stated periods, but United States pensions are not included, and declaring that all pension money shall be exempt from execution, interest received on pension money loaned out by a pensioner is not exempt from taxation. *Bednar v. Carroll*, (1908) 138 Ia. 336, 116 N. W. 316.

## Vol. V, p. 677. [*Pension, a vested right, etc.*]

**Government's right to recover from bank cashing fraudulent pension checks.** — Where a fraudulent pension was granted to W., and while the same was in full force, and before cancellation on the notice prescribed by such act, the defendant bank cashed a number of pension checks drawn to her order, which on

presentation were paid by the government, it was held that the government could not recover the money from the bank on the theory that the pension was fraudulent and invalid. *U. S. v. North Wilkesboro Bank*, (1910) 183 Fed. 759, 106 C. C. A. 471.

# PERJURY.

## Vol. V, p. 701, sec. 5392.

**Jurisdiction.** — Perjury committed by false swearing before a United States commissioner is not subject to the jurisdiction of a state court under a state statute defining and punishing perjury. *Com. v. Kitchen*, (1911) 141 Ky. 655, 133 S. W. 586.

**State laws.** — Where a defendant swore falsely, as to his qualifications to become a surety on a distiller's bond, before a deputy internal revenue collector, it was held that he was properly charged with perjury there-

on, as defined by this section, though under the state law perjury could only be committed in a judicial proceeding, other false oaths being defined and punished as "false swearing." *U. S. v. Hardison*, (1905) 135 Fed. 419.

**What does or does not constitute offense.** — **Oaths used in land offices.** — Under Timber and Stone Act June 3, 1878, sec. 1, ch. 151, 20 Stat. L. 89, 7 Fed. Stat. Annot. 300, which requires applicants to purchase land there-

under to file a verified written statement, and after the required publication of notice to "furnish to the register of the Land Office satisfactory evidence" of certain facts, the regulations of the Land Department, requiring such evidence to be in the form of depositions under oath, are in furtherance of the purposes of the statute and valid, and the false swearing in either the preliminary statement or in such depositions constitutes the crime of perjury and an offense against the United States, under this section. *Van Gasner v. U. S.*, (C. C. A. 1907) 153 Fed. 47.

Where an entryman on public lands signed and swore to an affidavit that he entered the land for his individual use and benefit, and not for speculation, when in fact he intended to immediately transfer the land to another under a pre-existing contract, he thereby committed perjury as defined by this section. *Nickell v. U. S.*, (C. C. A. 1908) 161 Fed. 702, *affirmed* (C. C. A. 1909) 167 Fed. 741. See also *U. S. v. Brace*, (1907) 149 Fed. 869.

*Proceedings under Oleomargarine Act.*—Section 6 of the Oleomargarine Act (Act May 9, 1902, ch. 784, 32 Stat. L. 197, 3 Fed. Stat. Annot. 131), in requiring wholesale dealers to keep such books and render such returns as the Commissioner of Internal Revenue may by regulation require under prescribed penalties for its violation, has no relation to the tax to be assessed on such dealer, and the regulations made thereunder and in force prior to their revision in 1907, in requiring an oath to the returns, do not have the force of law in such sense that a false oath to a return subjects the maker to prosecution for perjury under this section. *U. S. v. Lamson*, (1908) 165 Fed. 80.

*Naturalization proceedings.*—Perjury committed by a false allegation of fact in a naturalization petition is punishable under this section, regardless of whether such evidence is punishable under Naturalization Act June 29, 1906, ch. 3592, sec. 23, 34 Stat. L. 603, 1909 Supp. Fed. Stat. Annot. 375, or not. *U. S. v. Dupont*, (1910) 176 Fed. 823.

*Internal revenue matters.*—R. S. sec. 3165, as amended by Act Cong. March 1, 1879, ch. 125, sec. 2, 20 Stat. L. 329, 3 Fed. Stat. Annot. 573, authorizes every collector and deputy collector to administer oaths touching any part of the administration of the internal revenue laws, or where such oaths are authorized by law, or by regulations authorized by law. Internal Revenue Laws 1900, p. 47, sec. 321 (R. S. sec. 321, 3 Fed. Stat. Annot. 556), gives the Internal Revenue Commissioner general supervision of the collection of taxes imposed by any in-

ternal revenue law, and authorizes him to prepare and distribute instructions, regulations, etc., pertaining thereto; and one of the regulations providing for the collection of taxes on distilled spirits required collectors to examine distillers' sureties, and to require them to "justify" on a prescribed form. It has been held that under such provision an oath taken by a distiller's surety, with reference to his qualifications, before a deputy collector, was an oath taken in a case in which "a law of the United States authorizes an oath to be administered," within section 5392. *U. S. v. Hardison*, (1905) 135 Fed. 419.

*Proceedings for patent.*—R. S. sec. 4866, 5 Fed. Stat. Annot. 421, requires an applicant for a patent to make oath that he fairly believes himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition, or improvement for which he solicits a patent, that he does not know and does not believe that the same was ever before known or used. The Commissioner of Patents, with the approval of the Secretary of the Interior, under authority to make rules, promulgated rule 48, providing that the applicant shall make oath or affirmation that he does verily believe himself to be the original and first inventor and discoverer of the art, and also to state whether he is the "sole" or joint inventor of the invention claimed in his application. It has been held that, since the Interior Department could not by rule or regulation add any word or words to the statutory oath, an applicant for a patent was not guilty of perjury, though he falsely stated that he was the "sole" inventor of the article for which a patent was applied. *Patterson v. U. S.*, (C. C. A. 1910) 181 Fed. 970, *reversing* (1909) 172 Fed. 241.

*Disqualification as witness.*—The provision in this section that every person convicted of perjury shall thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed excludes a witness convicted of perjury under the laws of the United States from giving evidence in any United States court, whatever the law of the state where the trial had on the subject may be. *Wise v. Williams*, (1908) 162 Fed. 161.

The disqualification clause applies only to United States courts and not to testimony in state courts. *Samuels v. Com.*, (1909) 110 Va. 901, 66 S. E. 223.

*Necessity for conviction.*—Under this section the incapacity to testify attaches only to a person who has been convicted under the section. *O'Leary v. U. S.*, (C. C. A. 1907) 158 Fed. 796.

## Vol. V, p. 705, sec. 5393.

*Necessity for subscription to false oath.*—To support an indictment for subornation of perjury based on the alleged procurement of the making of a false affidavit or oath before the receiver or register of a land office in support of an application to enter land under

the homestead law, it is not essential that the affidavit should have been subscribed as well as sworn to before such officer. *Nurnberger v. U. S.*, (C. C. A. 1907) 156 Fed. 721.

*Entries to public lands.*—Procuring entryman on public lands to make false affidavits

constitutes subornation of perjury as defined by this section. *Nickell v. U. S.*, (C. C. A. 1908) 161 Fed. 702, (C. C. A. 1909) 167 Fed. 741.

Where an indictment charged that the defendant induced C. to make application for the purchase of timber lands, and in the furtherance of such application to make a false oath at the time of final entry with reference to the good faith of the application, which the register of the Land Office was authorized to administer by R. S. sec. 2246, 6 Fed. Stat. Annot. 233, and by the regulations of the Land Department, it sufficiently charged the offense of subornation of perjury. *U. S. v. Brace*, (1907) 149 Fed. 870.

**Instructions.**—Instructions given on the trial of a defendant charged with suborna-

tion of perjury in procuring homestead entrymen to make false oaths were held erroneous and misleading in that they authorized the jury to convict in case they found that any statement made by affiants in their affidavits was false and was intentionally sworn to, when there was evidence tending to show that some of the recitals in the affidavits respecting the intention to reside on and improve the land as affiants understood the law were not applicable to their entries; and that their act in swearing to the same was not therefore wilful and corrupt, as required by R. S. sec. 2291, as amended by Act March 3, 1877, ch. 122, sec. 2, 19 Stat. L. 404, 6 Fed. Stat. Annot. 292, to constitute the crime of perjury. *Nurnberger v. U. S.*, (C. C. A. 1907) 156 Fed. 722.

## Vol. V, p. 705, sec. 5396.

**Requisites.**—Since, as before, the enactment of R. S. sec. 1025, 2 Fed. Stat. Annot. 340, providing that no indictment shall be held insufficient for defects in matter of form only, and this section, relating to indictments for perjury, every indictment for perjury in a federal court must contain allegations showing (a) judicial proceedings or course of justice; (b) that all the defendant was sworn to give evidence therein; (c) the testimony given by him; (d) its falsity; and (e) its materiality to the issue or inquiry. *Hogue v. U. S.*, (C. C. A. 1910) 184 Fed. 245.

**Setting forth the substance of the offense charged.**—An indictment under this section, charging the defendant with perjury in falsely swearing that material changes were made in a certain document before he signed it, was insufficient, where it did not show the substance at least of the change which it was charged that he testified was made. *Hogue v. U. S.*, (C. C. A. 1910) 184 Fed. 245.

**Averring such court or person to have complete authority.**—R. S. sec. 2249, as amended by Act Cong. March 4, 1904, ch. 394, 33 Stat. L. 59, 10 Fed. Stat. Annot. 358, authorizes proof of homestead claims to be made before United States commissioners in the land district in which the lands are situated, and this section declares that every person who having taken an oath before a competent officer in any case in which the law of the

United States authorizes an oath to be administered that he will testify truly, etc., wilfully and contrary to his oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. An indictment for perjury in support of a homestead claim, sworn to before a United States commissioner, alleged that the commissioner was an officer who was authorized by the laws of the United States to administer an oath and take testimony in such proceeding, and was then and there engaged in taking testimony on the application of W. to make final homestead proof, etc., that it thereupon became material that the commissioner should be informed by the testimony whether W. had settled and resided on the land in good faith; and that to prevent the commissioner from knowing the true facts the defendant wilfully, corruptly, and falsely testified to facts specified which he did not believe to be true. It was held that under such allegations the court would take judicial notice that the commissioner had competent authority to administer the oath to defendant in the particular proceeding, and that the indictment was not, therefore, defective for failure to allege the commissioner's authority to administer the oath on which the perjury was based. *Barnard v. U. S.*, (C. C. A. 1908) 162 Fed. 618.

## Vol. V, p. 707, sec. 5397.

**Sufficiency of indictment.**—An indictment for subornation of perjury in procuring another to make a false oath or affidavit before the receiver of a Land Office to secure an entry of land, which averred that such oath or affidavit was made in support of "a certain application in writing to enter under the homestead laws of the United States, subject to entry at said Land Office," certain land described, was held to be sufficient after verdict as showing that the land described was at the time public land of the United States, subject to homestead entry at such Land Of-

fice. *Nurnberger v. U. S.*, (C. C. A. 1907) 156 Fed. 721.

**Designation of court.**—An indictment for subornation of perjury must designate the court in which the perjury occurred by specific averment or equivalent words. Where the caption and commencement show the court in which the indictment was found, further averments with reference to the proceedings in which the alleged perjury was committed, reciting them to have been in "said court," are not sufficient. *U. S. v. Howard*, (1904) 132 Fed. 326.

**Averment that witness was sworn.**—Under the settled rule that an indictment for subornation of perjury must contain all the averments necessary in one charging the crime of perjury against the witness suborned, such an indictment with respect to perjury committed in court must, by direct averment or equivalent words, show that the suborned witness was sworn to speak the truth, the whole truth, and nothing but the truth. It is not sufficient to charge that defendant procured the witness falsely upon oath to depose, etc., since such averment relates to the acts of defendant, and not of the witness; nor is the defect cured by further expressions which assume, without stating, that the witness was sworn—such as that “when he was so sworn,” or “when he so swore,” he did not believe the things to which he testified to be true. *U. S. v. Howard*, (1904) 132 Fed. 325.

**Averment of materiality of false testimony.**—An indictment for subornation of perjury must show that the testimony of which the perjury is predicated was material, either by an averment in terms that it was material or by stating facts showing its materiality. *U. S. v. Howard*, (1904) 132 Fed. 326.

**Omission of date.**—An indictment for subornation of perjury, under R. S. sec. 5393, 5 Fed. Stat. Annot. 705, which charges that the offense was committed “on the—day of December, 1893,” is defective, but the date not being of the essence of the offense, the defect is one of form only, and is cured by R. S. sec. 1025, 2 Fed. Stat. Annot. 340, which provides that no indictment shall be deemed insufficient by reason of any defect or imper-

fection in matter of form only, which shall not tend to the prejudice of the defendant. *U. S. v. Howard*, (1904) 132 Fed. 325.

**Omission of word “wilful.”**—The crime of perjury, as defined in R. S. sec. 5392, consists in a witness wilfully stating contrary to his oath any material matter which he does not believe to be true; and while, in an indictment for subornation of perjury, the omission of the identical word “wilful” in charging the false swearing by the witness may not be fatal, the indictment must in such case contain equivalent words, themselves free from ambiguity or equivocation. Such requirement is not met by an averment that the defendant knew at the time of the subornation that the testimony to be given by the witness was “false, wilful, and contrary to the oath” to be taken by the witness, which relates to the knowledge of defendant, and not to the state of mind of the witness. *U. S. v. Howard*, (1904) 132 Fed. 326.

**Evidence.**—On the trial of a defendant charged with subornation of perjury in procuring homestead entrymen to make the required oath that the entry was not made for the benefit of any other person, when in fact they had agreed to convey the land to the defendant for a stipulated price as soon as they obtained title, it was held to be error to refuse to permit the defendant to testify that he made no such agreements, but that the agreements actually made, as he understood them, left the conveyance optional with the other parties or to other facts, which tended to show that his act was not wilful nor corrupt, as required by the statute to constitute the crime charged. *Nurnberger v. U. S.*, (C. C. A. 1907) 166 Fed. 722.

## PHILIPPINE ISLANDS.

### Vol. V, p. 716, sec. 3.

**Vessels subject to duty.**—A foreign built vessel, owned entirely by a citizen of the United States, and entering a port of the United States from Manila, P. I., is not subject to tonnage duty under this Act, extending such duty to “foreign” vessels entering

from the Philippine Archipelago, since, while not “a vessel of the United States,” because not entitled to registry, she is an American and not a foreign vessel, by virtue of the citizenship of her owner. *The Alta*, (C. C. A. 1905) 136 Fed. 513.

### Vol. V, p. 718, sec. 1.

**Indictment for infamous crime.**—The requirement of the Fifth Amendment to the Federal Constitution, that infamous crimes must be presented by indictment, has no application to the Philippine Islands. *Dowdell*

*v. U. S.*, (1911) 221 U. S. 325, 31 S. Ct. 590, 55 U. S. (L. ed.) 753.

**Trial by jury.**—*Dowdell v. U. S.*, (1911) 221 U. S. 325, 31 S. Ct. 590, 55 U. S. (L. ed.) 753, following the same case set out in the original note.

### Vol. V, p. 718, sec. 2.

The collection of duties on imports to Manila, which was not authorized by the President's order of July 12, 1898, after the ratification of the treaty of peace with Spain, was not ratified by this section ratifying such order and the action of the federal au-

thorities taken in accordance with its provision. *Lincoln v. U. S.*, (1905) 197 U. S. 419, 25 S. Ct. 455, 49 U. S. (L. ed.) 816, (1906) 202 U. S. 484, 26 S. Ct. 728, 50 U. S. (L. ed.) 1117.

## Vol. V, p. 719, sec. 5.

**Advised of nature and cause of accusation.**—The requirement of the Philippine Bill of Rights, that the accused be advised of the nature and cause of the accusation against him, is satisfied where such complaint, however open it may be to criticism on demurrer, supposing the strict rules of the old common law to be applied, leaves no doubt in the mind of a person of rudimentary intelligence that it means to charge the accused with falsification of documents, contrary to the Philippine Penal Code. *Paraiso v. U. S.*, (1907) 207 U. S. 368, 28 S. Ct. 127, 52 U. S. (L. ed.) 240.

**Confronting witnesses.**—The right of the accused, under this section, to meet the witnesses face to face was not infringed by the action of the Supreme Court of the Philippine Islands, upon suggestion of diminution of the record, in ordering the judge and clerk of the court below to supply the failure of the record to show whether the accused pleaded to the complaint, and were present in court during the entire trial. *Dowdell v. U. S.*, (1911) 221 U. S. 325, 31 S. Ct. 590, 55 U. S. (L. ed.) 753.

**Cruel and unusual punishment, forbidden** by the Philippine Bill of Rights, is inflicted by the provisions of the Philippine Penal Code under which the falsification by a public official of a public and official document must be punished by fine and imprisonment at hard and painful labor for a period ranging from twelve years and a day to twenty years, the prisoner being subject, as accessories to the main punishment, to carrying, during his imprisonment, a chain at the ankle, hanging from the wrist, to deprivation during the term of imprisonment of civil rights, and to perpetual absolute disqualification to enjoy political rights, hold office, etc., and to surveillance of the authorities during life. *Weems v. U. S.*, (1910) 217 U. S. 349, 30 S. Ct. 544, 54 U. S. (L. ed.) 793.

**Imprisonment for debt**, contrary to this section, is not provided by the Philippine Penal Code, under which a person convicted of embezzlement may be made to suffer a subsidiary imprisonment for a term not exceeding one-third of the principal penalty, in lieu of the restoration of the sum found to be embezzled, with the right to be released from such subsidiary punishment upon payment of the money wrongfully converted. *Freeman v. U. S.*, (1910) 217 U. S. 539, 30 S. Ct. 592, 54 U. S. (L. ed.) 874.

**Self-crimination.**—An accused person cannot claim to have been compelled to be a witness against himself, in violation of this section, because of the denial of a motion to compel the provincial fiscal to return a statement made by accused in ignorance of his rights, and to prohibit the fiscal from using the statement, where such statement was not afterwards used in any way. *Pendleton v. U. S.*, (1910) 216 U. S. 305, 30 S. Ct. 315, 54 U. S. (L. ed.) 491.

**Due process of law and criminal appeal.**—The refusal of the Supreme Court of the Philippine Islands, on an appeal in a criminal

case, to entertain an objection to the sufficiency of the complaint, because such objection was not raised before final judgment in the trial court, does not amount to a conviction of the accused without informing them of the nature and character of the offense charged, or to a conviction without due process of law, in violation of this section, although that court, on appeal, has power to re-examine both the law and the facts, where, as a necessary consequence of the facts found, the testimony offered at the trial, without objection or exception in any form, established every ingredient of the crime. *Serra v. Mortiga*, (1907) 204 U. S. 470, 27 S. Ct. 343, 51 U. S. (L. ed.) 571.

**Due process of law.**—The due process of law secured to the people of the Philippine Islands by this Act was not denied by the affirmance in the Supreme Court of the Philippine Islands of a conviction of the offense described in Philippine Penal Code, art. 343, which was repealed after the conviction and sentence in the court of the first instance by the Act of the Philippine Commission of Oct. 9, 1907, Act No. 1757, the repealing Act also providing for the punishment of the same offense, and within limitations not exceeded by the sentence imposed under the former Act. *Ong Chang Wing v. U. S.*, (1910) 218 U. S. 272, 31 S. Ct. 15, 54 U. S. (L. ed.) 1040.

Due process of law was not denied by the action of the Supreme Court of the Philippine Islands in making an order upon its own motion when the accused were absent from the court, requiring the judge and clerk of court below to supply deficiencies in the record. *Dowdell v. U. S.*, (1911) 221 U. S. 325, 31 S. Ct. 590, 55 U. S. (L. ed.) 753.

**Twice put in jeopardy.**—An accused is not placed twice in jeopardy for the same offense within the meaning of this section because the Supreme Court of the Philippine Islands, upon reversing judgment below in a criminal case, on an appeal taken by the accused, convicted him, on the same facts, of a different offense, carrying an increased sentence. *Trono v. U. S.*, (1905) 199 U. S. 521, 28 S. Ct. 121, 50 U. S. (L. ed.) 292; *Flemister v. U. S.*, (1907) 207 U. S. 372, 28 S. Ct. 129, 52 U. S. (L. ed.) 252.

Treating as two different offenses assaults on two different individuals does not place the accused twice in jeopardy for the same offense, even if these assaults occurred very near each other, in one continuing attempt to defy the law. *Flemister v. U. S.*, (1907) 207 U. S. 372, 28 S. Ct. 129, 52 U. S. (L. ed.) 252.

The offenses of behaving in an indecent manner in a public place, open to public view, punishable under municipal ordinance, and of insulting a public officer by deed or word in his presence, contrary to P. I. Pen. Code, art. 257, are not identical, so that a conviction of the first will bar a prosecution for the other, although the acts and words of the accused set forth in both charges are the same. *Gavieres v. U. S.*, (1911) 220 U. S. 888, 31 S. Ct. 421, 55 U. S. (L. ed.) 499.



An acquittal of homicide, as defined in the Penal Code of the Philippine Islands, art. 404, is a bar to a subsequent conviction of the same offense arising out of the same facts, under an information charging the higher crime of assassination, as defined by article 403, since if not guilty of the lesser crime the accused could not, for the same acts, be guilty of the offense of higher grade. *Grafton v. U. S.*, (1907) 206 U. S. 333, 27 S. Ct. 749, 51 U. S. (L. ed.) 1084.

### Vol. V, p. 722, sec. 9.

**Hearing on appeal.**—The Supreme Court of the Philippine Islands, in reviewing the judgment of the court of first instance, in a criminal case, may determine for itself the

guilt or innocence of the defendant, upon the proofs presented at the trial. *Pendleton v. U. S.*, (1910) 216 U. S. 305, 30 S. Ct. 815, 54 U. S. (L. ed.) 491.

One acquitted by a military court of competent jurisdiction of the crime of homicide, as defined by the Penal Code of the Philippine Islands, art. 404, cannot be tried a second time in a civil court of those islands for the same offense. *Grafton v. U. S.*, (1907) 206 U. S. 333, 27 S. Ct. 749, 51 U. S. (L. ed.) 1084.

### Vol. V, p. 722, sec. 10.

This section is substantially re-enacted in Judicial Code, sec. 248, *ante*, title JUDICIARY, vol. 1, p. 234, of this Supplement.

All the reported cases taken to the Supreme Court from the Philippines down to June, 1911, which are not cited or not sufficiently described below in this note, are as follows: *Kepner v. U. S.*, (1904) 195 U. S. 100, 24 S. Ct. 797, 49 U. S. (L. ed.) 114; *Mendezona v. U. S.*, (1904) 195 U. S. 158, 24 S. Ct. 808, 49 U. S. (L. ed.) 136; *Trono v. U. S.*, (1905) 199 U. S. 521, 26 S. Ct. 121, 50 U. S. (L. ed.) 292; *Grafton v. U. S.*, (1907) 206 U. S. 333, 27 S. Ct. 749, 51 U. S. (L. ed.) 1084 (criminal cases involving constitutional question whether defendant was twice in jeopardy for the same offense); *Dorr v. U. S.*, (1904) 195 U. S. 138, 24 S. Ct. 808, 49 U. S. (L. ed.) 128 (as to constitutional right to trial by jury); *Serra v. Mortiga*, (1907) 204 U. S. 470, 27 S. Ct. 343, 51 U. S. (L. ed.) 571 (a conviction of adultery on complaint of the injured party, involving constitutional question of due process of law); *Flemister v. U. S.*, (1907) 207 U. S. 372, 28 S. Ct. 129, 52 U. S. (L. ed.) 252; *Carrington v. U. S.*, (1908) 208 U. S. 1, 28 S. Ct. 203, 52 U. S. (L. ed.) 367 (Federal Constitution and statutes involved); *Calvo v. De Gutierrez*, (1908) 208 U. S. 443, 28 S. Ct. 382, 52 U. S. (L. ed.) 564 (decree construing a family settlement of real estate); *Bosque v. U. S.*, (1908) 209 U. S. 91, 28 S. Ct. 501, 52 U. S. (L. ed.) 698 (application for admission to the bar, construction and effect of treaty involved, and due process of law); *Strong v. Repide*, (1909) 213 U. S. 419, 29 S. Ct. 521, 53 U. S. (L. ed.) 853 (an action to recover shares of corporate stock); *Pendleton v. U. S.*, (1910) 216 U. S. 305, 30 S. Ct. 315, 54 U. S. (L. ed.) 491 (as to alleged compulsory self-incrimination); *Weems v. U. S.*, (1910) 217 U. S. 349, 30 S. Ct. 544, 54 U. S. (L. ed.) 793, (determining that a punishment was forbidden by the Philippine Bill of Rights); *Freeman v. U. S.*, (1910) 217 U. S. 539, 30 S. Ct. 592, 54 U. S. (L. ed.) 874 (a criminal case involving the provision in the Bill of Rights for the government of the Philippines, "that no person shall be imprisoned for debt"); *Ling Su Fan v. U. S.*, (1910) 218 U. S. 302, 31 S. Ct.

21, 54 U. S. (L. ed.) 1049, and *Ong Chang Wing v. U. S.*, (1910) 218 U. S. 272, 31 S. Ct. 15, 54 U. S. (L. ed.) 1040 (criminal cases involving constitutional question of due process of law); *Chantangco v. Abaroa*, (1910) 218 U. S. 476, 31 S. Ct. 34, 54 U. S. (L. ed.) 1116 (a civil action for a jurisdictional amount, involving question of bar by previous acquittal in a criminal action); *Atlantic, etc., Co. v. Philippine Islands*, (1910) 219 U. S. 17, 31 S. Ct. 138, 55 U. S. (L. ed.) 70 (an action to recover from the government of the Philippine Islands the cost of repairing the damage to an incomplete public work); *Enriquez v. Go-Tiongco*, (1911) 220 U. S. 307, 31 S. Ct. 423, 55 U. S. (L. ed.) 476 (to review a judgment which affirmed a judgment dismissing a suit to set aside a judgment sale of community property); *Gavieres v. U. S.*, (1911) 220 U. S. 338, 31 S. Ct. 421, 55 U. S. (L. ed.) 489; *Dowdell v. U. S.*, (1911) 221 U. S. 325, 31 S. Ct. 590, 55 U. S. (L. ed.) 753 (a criminal case involving constitutional questions).

**Appellate jurisdiction in divorce case.**—The general rule that the federal courts have no jurisdiction of the subjects of divorce or alimony does not preclude an appeal from a decree of the Supreme Court of the Philippine Islands reversing a decree of the court of first instance, granting a divorce to a wife and awarding her as alimony *pendente lite*, and as her share of the conjugal property, a sum in excess of \$25,000. *De La Rama v. De La Rama*, (1906) 201 U. S. 303, 26 S. Ct. 485, 50 U. S. (L. ed.) 765.

**Statute of the United States involved.**—A suit to restrain the defendant from settling up title to certain gold mines in the Philippine Islands, or interfering with the same, and to obtain an accounting in which the meaning and effect of the provision of the Act of July 1, 1902, ch. 1369, sec. 45, 32 Stat. L. 703; 5 Fed. Stat. Annot. 731, concerning land titles are in question, involves a statute of the United States and a decree therein is therefore appealable. *Reavis v. Fianza*, (1909) 215 U. S. 16, 30 S. Ct. 1, 54 U. S. (L. ed.) 72.

**Cases involving a treaty.**—Judgments of the Supreme Court of the Philippine Islands

denying any liability of the present city of Manila upon municipal obligations incurred prior to the cession of the Philippine Islands to the United States by the treaty of Dec. 10, 1898, 30 Stat. L. 1754, 7 Fed. Stat. Annot. 814, are rendered in cases in which a treaty of the United States "is involved," and are therefore appealable, "since neither the court below nor this court can determine the continuity of the municipality nor the liability of the city as it now exists for the obligation of the old city, without considering the effect of the change of sovereignty resulting from that treaty." *Vilas v. Manila*, (1911) 220 U. S. 345, 31 S. Ct. 416, 55 U. S. (L. ed.) 491.

"Value in controversy."—The value of a mortgaged vessel and the profits from its use, demanded in a dismissed counterclaim in a suit to foreclose the mortgage, cannot be added to the amount of the mortgage debt in determining the value of the matter in controversy for the purpose of appellate jurisdiction. *Martinez v. International Banking Corp.*, (1911) 220 U. S. 214, 31 S. Ct. 408, 55 U. S. (L. ed.) 438, the court saying: "The case of *Harten v. Löffler*, (1909) 212 U. S. 397, 20 S. Ct. 351, 53 U. S. (L. ed.) 568, is cited as authority. But conceding that cases may arise where the amount of a judgment in favor of a plaintiff may be combined with the sum demanded in a dismissed counterclaim of a defendant, to determine whether the jurisdictional value exists, manifestly this is not a case for the application of the doctrine. The value of the matter in dispute in this court is the test of our jurisdiction. *Hilton v. Dickinson*, (1883) 108 U. S. 165, 2 S. Ct. 424, 27 U. S. (L. ed.) 688."

Two suits separately commenced, but tried together for convenience, will not be treated as consolidated, for the purpose of increasing the amount in dispute so as to sustain an appeal, where the understanding of court and counsel below was that there was in fact no consolidation. *Martinez v. International Banking Corp.*, (1911) 220 U. S. 214, 31 S. Ct. 408, 55 U. S. (L. ed.) 438.

*Uniting interests in several parties.*—The judgment in an action to recover real property in which the plaintiff, although claiming under a single title all the land occupied separately by the various defendants, does not allege joint ownership or joint possession or joint action of any kind, the controversy with each defendant relating to a separate and distinct parcel does not show a jurisdictional amount in dispute, for the purpose of appeal, where such judgment, while apparently rendered jointly, so far as the damages are concerned, against all the defendants, runs separately against each defendant for recovery of possession of that part of the land of which he was alleged and found to be in possession, and the whole amount of the damages added to the value of the land in controversy with any one of the defendants does not equal the jurisdictional amount. *Tupino v. La Compania General De Tabacos De Filipinas*, (1909) 214 U. S. 268, 29 S. Ct. 610, 53 U. S. (L. ed.) 992.

*Affidavits of value.*—In *Roura v. Philippine Islands*, (1910) 218 U. S. 386, 31 S. Ct.

73, 54 U. S. (L. ed.) 1080, to review a judgment affirming the trial court in refusing, on the opposition of the insular government, the prayer for registration of a land title, the court said: "Without going into detail, we say, in view of the affidavits filed in this court concerning the value of the property after allowing for the elements of speculation possibly entering into the amount fixed in the affidavits, we think, in the absence of affidavits in rebuttal, a sufficient showing has been made to give jurisdiction."

To the point that affidavits of value of property claimed by the appellant should be confined to the part of his claim that is in controversy in the Supreme Court on the appeal, see *Reavis v. Fianza*, (1909) 215 U. S. 16, 30 S. Ct. 1, 54 U. S. (L. ed.) 72.

"Final judgments and decrees."—A judgment of the Supreme Court of the Philippine Islands which directs the entry of judgment for the plaintiff below, in accordance with its decision, but leaves to the lower court the judicial determination of the exact amount for which the judgment shall be entered, is not final for the purpose of an appeal. *Martinez v. International Banking Corp.*, (1911) 220 U. S. 214, 31 S. Ct. 408, 55 U. S. (L. ed.) 438.

*Mode of review.*—Writ of error, and not appeal, is the proper proceeding to obtain a review by the United States Supreme Court of a judgment affirming a judgment of the Court of Land Registration, which denied registration of a tract of land. *Tiglaio v. Insular Government of Philippine Islands*, (1910) 215 U. S. 410, 30 S. Ct. 129, 54 U. S. (L. ed.) 257, following *Carino v. Insular Government of Philippine Islands*, (1909) 212 U. S. 449, 29 S. Ct. 334, 53 U. S. (L. ed.) 594; *Jover v. Costas v. Insular Government of Philippine Islands*, (1911) 221 U. S. 623, 31 S. Ct. 684, 55 U. S. (L. ed.) 884.

"Errors alleged to have been committed in an action at law can be reviewed here only by writ of error. This, in the absence of modification by statute, is the rule in respect to all courts whose records are brought here for review." *Behn v. Campbell*, (1907) 205 U. S. 403, 27 S. Ct. 502, 51 U. S. (L. ed.) 857, entertaining a writ of error to review a judgment in an action plainly at law, but citing *Behn v. Campbell*, (1905) 200 U. S. 611, 26 S. Ct. 753, 50 U. S. (L. ed.) 619, where an appeal first taken in the same case was dismissed.

Appeal, and not a writ of error, is the proper method of obtaining a review of a final order of the Supreme Court of the Philippine Islands denying an application for a writ of habeas corpus, because "final orders of the Circuit Courts or District Courts of the United States in habeas corpus can only be reviewed by appeal, and not by writ of error." *Fisher v. Baker*, (1906) 203 U. S. 174, 27 S. Ct. 135, 51 U. S. (L. ed.) 142, dismissing a writ of error.

*Record.*—A conviction for crime is not reviewable as involving the denial of the protection afforded by the Philippine Bill of Rights, where the most that can be gathered from the record is that the complaint was

bad by the rules of criminal pleading. *Paraiso v. U. S.*, (1907) 207 U. S. 368, 28 S. Ct. 127, 52 U. S. (L. ed.) 249, dismissing a writ of error. See generally cases cited under *Issue must appear of record*, in note to section 5 of the Circuit Court of Appeals Act of 1891, 4 Fed. Stat. Annot. 405, and *ante*, title JUDICIARY, p. 1321, of this Supplement.

Denial of a motion for rehearing by the Supreme Court of the Philippine Islands cannot serve to bring federal questions into the record so as to sustain a writ of error to that court. *Paraiso v. U. S.*, (1907) 207 U. S. 368, 28 S. Ct. 127, 52 U. S. (L. ed.) 249.

**Presumptions on appeal.**—The grounds for refusing to grant a new trial for newly discovered evidence will be presumed, on a writ of error, to have been sufficient, where they do not appear on the record. *Santos v. Holy Roman Catholic and Apostolic Church*, (1909) 212 U. S. 463, 29 S. Ct. 338, 53 U. S. (L. ed.) 599, an action to recover possession of a chapel.

**Questions reviewable—assignment of errors.**—Alleged errors of law in the opinion of the court below, which was engaged with a discussion of evidence and the inferences which might properly be drawn from it, will not be considered on a writ of error if they are not contained in the assignment of errors, where, on the whole, it is clear that the facts found justify the judgment rendered. *Behn v. Campbell*, (1907) 205 U. S. 403, 27 S. Ct. 502, 51 U. S. (L. ed.) 857.

"We do not feel called upon to consider errors not assigned. See *O'Neil v. Vermont*. (1892) 144 U. S. 323, 331, 12 S. Ct. 693, 36 U. S. (L. ed.) 460, 455." *Paraiso v. U. S.*, (1907) 207 U. S. 368, 28 S. Ct. 127, 52 U. S. (L. ed.) 249.

Questions not raised below, respecting the denial of rights which find expression and sanction in the Federal Constitution and the Philippine Bill of Rights, may be considered by the Supreme Court, on error to the Supreme Court of the Philippine Islands, in the exercise of its discretion under Supreme Court rule 35, to notice a plain error not assigned. *Weems v. U. S.*, (1910) 217 U. S. 349, 30 S. Ct. 544, 54 U. S. (L. ed.) 793.

The objection that possession and working of mining claims in the Philippine Islands for the time required under the Act of July 1, 1902, ch. 1369, sec. 45, 32 Stat. L. 703, 5 Fed. Stat. Annot. 731, to establish a right to a patent, will not support a suit to enjoin setting up title or interfering with the same, comes too late after a trial upon the merits. *Reavis v. Fianza*, (1909) 215 U. S. 16, 30 S. Ct. 1, 54 U. S. (L. ed.) 72.

**Scope of review.**—"In reviewing the action of the court below we are, of course, confined to the record and the case therein made, and may not, as the result of mistaken suggestions as to the issues and proof, disregard our duty by deciding, not the case as made, but an imaginary one, wherein issues not made and not presented below would have to be supplied, and whereby conjecture and surmise must be indulged to replace the total absence of all proof on a particular subject." *Roura v. Philippine Islands*, (1910) 218 U. S. 386, 31 S. Ct. 73, 54 U. S. (L. ed.) 1080.

**Review of questions of fact.**—On a writ of error findings of fact are not open to re-examination, as only questions of law are brought up by the writ. *Santos v. Holy Roman Catholic and Apostolic Church*, (1909) 212 U. S. 463, 29 S. Ct. 338, 53 U. S. (L. ed.) 599.

On writ of error in a criminal case assignments of error which challenge the sufficiency of the evidence to warrant a conviction cannot be considered where it is not contended that there was no evidence of guilt. *Ling Su Fan v. U. S.*, (1910) 218 U. S. 302, 31 S. Ct. 21, 54 U. S. (L. ed.) 1049.

"On appeal or writ of error from the judgment of the Supreme Court of the Philippine Islands the facts (when the courts below differ) will be reviewed by this court." *Strong v. Repide*, (1909) 213 U. S. 419, 29 S. Ct. 521, 53 U. S. (L. ed.) 853, citing *De La Rama v. De La Rama*, (1906) 201 U. S. 303, 309, 26 S. Ct. 485, 50 U. S. (L. ed.) 765, 767.

"An appeal brings up questions of fact as well as of law, but upon a writ of error only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact." *Behn v. Campbell*, (1907) 205 U. S. 403, 27 S. Ct. 502, 51 U. S. (L. ed.) 857, the court further saying: "It was held in *De La Rama v. De La Rama*, (1906) 201 U. S. 303, 26 S. Ct. 485, 50 U. S. (L. ed.) 765, that upon an appeal this court will consider whether a reversal by the Supreme Court of the findings of the court of first instance was justified on the ground that the findings below were plainly and manifestly against the weight of evidence, and, upon being satisfied that the action of the Supreme Court was not warranted, on that ground would reverse it. But this case was one of appeal. . . . The principle acted upon in that case is not applicable to writs of error."

**Concurrent findings of fact** by the two lower courts in support of a claim of certain natives of the Philippine Islands to have held possession of certain mines, and to have worked them to the exclusion of all others down to the bringing of suit, will not be disturbed by the Supreme Court of the United States on appeal, if there is some evidence of the facts found. *Reavis v. Fianza*, (1909) 215 U. S. 16, 30 S. Ct. 1, 54 U. S. (L. ed.) 72.

While, upon review by appeal, "this court will generally accept the concurrent conclusions of the trial and appellate courts, yet as was said by Mr. Justice Brewer in *Beyer v. Le Fevre*, (1902) 186 U. S. 114, 119, 22 S. Ct. 765, 46 U. S. (L. ed.) 1080, 1082: 'There has always been recognized the right and duty of this court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony, it will set the verdict or report aside and direct a re-examination.'" *De La Rama v. De La Rama*, (1906) 201 U. S. 303, 26 S. Ct. 485, 50 U. S. (L. ed.) 765.

**Harmless error.**—The exclusion of evidence in an equity cause, even if erroneous, is not ground for reversal, where, if admitted, it could not have affected the result. *Reavis v. Fianza*, (1909) 215 U. S. 16, 30 S. Ct. 1, 54 U. S. (L. ed.) 72.

## Vol. V, p. 722, sec. 12.

**Jurisdiction not conferred.**—This section which reserved to the United States in the Philippine Islands "such land or other property as shall be designated by the President of the United States for military and other reservations," does not confer upon him the

power to withdraw the reservation completely from the local jurisdiction and place it under the jurisdiction of the Navy Department, thereby erecting a new and independent authority for all purposes of civil government. (1906) 26 Op. Att'y-Gen. 91.

## Vol. V, p. 731, sec. 45.

**Adverse claims.**—An adverse claim which will defeat the right to a patent under this section when natives and their ancestors have held possession and worked mining claims in the Philippine Islands for the period required by that section, cannot be based upon entry and staking of claim and filing notice of location, where such possession was continuous down to the bringing of suit to restrain the person relying upon such acts as amounting to an adverse claim from setting

up title or interfering with the claims. *Reavis v. Fianza*, (1909) 215 U. S. 16, 30 S. Ct. 1, 54 U. S. (L. ed.) 72.

**Claim of title.**—The possession and working of a mining claim in the Philippine Islands for the time requisite, under this section, in order to establish a right to patent, need not have been under a claim of title. *Reavis v. Fianza*, (1909) 215 U. S. 16, 30 S. Ct. 1, 54 U. S. (L. ed.) 72.

## Vol. X, p. 262, sec. 6.

**Prohibiting exportation of Philippine coin.**—The owner of Philippine silver coin is not deprived of his property therein without due process of law, contrary to the Act of July 1, 1902, by the prohibition against the exportation of such coin from the Philippine Islands, under penalty of forfeiture and fine or imprisonment, which is made by the Philippine law No. 1411, enacted by the Philippine Com-

mission in the exercise of the power under the Act of Congress of March 2, 1903 (32 Stat. L. 952, ch. 980), sec. 6, to adopt such measures as are deemed proper, not inconsistent with the organic act, to maintain the parity between gold and silver pesos, but such statute is within the limits of the police power. *Ling Su Fan v. U. S.*, (1910) 218 U. S. 302, 31 S. Ct. 21, 54 U. S. (L. ed.) 1049.

## PILOTAGE.

## Vol. V, p. 747, sec. 4235.

**Constitutionality of pilotage laws.**—No inherent rights guaranteed by the Federal Constitution are infringed by state regulations providing for the appointment of pilots, and restricting the right to pilot to those duly appointed. *Olsen v. Smith*, (1904) 195 U. S. 332, 25 S. Ct. 52, 49 U. S. (L. ed.) 224, *affirming* (Tex. 1902) 68 S. W. 320.

The adoption of compulsory pilotage regu-

lations by a state, under the authority of this section, does not violate U. S. Const., art. 1, sec. 9, cl. 6, which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another. *Thompson v. Darden*, (1905) 193 U. S. 310, 25 S. Ct. 660, 49 U. S. (L. ed.) 1064.

## Vol. V, p. 749, sec. 4236.

**When waters are not the boundary.**—In *Leech v. Louisiana*, (1909) 214 U. S. 175, 29 S. Ct. 552, 53 U. S. (L. ed.) 956, it was held that the state of Louisiana may make it a criminal offense for a pilot not duly qualified under its laws to pilot a foreign vessel from the Gulf of Mexico to New Orleans, Louisiana, although he holds a license issued under the authority of the state of Mississippi; since New Orleans, although upon the Mississippi river, is not "situate upon waters which are the boundary between two states." The court said: "The case for the plaintiff in error depends upon the assumption that the 'waters which are the boundary between two states' are, in this case, the whole Mississippi river so far as

navigable. We are of opinion that the assumption is wrong, and that the limit of the waters referred to is the point at which they cease to be a boundary between two states. Neither continuity of water nor identity of name will carry them beyond that point. If the plaintiff in error had undertaken to pilot from the Gulf to Natchez, a different question would have been presented, and it may be that in that case the Mississippi license would have been good. But New Orleans, although upon the Mississippi, is not situate upon waters which are the boundary between two states, and therefore the section relied upon does not apply."

## Vol. V, p. 749, sec. 4237.

Only the discriminating features of state pilotage laws are abrogated by the provision of this section forbidding such discrimination, and annulling and abrogating "all existing regulations or provisions making any such discrimination," *Olsen v. Smith*, (1904) 195 U. S. 332, 25 S. Ct. 52, 49 U. S. (L. ed.) 224, affirming (Tex. 1902) 68 S. W. 320.

Separating discriminating features from rest of statute. — Whether clauses of a state pilotage law granting discriminatory exemption, in violation of this section, can be elimi-

nated without destroying the remaining provisions, is a question for the state court to decide, and cannot be reviewed by the federal Supreme Court, on writ of error to the state court. *Olsen v. Smith*, (1904) 195 U. S. 332, 25 S. Ct. 52, 49 U. S. (L. ed.) 224, affirming (Tex. 1902) 68 S. W. 320.

By the provisions of sections 1965 and 1969 of the Code of Virginia. — *Thompson v. Darden*, (1905) 198 U. S. 310, 25 S. Ct. 680, 49 U. S. (L. ed.) 1064, affirming the case set out in the original note.

## Vol. V, p. 750, sec. 4444.

**Effect on treaties.** — State pilotage laws, applied to a British vessel coming from a foreign port, do not conflict with a treaty provision that "no higher or other duties or charges shall be imposed in any ports of the United States on British vessels than those payable in the same ports by vessels of the United States," because of the exemption of coastwise steam vessels of the United States from pilotage, resulting from this section, or of any lawful exemption of coastwise vessels, created by the state laws. *Olsen v. Smith*, (1904) 195 U. S. 332, 25 S. Ct. 52, 49 U. S. (L. ed.) 224, affirming (Tex. 1902) 68 S. W. 320.

**No monopoly or combination forbidden by the federal anti-trust laws** is created by state regulations providing for the appointment of pilots, and restricting the right to pilot to those duly appointed. *Olsen v. Smith*, (1904) 195 U. S. 332, 25 S. Ct. 52, 49 U. S. (L. ed.) 224, affirming (Tex. 1902) 68 S. W. 320.

**The exemption of coastwise steam vessels of the United States from the operation of state pilotage laws** interferes with such laws only so far as they relate to these vessels. *Olsen v. Smith*, (1904) 195 U. S. 332, 25 S. Ct. 52, 49 U. S. (L. ed.) 224, affirming (Tex. 1902) 68 S. W. 320.

In *The Queen*, (1910) 184 Fed. 537, affirmed (C. C. A. 1911) 186 Fed. 725, it was

held that a duly registered American steamer engaged in making voyages between United States ports on Puget Sound and San Francisco, although in making such voyages she touched at the foreign way port of Victoria, taking on freight and passengers for San Francisco, was a "coastwise steam vessel," within the meaning of this section, which exempts such vessels from the operation of state pilotage laws, and that a state pilot whose services were refused on her entry into the port of San Francisco, her master and mate being licensed pilots under the laws of the United States, could not subject her to pilotage fees under the California statute (Pol. Code Cal., secs. 2466, 2468).

The North Carolina statute (Pub. Laws 1907, p. 906, ch. 625, sec. 13) requires all coastwise or foreign vessels over sixty gross tons to take a state licensed pilot between the sea and a certain port in the state. It has been held that this statute is not unconstitutional as undertaking to regulate commerce between the states and foreign countries, as applied to vessels other than coastwise steam vessels; the federal statute recognizing the right of the states to regulate pilots, except in so far as Congress sees fit to do so. *St. George v. Hardie*, (1908) 147 N. C. 88, 60 S. E. 920.

## PORTO RICO.

## Vol. V, p. 765, sec. 8.

The local statutory law of real property requiring the giving and recording of cautionary notice of a pending suit in order to affect innocent third parties dealing with the recorded owner is applicable to a suit brought on the equity side of the United States District Court of Porto Rico, in view of the provisions of this section, although by sec. 34 of this Act, 5 Fed. Stat. Annot. 773, the District Court of the United States for Porto Rico is given, in addition to the ordinary jurisdiction of federal District Courts, jurisdiction of all cases cognizant in the

federal Circuit Courts, with power to proceed therein in the same manner as a Circuit Court. *Romeu v. Todd*, (1907) 206 U. S. 358, 27 S. Ct. 724, 51 U. S. (L. ed.) 1093.

**Damages for a wrongful attachment** may, under this section, be assessed in the special proceeding provided by Porto Rico Code Civ. Pro., arts. 1409-1415, where attachments have wrongfully been issued and vacated for any cause. *Perez v. Fernandez*, (1906) 202 U. S. 80, 26 S. Ct. 561, 50 U. S. (L. ed.) 942, holding also that when the District Court is exercising the jurisdiction of a Cir-

cuit Court under section 34 of this Act, *infra*, this page, the general provisions for a jury trial as to issues of fact in the federal Circuit Courts, contained in R. S. sec. 648, 4 Fed. Stat. Annot. 389, do not prevent the court from enforcing the express provisions of Porto Rico Code Civ. Pro., arts. 1409-1415, for the recovery and assessment of damages for wrongful attachment.

**Abolishing quasi-public office.** — Congress

could, by this act, confiscate without compensation, so far as the Federal Constitution is concerned, the office of solicitor of the courts of first instance of the capital of Porto Rico, lawfully purchased in perpetuity, prior to occupation of Porto Rico by the military authorities of the United States, and the cession of that island to the United States. *Sanchez v. U. S.*, (1910) 216 U. S. 167, 30 S. Ct. 361, 54 U. S. (L. ed.) 432.

### Vol. V, p. 766, sec. 11.

Contract obligations were not impaired by so much of this section as requires United States currency at the rate of exchange prescribed by the act, and not at the rate of one dollar for each peso of indebtedness, to be accepted in discharge of an obligation on account of a purchase in 1894 of a planta-

tion in Porto Rico, which was to be satisfied with money current in the province at the rate of 100 centavos for each peso of indebtedness. *Serralles v. Eabri*, (1906) 200 U. S. 103, 26 S. Ct. 176, 50 U. S. (L. ed.) 391.

### Vol. V, p. 767, sec. 14.

**Extradition.** — Precisely the same power to issue a requisition for the return of a fugitive criminal as is possessed under R. S. sec. 5278, 3 Fed. Stat. Annot. 78, by the governor of any organized territory, is given by the governor of Porto Rico by the provisions of this section that the laws of the United States not locally inapplicable shall be in force and effect in Porto Rico, and of section 17, 5 Fed. Stat. Annot. 768; that the

governor of Porto Rico shall have all the powers of governors of the territories of the United States that are not locally inapplicable. *New York v. Bingham*, (1909) 211 U. S. 468, 29 S. Ct. 190, 53 U. S. (L. ed.) 286, *affirming* (1907) 189 N. Y. 124, 81 N. E. 773, *which affirmed* (1907) 117 App. Div. 411, 102 N. Y. S. 878; *In re Kopel*, (1906) 148 Fed. 505.

### Vol. V, p. 772, sec. 32.

**Corporation laws.** — The legislative assembly of Porto Rico has authority to pass laws setting forth the conditions under which domestic corporations may be organized and foreign corporations may do business there, subject, however, to the exceptions and restrictions contained in the Organic Act, and

the joint resolution of May 1, 1900, 31 Stat. 715, 5 Fed. Stat. Annot. 776, in regard to franchises of a public or quasi-public nature, including all railroad, street railway, telegraph, and telephone franchises, privileges, or concessions. (1907) 26 Op. Atty.-Gen. 176.

### Vol. V, p. 772, sec. 33.

**Questions between Roman Catholic church and people affecting property rights.** — Under this section, with the provisions of sections 8 and 15 of the same act, 5 Fed. Stat. Annot. 765, 769, the legislative assembly of Porto Rico had power to confer original jurisdiction upon the Supreme Court of Porto Rico

for the trial and adjudication of questions between the Roman Catholic church and the people or any municipality affecting property rights. *Ponce v. Roman Catholic Apostolic Church*, (1908) 210 U. S. 296, 28 S. Ct. 737, 52 U. S. (L. ed.) 1068.

### Vol. V, p. 773, sec. 34.

This section was amended by section 3 of the Act of March 2, 1901, ch. 812, 31 St. L. 953, 5 Fed. Stat. Annot. 777, for which latter section see also *infra*, p. 1661.

And see reference to section 34 in note to section 8 of this Act, *supra*, p. 1657.

**Court of bankruptcy.** — The District Court of the United States for Porto Rico is a court of bankruptcy "not within any organized circuit of the United States," as described in section 2 and section 24a of the Bankruptcy Act of 1898, *ante*, this Supplement, pp. 469,

603; and an appeal from an adjudication of bankruptcy by that court was taken to the federal Supreme Court in *Armstrong v. Fernandez*, (1908) 208 U. S. 324, 28 S. Ct. 419, 52 U. S. (L. ed.) 514.

"Cases cognizant in the Circuit Courts of the United States." — A mere reference in a bill in equity to the provisions of an order of the military governor of Porto Rico does not present a controversy arising under the laws of the United States, of which the federal District Court for Porto Rico would have

jurisdiction without regard to the citizenship of the parties, even if such order be treated as a law of the United States, where the bill does not call the attention of the court to a controversy arising under such order, in such a way as to invoke the court's action thereon. *Fraenkl v. Cerecedo*, (1910) 216 U. S. 295, 30 S. Ct. 322, 54 U. S. (L. ed.) 486.

A common-law action to recover damages for a wrongful attachment is not within the jurisdiction of the District Court under this section. *Perez v. Fernandez*, (1906) 202 U. S. 80, 26 S. Ct. 561, 50 U. S. (L. ed.) 942.

**Conformity to Porto Rican practice.** — "We think it was the intention of Congress in the Porto Rican Act to require the District Court exercising the jurisdiction of a Circuit Court, in analogy to the powers of the Circuit Courts in the states, to adapt itself, save in the excepted cases in equity and admiralty, to the local procedure and practice in Porto Rico. This conclusion is in accord with the policy of the United States, evidenced in the legislation concerning the islands ceded by Spain, and secures to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law." *Perez v. Fernandez*, (1906) 202 U. S. 80, 26 S. Ct. 561, 50 U. S. (L. ed.) 942.

The District Court for Porto Rico when

exercising the jurisdiction of a Circuit Court under this section must conform to the local practice for the issuing of attachments, and the recovery of damages when wrongfully issued, in view of the provisions in section 8 of this act, 5 Fed. Stat. Annot. 765 and *supra*, p. —, and secs. 914, 915 of the United States Revised Statutes, 4 Fed. Stat. Annot. 563, 577. *Perez v. Fernandez*, (1906) 202 U. S. 80, 26 S. Ct. 561, 50 U. S. (L. ed.) 942.

**Removal of causes.** — "We do not think the rule which demarks the line between the courts of the United States and state courts within the removal act should be held applicable to Porto Rico to the extent which might have obtained had the Act of 1901 [sec. 3, 5 Fed. Stat. Annot. 777] not been enacted. We conclude, therefore, that where a case is removed from the local Porto Rican court to the United States court, over which case the latter court would have had jurisdiction as to all the parties impleaded, if the case had been there originally brought, even though the removal was irregular, the party who caused the removal cannot be heard, after judgment against him, to assert that the United States court was wanting in jurisdiction solely on the ground that the case was erroneously removed." *Garrozi v. Dastas*, (1907) 204 U. S. 64, 27 S. Ct. 224, 51 U. S. (L. ed.) 369.

## Vol. V, p. 773, sec. 35.

The part of this section which deals with review by the United States Supreme Court on writs of error and appeals is revised and re-enacted with material changes and evidently superseded by Judicial Code, sec. 244, *ante*, p. 233, of this Supplement. The remaining part of the section remains in force under the last paragraph of Judicial Code, sec. 297, *ante*, p. 250, of this Supplement.

All the reported cases heard by the federal Supreme Court on appeals or writs of error under this section, prior to June, 1911, other than those elsewhere cited in this note are as follows:

*From the District Court for Porto Rico.* — *Perez v. Fernandez*, (1906) 202 U. S. 80, 26 S. Ct. 561, 50 U. S. (L. ed.) 942; *Romeu v. Todd*, (1907) 206 U. S. 358, 27 S. Ct. 724, 51 U. S. (L. ed.) 1093; *Martinez v. La Asociacion, etc.*, (1909) 213 U. S. 20, 29 S. Ct. 327, 53 U. S. (L. ed.) 679; *Cabrera v. American Colonial Bank*, (1909) 214 U. S. 224, 29 S. Ct. 623, 53 U. S. (L. ed.) 974; *Santiago v. Noguerras*, (1909) 214 U. S. 260, 29 S. Ct. 608, 53 U. S. (L. ed.) 989; *Fraenkl v. Cerecedo*, (1910) 216 U. S. 295, 30 S. Ct. 322, 54 U. S. (L. ed.) 486; *Will v. Tornabelli*, (1910) 217 U. S. 47, 30 S. Ct. 424, 54 U. S. (L. ed.) 660; *Todd v. Romeu*, (1910) 217 U. S. 150, 30 S. Ct. 474, 54 U. S. (L. ed.) 705; *Souffront v. La Compagnie des Sucreries*, (1910) 217 U. S. 475, 30 S. Ct. 608, 54 U. S. (L. ed.) 846; *Javierre v. Central Altagracia*, (1910) 217 U. S. 502, 30 S. Ct. 598, 54 U. S. (L. ed.) 859; *Herencia v. Guzman*, (1910) 219 U. S. 44, 31 S. Ct. 135, 55 U. S. (L. ed.) 81; *Perez v. Fernandez*

(1911) 220 U. S. 224, 31 S. Ct. 412, 55 U. S. (L. ed.) 443; *Blanco v. Hubbard*, (1911) 220 U. S. 233, 31 S. Ct. 415, 55 U. S. (L. ed.) 447.

*From the Supreme Court of Porto Rico.* — *Ponce v. Roman Catholic Apostolic Church*, (1908) 210 U. S. 296, 28 S. Ct. 737, 52 U. S. (L. ed.) 1068; *Maytin v. Vela*, (1910) 216 U. S. 598, 30 S. Ct. 439, 54 U. S. (L. ed.) 632.

"Same cases as from the Supreme Courts of the territories." — Prior to the change in this section by Judicial Code, sec. 244, *ante*, p. 233, this Supplement, the court said: "There may be cases — certainly civil cases — in the United States District Court for Porto Rico that do not involve any question arising under the Constitution, or a treaty, or an Act of Congress; and yet if the case be one which if determined in a Supreme Court of one of the territories of the United States could be brought here for re-examination, the final judgment could be reviewed by this court, although no right of a distinctly federal nature was involved." *Amado v. U. S.*, (1904) 195 U. S. 172, 25 S. Ct. 13, 49 U. S. (L. ed.) 145, a writ of error to the District Court.

"Constitution of the United States . . . brought in question." — Errors assigned with respect to the action of the trial court with reference to an alleged confession of guilt furnish no basis for the exercise by the federal Supreme Court of its appellate jurisdiction over the Porto Rican Supreme Court, where the record does not show even the semblance of the assertion or denial of a

right under the Federal Constitution. *Kent v. Porto Rico*, (1907) 207 U. S. 113, 28 S. Ct. 55, 52 U. S. (L. ed.) 127.

**"Act of Congress is brought in question."**—The federal question presented by the contention that the changes made by the Porto Rico legislature in the boundaries of judicial districts and in the number of judges deprived the courts affected of their validity under section 33 of this Act, 5 Fed. Stat. Annot. 772, legalizing existing tribunals, was held to be too frivolous to sustain a writ of error to the Supreme Court of Porto Rico, when the whole of section 33 is considered together with the context of the Act and especially with section 15 thereof, 5 Fed. Stat. Annot. 768. *Kent v. Porto Rico*, (1907) 207 U. S. 113, 28 S. Ct. 55, 52 U. S. (L. ed.) 127.

**Denial of right claimed under Act of Congress.**—The ruling of the District Court for Porto Rico that the recovery for the breach of a promise to marry was not limited to the expense incurred in reliance on the promised marriage, as provided by Porto Rico Civ. Code, art. 44, is not the equivalent, for the purpose of sustaining a writ of error from the federal Supreme Court, of a denial of a right claimed under a law of the United States, on the theory that this article became a law of the United States by reason of section 8 of this Act, continuing local laws in force. *Ortega v. Lara*, (1906) 202 U. S. 339, 26 S. Ct. 707, 50 U. S. (L. ed.) 1055.

A judgment of the Supreme Court of Porto Rico requiring an indebtedness to be liquidated in United States currency at the rate of 100 cents for each peso of indebtedness, on the ground that section 11 of this Act, 5 Fed. Stat. Annot. 766, under which the debtor claimed the right to pay in such currency at the rate of sixty cents for each peso of indebtedness, had no application to the case, is reviewable in the federal Supreme Court as denying a right claimed under a federal statute. *Serralles v. Esabri*, (1906) 200 U. S. 103, 26 S. Ct. 176, 50 U. S. (L. ed.) 391.

The overruling of a motion in arrest of judgment, in which the accused asserted that the grand jurors were not selected or drawn as required by the federal statutes, presents a case in which "an Act of Congress is brought in question and the right claimed thereunder is denied." *Rodriguez v. U. S.*, (1905) 198 U. S. 156, 25 S. Ct. 617, 49 U. S. (L. ed.) 994, a writ of error to the District Court.

The claim in a written motion in arrest of judgment or sentence that the indictment did not set forth "an offense under the statutes of the United States" is too indefinite to give the federal Supreme Court jurisdiction of a writ of error to the District Court under this section. *Amado v. U. S.*, (1904) 195 U. S. 172, 25 S. Ct. 13, 49 U. S. (L. ed.) 145.

**When the matter in dispute exceeds the sum of \$5,000.**—An appeal was sustained from a decree of the United States District Court for the district of Porto Rico in a suit brought by a wife to obtain a liquidation of

the community, in which the matter in dispute exceeded \$5,000. *Garrozi v. Dastas*, (1907) 204 U. S. 64, 27 S. Ct. 224, 51 U. S. (L. ed.) 369.

**Parties to writ of error.**—The death of the insured after judgment in favor of defendant in an action on the policy in which the insured was originally named as the sole plaintiff, does not require the dismissal of a writ of error sued out to review the judgment without reviving the action, suggesting the death on the record, or giving notice to the succession, where, to meet the plea that the plaintiff had no interest in the cause of action, the caption in the declaration was amended to show that the action was brought for the use of a specified corporation, and an averment of an assignment of the policy to such corporation was inserted in the body of the pleading. *Amadeo v. Northern Assur. Co.*, (1906) 201 U. S. 194, 26 S. Ct. 507, 50 U. S. (L. ed.) 722, a writ of error to the District Court.

The objection that a writ of error sued out on behalf of a liquidating company to review a judgment for defendant in an action on a policy of insurance could only be prosecuted by the liquidator will not require dismissal of such writ, where to meet the plea that the insured, who was originally named as the sole plaintiff, had no interest in the cause of action, the caption of the declaration was amended to show that the action was brought for the use of such company, and an averment of the assignment of the policy to such company "in liquidation, and of which Pedro Salazar is liquidator," was inserted in the body of the pleading, and no objection in this regard was made below. *Amadeo v. Northern Assur. Co.*, (1906) 201 U. S. 194, 26 S. Ct. 507, 50 U. S. (L. ed.) 722.

**Questions reviewable.**—Questions not presented by the pleadings nor raised in the lower court will not be considered on appeal. *Rodriguez v. Vivoni*, (1906) 201 U. S. 371, 26 S. Ct. 475, 50 U. S. (L. ed.) 792, an appeal from the District Court.

On review of a judgment or decree of the District Court of Porto Rico, the federal Supreme Court will, of its own motion, inquire into the jurisdiction of the court below, although no special exception was taken. *Perez v. Fernandez*, (1906) 202 U. S. 80, 26 S. Ct. 561, 50 U. S. (L. ed.) 942.

**Scope of review.**—Under this section it was held that no judgment or decree of the District Court of the United States for the district of Porto Rico can be reviewed by the Supreme Court in matter of fact, but only in matter of law, for that is the rule in cases coming "from the Supreme Courts of the Territories" to which the Act refers. *Garzot v. De Rubio*, (1908) 209 U. S. 283, 28 S. Ct. 548, 52 U. S. (L. ed.) 794, quoting from Idaho, etc., Land Imp. Co. v. Bradbury, (1889) 132 U. S. 509, 513, 10 S. Ct. 177, 178, 33 U. S. (L. ed.) 433, 436, as to "our jurisdiction over causes coming from the territories generally."

**Harmless error.**—Error committed by the trial court either in admitting evidence or in



the legal effect given to the evidence admitted concerning acts which were held adequate to interrupt the course of prescription is not ground for reversal, although the defeated party, relying on the certainty of a reversal because of such errors, may have neglected to make a full defense, or to assign other substantial errors in the Appel-

late Court. *Royal Ins. Co. v. Miller*, (1905) 199 U. S. 353, 28 S. Ct. 48, 50 U. S. (L. ed.) 226, a writ of error to the District Court.

Writs of habeas corpus, when grantable by the judges of district and circuit courts of the United States. See the title HABEAS CORPUS, 3 Fed. Stat. Annot. 162, and *ante*, p. 1100, this Supplement.

### Vol. V. p. 774, sec. 36.

**Audit of expenditure.**—A Porto Rican law concerning an audit of expenditures before disbursement is not objectionable to or inconsistent with the Organic Act merely because it provides for an effective audit of court expenses. Such a law does not tran-

scend the legislative power of the insular government, and, whether wise or not, cannot be treated as void or inapplicable to the United States court in Porto Rico. (1907) 26 Op. Atty-Gen. 438.

### Vol. V, p. 775, sec. 38.

The irrigation bonds of Porto Rico issued in conformity with the requirements of this section, and sections 1 and 3 of the Porto Rican Act of September 18, 1908, will constitute a valid and binding obligation of the people and government of Porto Rico, when they shall have been executed with due for-

malities, and their issue and sale (made or proposed) has been authenticated by the executive council, acting upon the approval and adoption of plans and specifications for the irrigation system as required by local law. (1908) 27 Op. Atty-Gen. 104.

### Vol. V, p. 777, sec. 3.

A corporation created by a decree of the Spanish Crown for charitable purposes, and limited in its field of operation to Porto Rico, does not continue, after the ratification of the treaty of peace between the United States and Spain, to be a citizen or subject of Spain, within the meaning of this section, so as to give jurisdiction to the federal District Court for Porto Rico over a suit to which it is a party. *Martinez v. La Asociacion, etc.*, (1909) 213 U. S. 20, 29 S. Ct. 327, 53 U. S. (L. ed.) 679.

A charitable corporation created by decree of the Spanish Crown to operate in Porto

Rico is not a citizen of the United States within the meaning of this section, but since the enactment of the Act of April 12, 1900, 31 Stat. L. 77, ch. 191, 5 Fed. Stat. Annot. 762 *et seq.*, is a citizen of Porto Rico, if a citizen of any country. *Martinez v. La Asociacion, etc.*, (1909) 213 U. S. 20, 29 S. Ct. 327, 53 U. S. (L. ed.) 679.

**Between Spanish subjects.**—Jurisdiction of the District Court under this section extends to a cause where the parties on both sides are subjects of the King of Spain. *Ortega v. Lara*, (1906) 202 U. S. 339, 26 S. Ct. 707, 50 U. S. (L. ed.) 1055.

## POSTAL SERVICE.

### Vol. V, p. 792, sec. 3829.

The government's mere occupation of a rented building on a post road for a post office, it has been held, did not constitute the establishment of a post office in the sense of accomplishing of itself any appropriation or dedication of the site selected to public use, or any interference with existing rights therein under this section. *U. S. v. Boston El. R. Co.*, (1910) 176 Fed. 968.

A policy insuring articles sent by mail provided that no article should be considered

as insured until a letter of advice, with a description of the property, etc., should be deposited in the post office at the place of mailing, and that the article should be deposited and registered at the post office. It was held under this section that mailing the letter of advice by depositing it in a mail box was insufficient, and did not cause the article to become insured. *Banco De Sonora v. Bankers' Mut. Casualty Co.*, (1904) 124 Ia. 576, 100 N. W. 532.

## Vol. V, p. 794, sec. 3834.

**Action on postmaster's bond.**—Under the bond of a postmaster, conditioned that he will faithfully discharge all the duties and trusts imposed on him by law or the rules and regulations of the Post-office Department, and Postal Laws and Regulations, sec. 1051, providing that the postmaster will be held accountable for all registered matter

coming into his office, he is liable for a registered package delivered to him; it being afterwards stolen, though without negligence on his part. *U. S. v. Griswold*, (1905) 9 Ariz. 304, 80 Pac. 317, *reversing* (1904) 8 Ariz. 453, 76 Pac. 596, set out in original note.

## Vol. V, p. 808, sec. 1.

**Postmaster-General not authorized to impose fines.**—There is no statute which authorizes the Postmaster-General to impose fines and enforce their collection from the

legal salaries of clerks and others in the department. *Sherlock v. U. S.*, (1908) 43 Ct. Cl. 161.

## Vol. V, p. 812, sec. 9.

**Liability of postmaster on bond for unlawful appointment.**—Under this section it has been held that a postmaster who, by direction of the Post-office Department, appointed a clerk in his office and mailed the checks in payment of her salary to her in Washington, taking credit therefor in his accounts, which he certified under oath were just and true as he verily believed, although such

clerk rendered no service in his office, is liable on his bond for the amount of the salary so allowed and paid him, notwithstanding the fact that he acted in good faith and in the supposition that such clerk was employed in the department in connection with the establishment of a free delivery at his office. *U. S. v. Moore*, (C. C. A. 1909) 168 Fed. 36.

Vol. V, p. 816. [*Postoffices at county seats to be continued.*]

**Re-establishment.**—Where such consolidation has taken place, such post office must be re-established regardless of any view the

Postmaster-General may entertain in respect of the public interests affected. *U. S. v. Cortelyou*, (1905) 26 App. Cas. (D. C.) 298.

## Vol. V, p. 818, sec. 2.

**Act applied to Long Island City.**—Congress has classified letter carriers with reference to the population of municipal subdivisions and without reference to the receipts of post offices; and the classification of a letter carrier depends upon the population of the place where he serves. Long Island City on Jan. 1, 1898, by virtue of the Act of the

Legislature of New York (Laws 1897, p. 1, ch. 378, sec. 1), became a part of the city of New York; and thereafter the letter carriers serving therein became letter carriers in the city of New York and entitled to be paid as such. *Maguire v. U. S.*, (1908) 43 Ct. Cl. 400.

## Vol. V, p. 818, sec. 4.

**"Substitute letter carriers" and regular "letter carriers"** have always been treated by the Post-Office Department and by Congress as distinct classes. The employment of "substitute letter carriers" is authorized by this Act, the compensation thereby authorized being "one dollar per annum and the *pro rata* compensation of the carriers whose routes they may be required to serve." *Alderman v. U. S.*, (1908) 44 Ct. Cl. 35.

The post-office regulations cannot be construed to confer upon the First Assistant Postmaster-General authority to suspend without pay or remove a letter carrier. In

the absence of a provision to the contrary, the power of removal is incident to the power of appointment, but to remove an officer there must be a valid exercise of power by proper authority. A letter carrier cannot be deprived of a salary unless the power was exercised expressly, and not indirectly or by implication. A removal or suspension without pay must be upon the direct order of the Postmaster-General; and, where it is a case of suspension without pay it should be expressly so stated in the order. *Beuhring v. U. S.*, (1910) 45 Ct. Cl. 404.

Vol. V, p. 819. [*Act of May 24, 1888, ch. 308.*]

There is no law authorizing payment to a "substitute letter carrier" for time consumed in familiarizing himself with duties

to be performed when he shall take the place of the regular letter carrier. The time spent by him in qualifying himself to perform the

service when the regular letter carrier ceases to perform it is not service rendered. *Kingston v. U. S.*, (1908) 44 Ct. Cl. 44.

The latter provision of this Act does not extend to "substitute letter carriers," for to so construe it would be putting a premium upon inexperience and inefficiency. *Alderman v. U. S.*, (1908) 44 Ct. Cl. 35.

A letter carrier cannot be deprived of his

statutory compensation unless the power to deprive him of it is actually exercised, expressly, and not indirectly or by implication. And it has been held that where a letter carrier entitled to an annual salary is not suspended without pay and is not restored to duty with loss of pay, he is entitled to be paid during the period of suspension. *Steele v. U. S.*, (1905) 40 Ct. Cl. 403.

### Vol. V, p. 821. [*Hours of work, Sundays and holidays.*]

The proviso does not apply only to letter carriers in new offices, but is a permanent remedial amendment of the existing eight-hour law, and both Acts must be construed *in pari materia* and in harmony with the evident intent of the later enactment.

The fact that the Post-Office Department gave a different interpretation to the statute favorable to letter carriers at large cannot prevail in the courts against the clear and unambiguous language of the statute. *Van Doren v. U. S.*, (1910) 45 Ct. Cl. 476.

### Vol. V, p. 823, sec. 3870.

**Scope of bond.**—The bond of a letter carrier and his surety for the faithful performance by the carrier of the duties imposed upon him, either by the postal laws of the United States or the regulations of the Post-Office Department, binds the surety for the faithful discharge by his principal of the duty of collecting letters and packages to be registered which were imposed on the letter carrier by the order of the Post-Office Department during the term of the bond. *National Surety Co. v. U. S.*, (C. C. A. 1904) 129 Fed. 70.

A mail carrier and the surety on his bond, which is conditioned that the principal shall account for and pay over all property and money coming into his possession by virtue of his position, are liable to the United States for the full amount of money stolen by the carrier from a registered letter, notwithstanding the fact that by the postal regulations the United States limits its own liability for the loss of money contained in any single registered letter to twenty-five dollars. *U. S. v. American Surety Co.*, (1907) 155 Fed. 941.

### Vol. V, p. 829, sec. 10.

**"Periodical publication."**—Although a publication complies formally with the conditions of this Act it will not be entitled to a second-class postage rate, unless, as required by section 10, it is a "periodical publication," which means that it shall not only have the feature of periodicity, but shall be a periodical in the ordinary sense of the term. *U. S. v. Cortelyou*, (1907) 28 App. Cas. (D. C.) 570.

The duty imposed by law upon the Postmaster-general of determining whether a publication is a "periodical publication," and as such entitled to second-class postage rates, is not a mere ministerial one, but involves the exercise of some discretion, which will not be interfered with by the courts unless clearly wrong. *U. S. v. Cortelyou*, (1907) 28 App. Cas. (D. C.) 570.

### Vol. V, p. 830, sec. 14.

Although the question whether certain publications are periodicals. — Under the settled rule that laches is not imputable to the government in its character as sovereign by those subject to its dominion, the fact that action on an application for admission of a periodical publication to the mails at the second-class rate of postage was delayed for several years by the officers of the Post Office Department, and that in the meantime the publication was admitted as second-class matter under a temporary permit issued by authority of section 282 of the Postal Regulations of 1893, to remain in force "until the Post Office Department shall determine whether it is admissible as second-class matter," does not entitle the publisher to a hearing before the department acts on his application, as in case of revocation of a privilege

once granted, and the courts have no authority to review the action of the Postmaster-general in refusing the application. *Lewis Pub. Co. v. Wyman*, (1907) 168 Fed. 752. *modified in* (1910) 182 Fed. 13, 104 C. C. A. 453.

The word "primarily" as used in this Act, excluding from the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates, means "chiefly" or "principally." *Lewis Pub. Co. v. Wyman*, (1910) 182 Fed. 13, 104 C. C. A. 453, *modifying* (1907) 168 Fed. 752.

A newspaper otherwise entitled to be admitted to the second class would violate the law by mailing under the second-class rate only where the papers mailed are designed primarily for advertising purposes, or for

free circulation, or for circulation at nominal rates. *U. S. v. Atlanta Journal Co.*, (1911) 185 Fed. 656.

**Revocation of certificate of entry of publication.** — The Postmaster-general is not bound by the construction placed by a predecessor in office on the statute relating to sec-

ond-class mail matter, so as to preclude him from revoking a certificate of entry of a publication as second-class matter, which had been issued by such predecessor, where no vested right has been created by such certificate. *Columbian Correspondence College v. Wynne*, (1905) 25 App. Cas. (D. C.) 149.

### Vol. V, p. 833, sec. 1.

An incorporated educational institution conducting a correspondence college for the gain and profit of its stockholders is not a regularly incorporated institution of learning

within the meaning of this Act. *Columbian Correspondence College v. Wynne*, (1905) 25 App. Cas. (D. C.) 149.

### Vol. V, p. 834, sec. 1. [*Second-class mail privileges, etc.*]

**Validity of order.** — Complainant, the publisher of a periodical, was notified to appear June 17, 1906, before the Third Assistant Postmaster-general and show cause why the authorization for the admission of his publication as second-class mail matter should not be revoked, and why the third-class rate of postage should not be charged for the transmission of such publication. Complainant appeared and was notified that he might submit evidence, but nothing further was done until April 19, 1906, when the publisher was notified that, as a result of investigation, it was found that his right to mail subscription copies as second-class matter did not exceed 141,328, and that he would be afforded an opportunity to present evidence to the contrary on a subsequent day. The letter also informed him that the right of such publication to second-class entry was also in dispute. On the adjourned day the publisher appeared, but the hearing was limited to the question as to

the number of copies the publisher was entitled to mail as second-class matter, and without further hearing his right to use the second-class privilege at all was subsequently revoked. It was held that such order was entered without the hearing required, and was therefore void. *Lewis Pub. Co. v. Wyman*, (1907) 132 Fed. 787.

**Sufficiency of notice.** — A notice by the Third Assistant Postmaster-general to publishers that on a specified day and place they will be given a hearing to show cause why second-class mail privilege heretofore accorded the issue of one of their publications shall not be revoked and third-class rates charged, on the ground that they do not constitute a newspaper or other periodical publication, but are in fact books, is sufficiently explicit, especially where the publishers admit that the question raised is one of law. *Hitchcock v. Smith*, (1910) 34 App. Cas. (D. C.) 821.

### Vol. V, p. 838, sec. 3892.

**Object of the Act.** — "There is another federal statute (section 3892, Rev. Stat.), which seems to proceed upon the theory that the legal custody of the government continues until the mail matter reaches the addressee for whom it was intended, and that any destruction or embezzlement of such a letter, which by mistake has left the hands of the postal authorities, and has not yet reached the addressee, may be punished as a federal crime. *U. S. v. McCready*, (1882) 11 Fed. 225." *U. S. v. Meyers*, (1906) 142 Fed. 907. See to the like effect *U. S. v. Bullington*, (1908) 170 Fed. 121.

**Destruction of letter withdrawn from mail by postmaster.** — Where a postmaster having written, stamped, and deposited a letter in the mail, before it was transported, withdrew it and delivered it to defendant, who agreed to take it, with other mail, to the addressee, but defendant instead secreted or destroyed the letter, it was held that the postmaster's withdrawal of the letter terminated the government's authority over it, and that its subsequent destruction constituted no offense. *U. S. v. Bullington*, (1908) 170 Fed. 121.

### Vol. V, p. 839, sec. 3893.

"The words 'obscene,' 'lewd,' and 'lascivious,' as used in this section, signify that form of immorality which has relation to sexual impurity, having the same meaning as is given them at common law in prosecutions for obscene libel." *Hanson v. U. S.*, (C. C. A. 1907) 157 Fed. 749. See to the like effect *U. S. v. O'Donnell*, (1908) 165 Fed. 218.

The word "obscene" should be given fully as broad a significance as it had at common law. *Knowles v. U. S.*, (C. C. A. 1909) 170 Fed. 409.

**The test is whether the tendency of the matter.** — If it is of such nature that the reading would, in the opinion of reasonable persons, or the jurors selected to try one charged with violating the section, tend to deprave or corrupt the morals of reasonable persons, and would suggest to the minds of either sex thoughts of an impure or libidinous character, it is within the prohibition of the statute. *U. S. v. Musgrave*, (1908) 160 Fed. 700. See to the same effect *Macfadden v. U. S.*, (C. C. A. 1908) 165 Fed. 51.

The true test to determine whether a writing is nonmailable under this statute as obscene, lewd, or lascivious, is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd, or lascivious thoughts or desires. *Knowles v. U. S.*, (C. C. A. 1909) 170 Fed. 409.

**Medical works.**—Where the acts described and the ideas conveyed in a book are calculated to deprave the morals of the reader by exciting sensual desires and libidinous thoughts, the book is obscene, and it is immaterial that the information conveyed is accurate and scientific and tends to prevent disease and other ills resulting from existing ignorance upon the topics discussed; that, as a whole, the book is calculated to be of value to the medical practitioner and to men and women in the marriage relation, that its publication was approved by several physicians; and that some portions of it are extracts from standard medical works. *Burton v. U. S.*, (1906) 142 Fed. 57, 73 C. C. A. 243.

**Determination of obscene character.**—Whether or not a book is obscene within the provision of this section should be determined upon a consideration of such parts of it as are claimed to be obscene, together with so much of the context as may be necessary to a proper understanding of the parts referred to, but not necessarily upon an inspection of the entire book with reference to all its contents. *Burton v. U. S.*, (1906) 142 Fed. 57, 73 C. C. A. 242.

**Language which is exceedingly coarse and vulgar.**—Accused mailed a pamphlet entitled "Sexual Debility, Its Cause and Cure," containing matter relevant to the title, and another entitled "Syphilis and Gonorrhea, Their Origin, Effect, and Cure," which was similarly comprehensive of the matters treated of, except that it extended to other venereal diseases. A third pamphlet was entitled "A Guide to Full Pockets," and was intended to attract readers to subscribe for stock in a corporation engaged in selling medicines and prescriptions intended to relieve sexual disorders. It was held that, though such pamphlets contained vulgar terms and were coarse in expression, they did not, in the absence of a design to pander to lascivious curiosity or corrupt morals, constitute nonmailable matter within this section. *Hanson v. U. S.*, (C. C. A. 1907) 157 Fed. 749.

**Description of obscene matter.**—An indictment under this section, which charges defendant with having mailed a letter containing "obscene, lewd, and lascivious matter," is not broadened in scope by a further characterization of such matter as of an indecent character. *U. S. v. O'Donnell*, (1908) 165 Fed. 218.

**Spreading obscene matter on record discretionary with court.**—Whether or not a writing charged to have been deposited in a post office in violation of law is too obscene, lewd, and lascivious to be spread upon the records is a question which it is within the

discretion of the court to determine. *Rinker v. U. S.*, (C. C. A. 1907) 151 Fed. 755.

It is a question for the jury whether the matter is obscene, lewd, and lascivious within this section. *U. S. v. Benedict*, (1908) 165 Fed. 221; *Konda v. U. S.*, (C. C. A. 1908) 166 Fed. 91.

**"Or other publication of an indecent character."**—In this section, which declares unmailable "every obscene, lewd, or lascivious book, pamphlet . . . or other publication of an indecent character," the words "indecent character" qualify only the words "other publication," and, in an indictment for its violation by mailing of a letter, it is not essential that the letter be described as of an indecent character, in addition to describing it as obscene, lewd, and lascivious. *Rinker v. U. S.*, (C. C. A. 1907) 151 Fed. 755.

**Sufficiency of allegations—As to character of letter.**—An indictment under this section sufficiently describes the letter, where it sets out sufficient thereof to identify it and alleges that the contents are so obscene, lewd, and lascivious as to be improper to spread on the records of the court, and, if the defendant desires more specific information as to such contents, he may apply for a bill of particulars. *Rinker v. U. S.*, (C. C. A. 1907) 151 Fed. 755.

In an indictment under this section an averment that defendant knowingly deposited in a post office for mailing circulars giving information how, where, of whom, and by what means obscene, lewd, and lascivious books might be obtained, and that defendant unlawfully and knowingly meant and intended thereby to give such information, is a sufficient averment that defendant knew the character and contents of such circulars, and it is not necessary to set out the same, nor to further characterize or describe the books referred to therein than to aver that they were obscene, lewd, and lascivious. *Shepard v. U. S.*, (C. C. A. 1908) 160 Fed. 584.

An indictment under this section states an offense where it sets out a letter written to defendant inquiring for some medicine or other means for accomplishing an abortion, and a letter, alleged to have been mailed by defendant in reply, which, when read in connection with the letter of inquiry, in effect offers for a stated consideration to effect the desired result by some treatment or operation, although the particular means is not specified; the word "thing," as used in the statute, being a comprehensive term, which includes any kind of treatment or operation. *U. S. v. Somers*, (1908) 164 Fed. 259.

An indictment under this section, which charges defendant with depositing on a day named in the United States mail a letter containing information where and of whom articles intended to prevent conception could be obtained, addressed to a person named at Goshen, Ind., but which contains no copy of the letter, no averment that it is so indecent as to be unfit to be spread upon the record of the court, and no allegation of its date, of the name signed to it, of the place where it was mailed, or of any words, figures, or marks which it contains, whereby it can be identi-

fied, does not state the facts which constitute the offense charged with such clearness and certainty as to enable the defendant to avail himself of a conviction or acquittal thereon in defense to a second prosecution for the same offense, and it is insufficient in the face of a motion in arrest of judgment. *Floren v. U. S.*, (C. C. A. 1911) 186 Fed. 961, following *Grimm v. U. S.*, (1894) 156 U. S. 608, 15 S. Ct. 471, 39 U. S. (L. ed.) 550; *Rosen v. U. S.*, (1896) 161 U. S. 29, 16 S. Ct. 438, 480, 40 U. S. (L. ed.) 606.

**Article or thing designed to prevent conception.**—An indictment under this statute must state what the particular "article or thing" consisted of; describing it with at least such particularity that the accused may not only know the particular charge against him, but may be able to plead the judgment of conviction or acquittal in bar of a second prosecution. *U. S. v. Pupke*, (1904) 133 Fed. 243.

**On or about a given date sufficient.**—An indictment under this section for depositing an obscene, lewd, and lascivious letter in the mails, is not bad because it alleges that the offense was committed "on or about" a given date, where it shows that but a short time elapsed between the writing of the letter and the finding of the indictment; the defect being one of form only, by which the defendant was not prejudiced, and to be disregarded under *R. S. sec. 1025*. *Rinker v. U. S.*, (C. C. A. 1907) 151 Fed. 755.

**Duplicity.**—An indictment under this section, charging the defendant with having mailed a letter giving information where and how, and of whom and by what means, articles and things designed and intended "for the prevention of conception and for the procuring of abortion" might be obtained, does not charge two offenses. *Lee v. U. S.*, (C. C. A. 1907) 156 Fed. 948.

**Knowingly.**—One who causes objectionable matter written by him to be printed in a newspaper, intending to bring it to the attention of the readers of the paper, and knowing that the regular and established method of transmitting the paper to its readers is by mail, knowingly causes the objectionable matter to be deposited in the mail within this section, when in such regular course the paper with the objectionable matter printed therein is deposited in the post office for mailing and delivery. *Demolli v. U. S.*, (C. C. A. 1906) 144 Fed. 363.

An indictment under this section which charges that defendant "unlawfully and knowingly" mailed an obscene, lewd, and lascivious pamphlet, sufficiently charges that he knew the character of such pamphlet. *Konda v. U. S.*, (C. C. A. 1908) 166 Fed. 91.

An indictment charging the defendant with "wilfully, unlawfully, wrongfully, and knowingly" mailing an obscene circular giving information where an obscene book might be obtained, the sufficiency of which is not questioned before verdict, is, upon motion in arrest of judgment, to be taken as meaning that the circular was mailed with knowledge of its contents and of the book respecting

which it gave information. *Burton v. U. S.*, (1906) 142 Fed. 57, 73 C. C. A. 243.

**A criminal intent.**—In a prosecution under this statute the purpose of the defendant is immaterial, and that his motive was good is no defense. *Knowles v. U. S.*, (C. C. A. 1909) 170 Fed. 409.

**Defendant's belief as to character of obscene matter.**—In a prosecution under this section the inquiry is whether or not the publication charged to have been obscene was in fact of that character, and if it was, and the defendant knew its contents at the time he deposited it in the mail, it is not material that he himself did not regard it as obscene. *Burton v. U. S.*, (1906) 142 Fed. 57, 73 C. C. A. 243.

**"Deposit or cause to be deposited for mailing or delivery"—Deposit by third person.**—It is not essential to the commission of the offense prescribed by this section that the objectionable matter be deposited in the mail by the offender himself, or by another acting under his express direction; he being equally responsible if it is deposited therein as a natural consequence of an act intentionally done by him with knowledge of its probable effect. *Demolli v. U. S.*, (C. C. A. 1906) 144 Fed. 363.

An indictment charging that a defendant deposited in the mails unmailable matter includes the charge that he caused such matter to be deposited, it being immaterial whether he deposited it by his own hand or by an agent. *Shepard v. U. S.*, (C. C. A. 1908) 160 Fed. 584.

**Deposit in letter box.**—Under such an indictment an averment that prohibited matter was deposited in a post office box is sustained by proof that it was deposited in a letter box placed by the government for receiving mail, and was taken by its agents from such box to the post office, and there stamped and sent out. *Shepard v. U. S.*, (C. C. A. 1908) 160 Fed. 584.

**Sufficiency of indictment.**—An indictment under this section has been held to sufficiently charge that defendant deposited an obscene letter in a post office "for mailing or delivery," although not in such language, where the plain and reasonable meaning of the language used is that such was the purpose with which the letter was deposited in the post office. *Rinker v. U. S.*, (C. C. A. 1907) 151 Fed. 755.

**Unmailable character of writing question for jury.**—In a prosecution under this section there is a preliminary question for the court to determine whether the writing could by any reasonable judgment be held to come within the prohibition of the law, and, whenever reasonable minds might reach different conclusions as to its character, it is the duty of the court to submit the question to the jury. The court cannot properly in any case declare the writing to be within the statute as matter of law. *Knowles v. U. S.*, (C. C. A. 1909) 170 Fed. 409.

Whether or not a newspaper article commenting on the death of a young unmarried woman as the result of an attempted abortion, and in effect approving fornication and con-

demning society for its attitude toward it, was within this section is a question for the jury. *Knowles v. U. S.*, (C. C. A. 1909) 170 Fed. 409.

**Inquiry by government officer.**—Accused being on trial for sending an obscene letter through the mails, directed to G., the government offered in evidence an alleged reply to a letter written to accused by a postal inspector, written on the back of the inspector's letter, which the government claimed was in the handwriting of accused, stating that accused had received a dental certificate, and was glad to get it, because it saved him accepting free board and lodging for six months, and that, while he liked big dinners, he did not like to impose on good nature; the government claiming that this had reference to accused's conviction and incarceration before G., as a justice of the peace, on a charge of practicing dentistry without a license. It did not appear that the inspector had any knowledge of accused's incarceration as claimed. It was held that the letter was not admissible

as showing motive for sending the alleged obscene letter to G. *U. S. v. North*, (1911) 184 Fed. 151.

**Liability of partners.**—Where, in the execution of their joint enterprise, one partner deposits a nonmailable circular in the mail by the authorization of another, or with his knowledge and acquiescence, the latter causes the circular to be so deposited within the meaning of this section. *Burton v. U. S.*, (1906) 142 Fed. 57, 73 C. C. A. 243.

**A corporation has capacity to commit the crime of mailing obscene, nonmailable matter, prohibited by this section.** *U. S. v. New York Herald Co.*, (1907) 159 Fed. 296. And it has been held that such section was applicable to a corporation organized for the purpose of publishing a newspaper, and that proof of the mailing by such corporation of its newspaper, containing obnoxious matter, was sufficient to show that the corporation had knowledge thereof. *U. S. v. New York Herald Co.*, (1907) 159 Fed. 296.

### Vol. V, p. 846, sec. 3894.

**What constitutes "lottery," "gift concert," etc.**—An advertisement in a newspaper.—A newspaper advertisement offering a prize for the best essay on the name of a certain breakfast food to be judged by three persons named, and each essay when submitted to be accompanied by three labels from packages of such food, may or may not be an advertisement of a lottery which will render the newspaper unmailable under this Act, depending on whether or not the prize is "dependent upon lot or chance." To escape such condemnation the offer must be made and carried out in good faith, and the prize awarded on the merits, and the advertisement should contain a sufficiently definite statement of what the word "best" means as used therein to advise competitors of the standard of comparison to be applied by the judges. *Brooklyn Daily Eagle v. Voorhies*, (1910) 181 Fed. 579.

**Corporate certificates on instalment plan.**—A scheme by which certificates are issued by a corporation, on each of which the holder

agrees to pay one dollar per week, subject to forfeiture for nonpayment, and about seventy-five per cent. of which payments are paid into a "mutual benefit credit fund" until all certificates prior in date have matured and been canceled, when his own certificate shall mature, and he shall be paid from such fund the sum of two dollars for each week such certificate has been in force, provided there is so much in the fund, not exceeding however \$160, is a lottery within the meaning of this section. *Fitzsimmons v. U. S.*, (C. C. A. 1907) 156 Fed. 477, 482.

**Averments in indictments—Existence of lottery or gift enterprise.**—An indictment for sending through the mails a newspaper containing an advertisement of a lottery or gift enterprise, or a complete or partial list of prizes awarded at the drawing of a lottery or gift enterprise, must aver, either specifically or by necessary intendment, the existence of a lottery or gift enterprise. *U. S. v. Irvine*, (1907) 156 Fed. 376.

### Vol. V, p. 849, sec. 3.

**Offer of reward for kidnapping on face of envelope.**—The deposit in a post office of a stamped envelope, on the face of which was printed in large red letters, "\$1,000 reward will be paid to any person who kidnaps Ex-Gov. Taylor and returns him to Kentucky authorities," constitutes a violation of this Act. *Warren v. U. S.*, (C. C. A. 1910) 183 Fed. 718.

**Intent.**—In a prosecution for sending nonmailable matter through the mail, in violation of this Act, it is not material whether the objectionable language is true or false, or whether accused was actuated by public spirit or private malice. *Warren v. U. S.*, (C. C. A. 1910) 183 Fed. 718.

### Vol. V, p. 872, sec. 3929.

**Review by courts.**—A federal court of equity has jurisdiction of a suit to determine whether or not the matter because of

which it is proposed to exclude a newspaper from the mails has been legally held to be unmailable by the Postmaster-general, under

the statutes of the United States, and if his action is found to be unauthorized to enjoin the exclusion of such paper. *Brooklyn Daily Eagle v. Voorhies*, (1910) 181 Fed. 579.

In a doubtful case within his jurisdiction, in the absence of fraud or gross mistake of fact, where there is some evidence satisfactory to the Postmaster-general to sustain a fraud order issued under R. S. secs. 3929, 4041, as amended by Act Sept. 19, 1890, ch. 908, secs. 2, 3, 26 Stat. L. 466, and by Act March 2, 1895, ch. 191, sec. 4, 28 Stat. L. 964, his decision of a question of fact on which the order is founded is conclusive and will not be reviewed by the courts. *People's U. S. Bank v. Gilson*, (C. C. A. 1908) 161 Fed. 286, *affirming* (1905) 140 Fed. 1.

Under this section and section 4041, *infra*, the Postmaster-general may find that a concern is using the mails in conducting a scheme to defraud which warrants the issuance of such an order on the evidence of the agents and inspectors of the department, and such a finding cannot be reviewed by the courts in so far as it involves questions of fact, nor unless a plain error of law is shown. *People's U. S. Bank v. Gilson*, (1905) 140 Fed. 1.

#### Issuance of fraud order by the department.

—The use of the postal service of the United States is not a matter of right, but of privilege, limited by the statutes declaring certain classes of matter to be nonmailable, and it is competent for the Post-office Department to determine *ex parte* that a concern is using the mails in conducting a scheme to defraud, in violation of the statute, and to base an order excluding it from such use on such finding. If a hearing is granted before the issuance of such an order, the concern affected may properly be required to assume the burden of proof, and to show affirmatively that its business is legitimate and honest. *People's U. S. Bank v. Gilson*, (1905) 140 Fed. 1.

**What transactions will justify fraud orders.**—This and section 4041, *infra*, are not restricted to schemes wanting in all the elements of a legitimate business, or in which it is intended to return nothing whatever or nothing equivalent in value for the money obtained, but embrace those whereby a business otherwise legitimate is designedly so conducted that by false representations its patrons are induced to part with their money in the belief that they are purchasing something worth more than that which is actually being sold, though they may approximate in commercial value the price asked and received. *Harris v. Rosenberger*, (C. C. A. 1906) 145 Fed. 449, *reversing* (1905) 136 Fed. 1001.

A scheme conducted by a company by the issuance and sale of so-called "diamond leases," numbered consecutively in order of their issuance and arranged in series, each purchaser being required to make a certain number of weekly payments, and the fund thus created to be applied in fixed proportions to the payment of the expenses of the company and the redemption of the oldest outstanding lease in the same series and in

prior series by purchasing and delivering to each holder a diamond of a stated weight and value, there being no other fund applicable to such redemption, except that arising from such weekly payments and from fines and forfeitures on account of lapses, is a lottery or scheme for the distribution of property by lot or chance, within the meaning of this section and section 4041, *infra*. *Preferred Mercantile Co. v. Hibbard*, (1905) 142 Fed. 877.

"Our conclusion is that when a business, even if otherwise legitimate, is systematically and designedly conducted upon the plan of inducing its patrons, by means of false representations, to part with their money in the belief that they are purchasing something different from, superior to, and worth more than, what is actually sold, it becomes an objectionable scheme or device within the intentment of sections 3929 and 4041, although what is being sold may approximate in commercial value the price asked and received." *Harris v. Rosenberger*, (C. C. A. 1906) 145 Fed. 449.

R. S. secs. 3929 and 4041 apply to two classes of cases: First, to schemes for the distribution of money, etc., by lot, chance, or drawing of any kind; and, second, to all schemes or devices for obtaining money or property of any kind by means of false or fraudulent pretenses, representations, or promises. *Degge v. Hitchcock*, (1910) 35 App. Cas. (D. C.) 218.

This section contemplates three classes of transactions, namely, lotteries and other like games of chance, "confidence games," and schemes which from their very nature, in the light of business experience, are sure to end in financial disaster to their contributors; and does not include an ordinary mail-order liquor business in which the customers are given a fair commercial equivalent for the price paid, though the seller is guilty of trade puffing and of a false statement in his advertising as to the age of his liquors. *Rosenberger v. Harris*, (1905) 136 Fed. 1001.

For descriptions of particular schemes, see *Preferred Mercantile Co. v. Hibbard*, (1905) 142 Fed. 877; *U. S. v. McKenna*, (1906) 149 Fed. 252.

**Jurisdiction of Postmaster-general.**—The Postmaster-general, though entitled to pass finally on questions of fact raised in such proceedings, has not exclusive jurisdiction to pass on questions of law. *Rosenberger v. Harris*, (1905) 136 Fed. 1001.

**Requisites by bill to enjoin fraud order.**—A bill in equity cannot be maintained in a federal court to enjoin the enforcement of a fraud order made by the Postmaster-general unless it makes a clear *prima facie* case that the facts adduced before him could not possibly support such order, or that complainant's legal or constitutional rights have been violated, and such a bill is insufficient where it shows a hearing upon due notice on charges of fraud clearly within the statute, but does not show what proofs were adduced. *Appleby v. Cluss*, (1908) 160 Fed. 984.



## Vol. V, p. 881, sec. 245.

**Liability for penal sum.**—The surety on the bond of a bidder for a contract for carrying the mails on default by the principal is liable for the full sum mentioned as the penalty of the bond without regard to the actual damages sustained by the United States, where the bond, although in the usual form, recites that it is given pursuant to Act June 23, 1874, 18 Stat. L. 235, ch. 456, sec. 245, and "subject to all the terms, conditions, and remedies thereon in said Act provided;" one of its provisions being that in case of default by a bidder "he and his sureties shall be liable for the amount of said bond as liquidated damages to be recovered in an action of debt on said bond." *U. S. v. U. S. Fidelity, etc., Co.*, (1907) 151 Fed. 534.

A proposal bond, given by a bidder for a contract for carrying the mail, conditioned as required by this Act, is an absolute undertaking to pay the amount named therein as liquidated damages in case of condition broken, and not one of indemnity or security to the government against loss or damages for breach of contract, and in an action thereon the actual damages cannot be inquired into. *U. S. v. Alcorn*, (1906) 145 Fed. 995.

In an action on a proposal bond given by a bidder for a contract for carrying the mail, as required by this Act, where the bidder entered into the contract with the required surety for its faithful performance, but failed to complete such performance, the fact that the government recovered from such surety the actual damages sustained by reason of the breach of contract does not constitute a defense. *U. S. v. Alcorn*, (1906) 145 Fed. 995.

**Liability for loss by robbery of the mail.**—Where a contract for transportation of mail provided that the contractor should account for and pay over all money of the United States which might come into his possession, he being only required to carry mail, and not to carry money as such, his surety was not liable, on his bond for the faithful carrying out of the contract, for the loss by robbery of money belonging to the United States, placed in his mail bag without his knowledge or acquiescence, even though he was an insurer of the safe delivery of money delivered to him for transportation with knowledge. *American Surety Co. v. U. S.*, (C. C. A. 1909) 171 Fed. 408.

## Vol. V, p. 883, sec. 3950.

Where plaintiff went to defendant as a notary who took his oath to a bid for a contract carrying mail, and requested him not to divulge the bid, such implied promise, if there was one, was illegal and contrary to

public policy under this section, which condemns the suppression of such bidding. *Hardison v. Reel*, (1911) 154 N. C. 273, 70 S. E. 463.

## Vol. V, p. 888, sec. 3960.

**Extra service without contract—right to payment.**—A contractor for carrying the mails is not entitled to extra compensation for services outside the terms of his contract, which were performed in compliance with the unauthorized demand of the local postmaster, where, upon protest to the Postmaster-General, the contractor was promptly relieved from such services, and another contract was made for their performance. *Slavens v. U. S.*, (1905) 196 U. S. 229, 25 S. Ct. 229, 49 U. S. (L. ed.) 457, *affirming* (1903) 38 Ct. Cl. 574; *Travis v. U. S.*, (1905) 196 U. S. 239, 25 S. Ct. 233, 49 U. S. (L. ed.) 461, *affirming* (1903) 38 Ct. Cl. 590.

An increase in the service required on a mail route, as the result of the establishment of a new distributing station in the city of New York, amounting to more than 300,000 miles of additional transfer service, and involving an additional expenditure of nearly

\$10,000 for ferry tolls, cannot be required by the Postmaster-General without extra compensation, under the authority reserved to him in the contract to call for new, additional, mail messenger, or transfer service without additional compensation. *U. S. v. Utah, etc., Stage Co.*, (1905) 199 U. S. 414, 26 S. Ct. 69; 50 U. S. (L. ed.) 251, *affirming* (1904) 39 Ct. Cl. 420.

The carriage of the mails up and down the steps at elevated railroad stations is called for by a contract for performing the covered regulation wagon, mail messenger, transfer, and mail station service on a mail route, in which the contractor agreed to take the mails from and deliver them to the post offices, mail stations, and cars. *U. S. v. Utah, etc., Stage Co.*, (1905) 199 U. S. 414, 26 S. Ct. 69, 50 U. S. (L. ed.) 251, *affirming* (1904) 39 Ct. Cl. 420.

## Vol. V, p. 893, sec. 3962.

The power to fine is discretionary.—See *Lewis Pub. Co. v. Wyman*, (1907) 152 Fed. 787, to the same effect as the note in the original.

**Vol. V, p. 904, sec. 3982.**

The word "packet" as used in this section is limited to its original meaning throughout the postal laws to cover only a written communication of four or more sheets, which by Act 1827, sec. 5, ch. 61, 4 Stat. L. 238, was required to pay quadruple postage, and does not include a "packet of merchandise" not exceeding four pounds sent by mail. *Williams v. Wells Fargo, etc., Express*, (C. C. A. 1910) 177 Fed. 352.

**No monopoly by postal service of carriage of parcels.**—While Congress has full constitutional power to reserve to the postal department a monopoly of the business of receiving, transmitting, and delivering mails, and in the exercise of such right may enact such rules, regulations, and laws as will effectively preserve its monopoly and prescribe fines, penalties, forfeitures, and punishments therefor, yet this monopoly is intended to extend only to letters, packets of letters, and the like mailable matter; and Congress has never attempted to extend its monopoly to the transportation of merchandise in parcels weighing less than four pounds, nor to prohibit private express companies making regular trips over established post routes from engaging in the business of carrying

such parcels for hire. *Williams v. Wells Fargo, etc., Express*, (C. C. A. 1910) 177 Fed. 352.

**Suit for penalty must be in the name of the United States.**—R. S. sec. 3982 prohibits the establishment of a private express for the conveyance of letters or packets over any post road, and provides that any person violating the section shall be liable to a penalty of \$150 for each offense; section 4059 declares that all penalties imposed for a violation of law affecting the Post-office Department shall be recoverable one-half to the use of the person informing and prosecuting the same and the other half to the use of the Post-office Department; but section 919, constituting part of the Act regulating procedure in federal courts, commands that all suits for the enforcement of a penalty arising under the postal laws shall be brought in the name of the United States. It was held that a suit to recover a penalty for the alleged violation of this section could not be brought by a private prosecutor, but was maintainable only by and in the name of the United States. *Williams v. Wells Fargo, etc., Express*, (C. C. A. 1910) 17 Fed. 352.

**Vol. V, p. 916, sec. 4000.**

If a railway postal clerk was in charge of the mail at the time he was injured by the derailment of a train, in an action against the railroad company for his injuries the burden of proving he was a passenger would not rest on him, as this section imposes on

railway companies carrying mail the duty to also carry, without extra compensation, the person in charge thereof. *Hoskins v. Northern Pac. R. Co.*, (Mont. 1909) 102 Pac. 988.

**Vol. V, p. 918, sec. 13.**

**Compensation where only part of road aided by grant.**—A railway company carrying the mails over a continuous route which includes certain land-aided railroads is only entitled to the land-grant rates for those portions of the route, under the provisions of this Act, which provisions must be construed

as extending not only to the original land-aided companies, but to every other company carrying the mails over such roads. *Chicago, etc., R. Co. v. U. S.*, (1910) 217 U. S. 180, 30 S. Ct. 470, 54 U. S. (L. ed.) 721, *affirming* (1908) 43 Ct. Cl. 595.

**Vol. V, p. 919, sec. 4002.**

**Adjustment of compensation for extension of route.**—The adjustment of compensation to a railway company for carrying the mails, made by the Postmaster-General in the exercise of his authority under this Act, to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation, may be confined, where an extension is made beyond the terminal of an established mail route, to the extension alone,

without readjusting the compensation for the whole route as extended. In this case Mr. Justice McKenna said: "There is nothing in the section which requires the abrogation of prior contracts when an extension is made beyond the terminal of an established route or precludes provisions for the extension alone." *Chicago, etc., R. Co. v. U. S.*, (1905) 198 U. S. 385, 25 S. Ct. 665, 49 U. S. (L. ed.) 1094.

**Vol. V, p. 933, sec. 4017.**

A post-office inspector's relinquishment of his salary cannot be regarded as voluntary; but the rule does not apply to a case where

he is seeking to recover pay for time during which he was excused from duty because of illness. *Small v. U. S.*, (1909) 45 Ct. Cl. 13.

**Vol. V, p. 937, sec. 4025.**

The appropriation acts appropriating for actual and necessary expenses of general superintendents and "railway postal clerks, while actually traveling on business of the department and away from their several desig-

nated headquarters," by their own language exclude railway postal clerks traveling in the discharge of their ordinary duty. *Hartman v. U. S.*, (1905) 40 Ct. Cl. 133.

**Vol. V, p. 942, sec. 4030.**

One who receives a money order, without a written application and payment therefor as required by law, is liable to the United States for its value, though he has, in good

faith, paid the full value to the issuing agent in other ways. *U. S. v. Bolognesi*, (1908) 164 Fed. 159.

**Vol. V, p. 944, sec. 4037.**

Title to order.—Defendant was the indorsee of a money order which he sent by an agent to the post office on which it was drawn in order to get it cashed. The agent sold the order to plaintiff, indorsing it with his own name. Under this Act it was held that plaintiff obtained no title to the order. *Moore v. Skyles*, (1905) 33 Mont. 135, 82 Pac. 799.

It is no defense to an action by the United States to recover the amount paid in re-

demption of postal money orders from the payees to whom they were paid, and to whom they were issued by a post-office clerk without authority and in violation of law, without first receiving applications and payment therefor, that defendants took such orders in good faith from said clerk in payment of sums justly due them from him as a banker, or that their invalidity did not appear from their face. *U. S. v. Bolognesi*, (1909) 169 Fed. 1013.

**Vol. V, p. 946, sec. 4041.**

What transactions are fraudulent.—The provisions of sections 3929 and 4041 R. S., empowering the Postmaster-General to issue so-called fraud orders as a means of stopping the use of the mails as an agency in conducting schemes or devices for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, are not restricted to schemes or devices which are wanting in all the elements of a legitimate business, or in which it is intended to return nothing whatever or nothing at all equivalent

in value for the money obtained, but embrace those whereby a business, otherwise legitimate, is systematically and designedly so conducted that, by means of false representations, its patrons are induced to part with their money in the belief that they are purchasing something different from, superior to, and worth more than, what is actually being sold, although that may approximate in commercial value the price asked and received. *Harris v. Rosenberger*, (C. C. A. 1906) 145 Fed. 449.

**Vol. V, p. 949, sec. 4046.**

Money received by rural letter carrier not "money order funds."—The post-office regulations authorize rural letter carriers to take and receipt for money from patrons of their routes and to purchase and forward money orders to the persons or corporations for which they are designed. It has been held that money received and receipted for by a rural letter carrier from patrons of his route, to be used in the purchase and forwarding of money orders, while in the possession of such carrier and before surrender at the post office, did not constitute "money order funds," for the embezzlement of which the carrier could be prosecuted under this section and

section 4045. *U. S. v. Mann*, (1907) 160 Fed. 552.

Averment that funds came into possession by virtue of employment necessary.—An indictment under this section is not sufficient where it merely avers that defendant was a clerk employed in a money order office, and charges the offense in the language of the statute, but it must, in addition, charge that the funds converted came into his possession by virtue of his employment, which is essential to the crime of embezzlement and to differentiate it from larceny. *U. S. v. Allen*, (1909) 150 Fed. 152.

**Vol. V, p. 953, sec. 4053.**

Intent not an element.—Any appropriation of money order funds by a postmaster to his own use is embezzlement within this sec-

tion regardless of the intent or purpose of the conversion. *Griffin v. Zuber*, (Tex. 1908) 113 S. W. 961.

## Vol. V, p. 957, sec. 5463.

**Sentence.**—"If this section were before us for construction, unaffected by precedent, we should be disposed to hold that it was intended to provide for the punishment of two distinct offenses, one of forging or altering a money order and one of uttering the same, and that the first two counts of the indictment which is before us charge distinct and separate crimes, punishable by separate sentences. But it has been generally held that the forging and uttering of a forged instrument are parts of one transaction, and that, where the different counts of an indictment charge different crimes which are parts of a

single transaction, the sentence based on a general verdict or plea of guilty must impose only one penalty, and that a separate sentence for each count is erroneous and void. *Ex p. Joyce*, (1877) 23 Int. Rev. Rec. 297, 13 Fed. Cas. No. 7,556; *Parker v. People*, (1880) 97 Ill. 32; *In re Walsh*, (1893) 37 Neb. 454, 55 N. W. 1075; *Devere v. State*, (1890) 3 Ohio Cir. Dec. 249, 5 Ohio Cir. Ct. 509; *Lovejoy v. State*, (1898) 40 Tex. Crim. 89, 48 S. W. 520." *Per curiam* in *U. S. v. Carpenter*, (C. C. A. 1907) 151 Fed. 214, 10 Ann. Cas. 509.

## Vol. V, p. 959, sec. 5467.

**Sufficiency of allegation—Description of employment.**—The provision of this statute making it a criminal offense for an employee in the postal service to embezzle a letter, necessarily implies that the letter must have come into his possession in his official character; and an indictment thereunder which fails to allege such fact is fatally defective. *Shaw v. U. S.*, (C. C. A. 1908) 165 Fed. 174.

In a prosecution under this section an indictment is fatally defective which fails to show that the letter embezzled came into the possession of the defendant officially; that is to say, as an employee of the postal service. *U. S. v. Aurandt*, (1910) 15 N. M. 292, 107 Pac. 1064.

**Description of contents.**—An indictment of a railway postal clerk for embezzling a letter containing "articles of value," to wit, "twelve dollars in money of the United States," which letter was addressed to a specified person at a specified address, it being alleged that a further description of the letter and its contents is unknown to the grand jurors, sufficiently describes the money. *Shaw v. U. S.*, (C. C. A. 1910) 180 Fed. 348.

An indictment of a railway postal clerk for secreting and embezzling a letter containing an article of value need not describe the article with the same precision as in a prosecution for forgery or larceny, but the article must be stated. *Shaw v. U. S.*, (C. C. A. 1910) 180 Fed. 348.

The allegation in the present case that the embezzled letter contained "an article of value," a more definite description of which "being to grand jurors unknown," considered in the light of the record, and doubted, but not decided, whether the allegation was sufficient under the rule last mentioned. *U. S. v. Aurandt*, (1910) 15 N. M. 292, 107 Pac. 1064.

**Money is comprehended by the term an "article of value"** within this section. *Shaw v. U. S.*, (C. C. A. 1910) 180 Fed. 348.

**Evidence.**—In a trial of a railway postal clerk for embezzling a letter containing money the fact that the letter which was introduced in evidence was found in his pocket was some evidence tending to show intent to embezzle. *Shaw v. U. S.*, (C. C. A. 1910) 180 Fed. 348.

Upon a trial under this section it has been held admissible to show by other employees that the mails at the office had been very heavy for some time prior to this occurrence.

and that many letters and packages came in bad condition, with the edges worn and broken, so that articles could readily fall out, as evidence tending to support the defense; its weight being for the jury. The government was entitled to prove a statement made by defendant a short time previously that he had destroyed a number of election circulars, a quantity of which had come into the office for distribution, as evidence tending to show the commission of an offense of similar character to those charged and bearing on the question of intent. *Chitwood v. U. S.*, (C. C. A. 1907) 153 Fed. 551.

**Pretended postmark of a fictitious post office.**—"It makes no difference with respect to the duty of a carrier when a letter comes into his hands in the course of his official employment, whether it be genuine, or a decoy or have a fictitious address, or whether it bears the pretended postmark of a fictitious post office. The opening, detention, destruction, or the embezzlement of the contents of either kind of letter is equally punishable." *Byram v. U. S.*, (1905) 25 App. Cas. (D. C.) 546.

**Decoy letter.**—A post-office superintendent discovered a misboxed letter, which had been placed in a "dead" pigeonhole at the top of the case, where defendant, a clerk, was engaged in sorting mail. The letter was removed by the superintendent and handed to a post-office inspector, who took it to the addressee, and, without delivering it, obtained permission to open it. He then returned to the post office, unsealed the letter, and took from it an express order for two dollars, a statement of account, and a letter from the sender of the money order. After making a copy of the letter, he placed it in the envelope with two marked one dollar bills, and forwarded the money order and the statement to the addressee. The envelope containing the letter and bills having been duly sealed was returned to the dead pigeonhole, and a short time thereafter was embezzled by defendant. It was held that the letter at the time it was returned by the inspector to the dead pigeonhole had not ceased to be mail matter, and that defendant was therefore properly convicted of embezzling a letter containing inclosures, in violation of this section. *Ennis v. U. S.*, (C. C. A. 1907) 154 Fed. 842.

## Vol. V, p. 965, sec. 5469.

"This statute is not confined to a technical larceny from the mails."—An indictment under this statute is not governed by the rules applicable to one for larceny, but is sufficient if it charges that the defendant unlawfully stole from a designated post office a letter, described sufficiently for its identification, and it is unnecessary to aver that it contained anything of value, or whose property it was, or that it was in the post office for transmission through the mails. *Bowers v. U. S.*, (1906) 148 Fed. 379, 78 C. C. A. 193.

## Vol. V, p. 971, sec. 5475.

Sentence must impose "imprisonment at hard labor."—A sentence under this section or under section 5478 is fatally defective un-

Sufficiency of allegation of intent.—To constitute an offense under this section the taking must be either fraudulent or unlawful, and must be so charged in the indictment. An indictment which leaves it open to inference that the letter charged to have been taken may have been delivered to and received by defendant, though a mutual mistake, is insufficient to charge an offense thereunder. *U. S. v. Meyers*, (1906) 142 Fed. 907.

less it imposes imprisonment "at hard labor" as required by each section. *Sorenson v. U. S.*, (C. C. A. 1909) 168 Fed. 785.

## Vol. V, p. 972, sec. 5478.

Sufficiency of allegations in indictment.—An indictment does not charge an offense under this section where it charges the breaking into a building used in part as a post office, with intent to commit larceny "in said building," but fails to charge an intent to commit larceny in that part of the building used as a post office, to which part only the statute applies. *U. S. v. Martin*, (1905) 140 Fed. 256.

Burglary of room adjoining post office.—An intent to commit larceny or other depredation in the part of the building used as a

post office is an essential ingredient of the offense; and where a post office was kept within a room used for mercantile purposes, being separated from the remainder of the room by a fence or partition, a breaking and entering of such room and the stealing of property from a safe therein, although including post office funds, will not warrant a conviction under this section unless it is shown that the safe was within the inclosure used as the post office. *Sorenson v. U. S.*, (C. C. A. 1909) 168 Fed. 785.

## Vol. V, p. 973, sec. 5480.

- I. IN GENERAL, 1673.
- II. SCHEME OR ARTIFICE TO DEFRAUD, 1673.
- III. OPENING CORRESPONDENCE THROUGH POST OFFICE, 1677.
- IV. DEPOSITING AND RECEIVING LETTERS FROM THE MAIL, 1678.
- V. INDICTMENT AND SENTENCE, 1680.

## I. IN GENERAL.

"The purpose of the amendment was not to restrict."—This amendment did not limit the scope of such sections to schemes, artifices, or devices described in the amendment, but added to the offenses denounced by the original Act those specified in Act of 1889. *Miller v. U. S.*, (1904) 133 Fed. 337, 66 C. C. A. 399.

Three essential elements.—The elements of the offense of devising a scheme or artifice to defraud, to be effected by means of the post office establishment of the United States, in violation of this section, are: (1) That defendant devised the scheme to defraud, as alleged; (2) that he intended to effect such scheme or artifice by opening correspondence or communication with the persons intended to be defrauded, by means of the post-office establishment of the United States, or by inciting them to open correspondence with him

respecting such scheme or artifice; and (3) that in the furtherance and execution of the scheme, or in attempting to further the same, defendant deposited or caused to be deposited in the United States post office letters, papers, writings, or circulars, or took from the post office papers or writings connected with the furtherance of such scheme. *U. S. v. Dexter*, (1907) 154 Fed. 890. See to the same effect *Brown v. U. S.*, (C. C. A. 1906) 143 Fed. 60; *Brooks v. U. S.*, (1906) 146 Fed. 223, 76 C. C. A. 581; *U. S. v. Smith*, (1909) 166 Fed. 958; *Foster v. U. S.*, (C. C. A. 1910) 178 Fed. 165; *Horn v. U. S.*, (C. C. A. 1910) 182 Fed. 721; *Rimmerman v. U. S.*, (C. C. A. 1911) 186 Fed. 307.

## II. SCHEME OR ARTIFICE TO DEFRAUD.

A "scheme or artifice" to defraud, within this section, prohibiting the use of the post-office establishment in aid of a scheme or artifice to defraud, is the formation of a plan, device, or trick to perpetrate a fraud on another. *U. S. v. Dexter*, (1907) 154 Fed. 890.

What constitutes.—This section includes everything designed to defraud.—This section includes every scheme to be effected by the use of the post-office establishment which is in fact designed to defraud, by representa-

tions as to the past or present, or suggestions and promises as to the future, it being immaterial that the business or scheme conducted is an actual business provided it is the basis of a fraudulent scheme. *Foster v. U. S.*, (C. C. A. 1910) 178 Fed. 165. See to the same effect *Lemon v. U. S.*, (C. C. A. 1908) 164 Fed. 953.

*Calculated to deceive or defraud.* — Whether the pretensions made by the accused, which are averred to constitute the scheme to defraud, constitute an agreement, valid or otherwise, or consist of representations of fact, present or future, an expression of opinion or assurance of past, present, or future conditions, it may constitute a scheme to defraud, provided only it be designed and reasonably adapted to deceive. *Brooks v. U. S.*, (1906) 146 Fed. 223, 76 C. C. A. 581.

To constitute the offense of using the mails to carry into effect a scheme to defraud, within this statute, it is not necessary that there should be actual misrepresentation as to an existing fact; but it is sufficient if the representations made were intended and calculated to deceive and defraud. *McCarthy v. U. S.*, (C. C. A. 1911) 187 Fed. 117.

*A scheme for giving horoscopes.* — A scheme by a defendant to induce persons by means of letters sent through the mails to send him one dollar each in payment for a special life reading, giving the horoscope of the sender and the events of his life from the cradle to the grave, is a scheme or artifice to defraud to be effected by the use of the Post Office Department, within the meaning of this section, if in consideration of the payment so sent defendant returned and intended to return to the senders a stock letter purporting to be a special life reading, but which were alike in each case, regardless of the age, color, or sex of the recipient. So too is a scheme by a defendant to induce persons receiving such letters to purchase from him paper made in imitation of parchment at the price of one dollar per yard, by representations made in such letters that the paper was pure parchment, and that certain charms, if written on pure parchment, would have certain influences on the lives of the persons who used them, if defendant knew that such paper was not pure parchment, and was worth much less than one dollar per yard. *U. S. v. White*, (1906) 150 Fed. 379.

*Intimidating letters of labor union.* — Officers of a labor union who send letters or circulars through the mails to customers of a manufacturing corporation to induce them to withdraw their custom from it for the purpose of ruining its business or forcing it to pay a fine imposed on it for employing non-union workmen, whether such fine and boycott were initiated by such officers or by the union with their participation and approval, are guilty within this section. *U. S. v. Raish*, (1908) 163 Fed. 911.

*Exaggerations.* — The fact that a circular sent out by mail by a commission merchant to advertise his business contained some exaggerations as to his facilities for handling property consigned to him, or that he failed to settle with some of his patrons, is not suf-

ficient to establish a scheme or artifice to defraud, within this section. *Faulkner v. U. S.*, (C. C. A. 1907) 157 Fed. 940.

*Averment and description of scheme to defraud — Sufficiency of averments.* — An indictment charging defendants with a scheme to use the mails, and a contract between the directors of a mutual insurance company and one of the defendants to procure from its members money, to appropriate these sums to the defendants and thereby render the corporation insolvent, shows a scheme to defraud the members of the corporation, within this section. *Miller v. U. S.*, (1904) 133 Fed. 337, 66 C. C. A. 399.

An indictment under this Act which charges that defendants devised a scheme to defraud intended to be executed, and which was executed, by the use of the mail service of the United States by pretending that they were engaged in a certain solvent banking enterprise, and making other pretenses in relation thereto, which pretenses were false and were made for the purpose of inducing others to deposit money with them or to buy stock, and with the intention of appropriating such money to their own use, is sufficient to charge the offense, and need not specifically charge that defendants knew their bank to be insolvent. *Lemon v. U. S.*, (C. C. A. 1908) 164 Fed. 953.

An indictment under this section, while required to allege the particulars of the scheme with sufficient certainty to show its existence and character, need not do so with the same particularity as to time, place, and circumstance as is required with reference to the mailing of the letter. *Brooks v. U. S.*, (1906) 146 Fed. 223, 76 C. C. A. 581.

Though an indictment for using the post office in furtherance of a scheme to defraud must describe the alleged scheme with such certainty as to clearly inform the defendants of the charge made against them, an indictment is sufficient if it states such elements with sufficient certainty to enable the defendants to prepare their defense. *Foster v. U. S.*, (C. C. A. 1910) 178 Fed. 165.

An indictment alleged that the defendant with others by means of advertisements published in newspapers, and correspondence conducted by and through the United States mail service, pretended to be engaged under the name "National Securities Company" in a lucrative and honorable business as a broker, dealing in grain, provisions, and stocks, and pretended to be possessed of superior knowledge concerning the business, making loss improbable, and pretending to pay interest to depositors at the rate of six per cent. per month, and to permit withdrawals at the depositors' election, when in fact he had no such superior knowledge, did not intend for any great length of time to pay six per cent. per month, nor permit withdrawals at depositors' pleasure, but intended by such false pretensions to induce deposits, for the sole purpose of converting them to his own use. It was held that the indictment sufficiently alleged a scheme to defraud, within such section. *Brooks v. U. S.*, (1906) 146 Fed. 223, 76 C. C. A. 581.

Where an indictment charged defendant with devising a scheme to defraud, by inducing others to purchase stock on false representations of fact, and alleged that the scheme was to be effected by correspondence through the post office, and that a letter was actually mailed in furtherance thereof, the indictment was not demurrable for failure to charge that the stock was lacking in value to such an extent as to defraud those who paid the price asked therefor. Nor was it demurrable for failure to allege the particulars in which the representations charged were false, as such defect could be cured by furnishing a bill of particulars. *U. S. v. Palmieri*, (1909) 169 Fed. 490.

In an indictment for using the mails in and for executing a scheme to defraud, it need not be alleged that the contents of a letter or circular charged to have been mailed pursuant to such scheme were false. *Grey v. U. S.*, (C. C. A. 1909) 172 Fed. 101.

A count in an indictment under this section, for using the mails to carry out a scheme to defraud, is not insufficient because it refers to a prior count for a statement of the scheme to defraud, where the reference is adequate to the making up of a sufficient accusation. *Bartholomew v. U. S.*, (C. C. A. 1910) 177 Fed. 902.

An indictment for using the mails in furtherance of a scheme to defraud set out in the first count a description of the scheme, with an allegation that defendants devised it, and in the second and third counts, instead of repeating such allegation, charged that defendants "in and for executing the scheme and artifice to defraud set out in the first count of this indictment, which statement is hereby made a part of this second count of this indictment, and in attempting so to do," etc. It was held that the latter counts were not objectionable for failure to charge that defendants actually devised the scheme, on the theory that the word "statement" related only to the description of the scheme. *Foster v. U. S.*, (C. C. A. 1910) 178 Fed. 165.

If the scheme is sufficiently outlined to show its design and adaptability to deceive, and to fairly acquaint the accused with what he is required to meet, it answers the requirement of the statute. *Brooks v. U. S.*, (1906) 146 Fed. 223, 76 C. C. A. 581.

An indictment for using the mails to defraud, in violation of this section, by subdividing a tract of land in Louisiana of small value into lots ten or twenty feet square, and selling certificates, each purporting to give the holder an option to purchase an interest in a lot, upon false representations that the lots were within an oil district and very valuable, and that large cash offers had been made for certain of the same, construed, and was held to charge a scheme and artifice to defraud within the meaning of this statute, which, when carried on by means of correspondence through the mails, constituted a violation thereof. *Gourdain v. U. S.*, (C. C. A. 1907) 154 Fed. 453.

Defendants were officers of a manufacturing corporation, owning a plant and actually en-

gaged in manufacturing and selling the product. In order to sell an increased issue of stock, defendants sent through the mails letters to certain persons, representing that the company desired to establish branch selling houses and to employ managers therefor at a stated salary. The letters also contained false representations as to the profits and dividends of the company, and by their means certain of the persons addressed were induced to purchase stock of the company at par in the belief that they would be appointed branch managers. It was held that an indictment charging such facts, and that the representations made were knowingly false, did not charge the offense of using the mails to defraud, within the meaning of this section, it not being charged that the stock was not worth the price paid for it. *Miller v. U. S.*, (C. C. A. 1909) 174 Fed. 35.

**Duplicity.** — Averments in an indictment that artifices used in furtherance of a scheme to defraud, to be carried on through the use of the mails, were intended to give one understanding of the scheme to one class of investors and another and different understanding to a different class, both being deceived and defrauded by the same artifices, do not make out two separate schemes so as to render the indictment bad for duplicity. *Gourdain v. U. S.*, (C. C. A. 1907) 154 Fed. 453.

**Variance.** — A defendant charged in the indictment with having devised a scheme to defraud, to be effected by means of the post office establishment, in violation of this statute, must be shown to have devised the particular scheme specified in the indictment, and cannot be convicted on evidence that it is consistent with a different scheme, which, although equally within the statute, is not charged. *Beck v. U. S.*, (C. C. A. 1906) 145 Fed. 625.

In a prosecution under this section defendant cannot be convicted unless the proof establishes the "scheme" substantially as alleged in the indictment. *Brown v. U. S.*, (1906) 146 Fed. 219, 76 C. C. A. 577.

A conviction on an indictment for using the mails to defraud, in violation of this section, which charged that defendant falsely represented to the persons intended to be defrauded by letters and circulars sent through the mail that she was conducting a fair, honest, and *bona fide* matrimonial agency, well knowing that she was not, was sustained by evidence showing that she inserted false advertisements in newspapers, purporting to have been inserted by a man or woman of wealth who desired to marry, and in reply to answers received through the mail sent letters and circulars representing that she conducted a matrimonial bureau, and had many clients of wealth of both sexes, and thereby obtained from persons so addressed a fee of five dollars each for membership in such bureau and to be introduced to such clients of wealth, when in fact, so far as shown, none were ever so introduced, and no marriages resulted, and defendant made no attempt to carry out the promises made. *Glinn v. U. S.*, (C. C. A. 1910) 177 Fed. 679.

The rule upon the question whether there is an intent.—On the trial of a defendant charged, under this statute, with using the mails to effect a scheme or artifice to defraud, where it is shown that defendant published advertisements and sent out circulars and letters offering to impart to persons communicating with him, in return for money sent him, instructions as to how they could acquire occult and supernatural powers, the question for the jury to determine is not whether or not it was possible for him to impart such information, but whether he honestly and in good faith intended to do so, and upon such determination the question whether he believed himself able to do so is material. *U. S. v. White*, (1906) 150 Fed. 379.

To constitute an offense within this statute there must have been an intention to injure the person addressed or sought to be reached by defrauding him of something which he already had; and the making of false representations, for the purpose of deceiving the persons addressed by raising expectations of gain or advantage which it was not the intention to fulfil, is insufficient. *Miller v. U. S.*, (C. C. A. 1909) 174 Fed. 35.

In a prosecution under this section, it is a defense that defendant honestly believed that the representations made in the letters or circulars which he is charged with having sent through the mails were true, and that he had no actual intent to defraud. *Rudd v. U. S.*, (C. C. A. 1909) 173 Fed. 912.

In a prosecution for misuse of the mails in furtherance of a scheme to defraud by the sale of worthless mining stock, if any one or more of the defendants honestly believed that the representations made by him respecting the property were true, or had reasonable grounds to so believe, such belief would constitute a complete defense as to him. *Horn v. U. S.*, (C. C. A. 1910) 182 Fed. 721.

This section does not make any discrimination with respect to the right to the use of the postal establishment of the United States by persons whose vocation is healing, between those who profess to cure by the use of mental science and those who use drugs; and, in a prosecution thereunder for such use of the mails, the question of the defendant's good faith is the cardinal question. If she practiced in good faith, without the intention to defraud, she is not guilty, although in fact the theory and practice followed were worthless; but if, without belief in her practice, and with knowledge that her representations regarding it were false, she made them to defraud, the fact that mental healing is a lawful vocation does not prevent conviction. *Post v. U. S.*, (1905) 135 Fed. 1, 67 C. C. A. 569, rehearing denied 135 Fed. 1022, 67 C. C. A. 679, reversing (1904) 128 Fed. 950.

To constitute a violation of this section it is not necessary that the scheme should be fraudulent on its face; but, although it is apparently a legitimate business, it is within the statute if there was an intention not to conduct such business honestly, but to use it to defraud. *McConkey v. U. S.*, (C. C. A. 1909) 171 Fed. 829.

Under this section the intent to defraud is an essential element of the offense, to be determined by the jury as a question of fact from all of the evidence; and an instruction in such a case that "the law presumes that every man intends the natural, legitimate, and necessary consequences of his acts," is erroneous, as tending to mislead the jury into the presumption that if the scheme in its operation resulted in defrauding persons, the law raises a conclusive presumption of an intent to defraud. *Hibbard v. U. S.*, (C. C. A. 1909) 172 Fed. 66.

In a prosecution under this section, if a defense that defendant honestly believed that the representations made in the letters or circulars which he is charged with having sent through the mails were true, and that he had no actual intent to defraud, is made, it is for the determination of the jury. *Rudd v. U. S.*, (C. C. A. 1909) 173 Fed. 912.

*Averment of intent.*—An indictment for misuse of the mails, in furtherance of a scheme to defraud by the sale of worthless mining stock, alleging that defendants' representations were in fact false and untrue and known by defendants to be so, constituted a sufficient averment, if such were necessary, that defendants did not in good faith believe, or have reasonable grounds to believe, that the representations were true. *Horn v. U. S.*, (C. C. A. 1910) 182 Fed. 721.

An indictment alleged that defendant by advertisements sought to bring the alleged business of the Globe Realty Company, a pretended real estate agent, to the attention of persons who had real estate to sell, intending to procure them to list the same with such company, which had no existence except as a name under which defendant did business, for the purpose of procuring them to pay for advertising their real estate whether a sale was made or not; that defendant intended to make no efforts toward such sale; that he intended to execute such scheme by the use of the post office establishment of the United States, and in so doing deposited a letter and circular addressed to D. to induce him to sign a contract in accordance with such scheme. It was held that such indictment stated an offense within this statute and was not demurrable because it did not allege that the acts charged were wilfully and unlawfully done. *U. S. v. Smith*, (1909) 166 Fed. 958.

Where an indictment for misuse of the mails charged a scheme to defraud by means of false representations to be disseminated through the mails, that the scheme was carried out, that the representations were false and fraudulent, and that thereby certain named persons were induced to part with their money and give it to defendant, it was not necessary that the indictment should also allege that the scheme was formed by defendant with intent to defraud. *Ewing v. U. S.*, (1905) 136 Fed. 53, 69 C. C. A. 61.

*Evidence.—Admissibility of cash book.*—In a trial for conspiring to use the mails in carrying out a scheme to defraud, the cash book, checks, and entries of cash in defendant's deposit book in a trust company, made during the continuance of the scheme, were



properly admitted to show the conspiracy. *U. S. v. Marrin*, (1908) 159 Fed. 767.

**Admissibility of declarations.** — In a prosecution for misuse of the mails, in furtherance of a scheme to defraud by sale of worthless mining stock, evidence that one of the defendants promised witness that she should have a half interest in the profits of 28,000 shares of canceled or forfeited stock of a mining corporation, when it was resold by him, that she was to pay nothing for the stock, and when it was resold five cents a share was to go to the corporation, and the witness and defendant were to divide the balance, and that she had received \$562 as her share of the part of the stock that had been sold, was properly admitted as against such defendant to show his method of dealing with the stock of the company. *Horn v. U. S.*, (C. C. A. 1910) 182 Fed. 721.

**Sufficiency.** — Where the evidence established the charge that defendant advertised as a matrimonial agency, and obtained money from a person by false representations made in the advertisement, the offense of using the mails to defraud was complete; and it was no defense that defendant afterwards put the person defrauded in correspondence with a woman whom he married. *Grey v. U. S.*, (C. C. A. 1909) 172 Fed. 101.

Accused was indicted for depositing a letter in the post office in execution of a scheme to defraud. The scheme alleged consisted of the insertion of an advertisement in a newspaper containing the words "How to speculate on Board of Trade. Sent free by J. L. Brown & Co.," etc., to induce the public through correspondence conducted by mail to purchase through defendant under the name of "J. L. Brown & Co." commodities on some board of trade to enable defendant, who did not intend to make such purchases, to convert the money to his own use. The proof was that one Hardwick saw such advertisement and without correspondence sent defendant \$1,000 by wire, with instructions to buy options on pork. Defendant immediately returned a memorandum showing a sale made by him to Hardwick, and not a purchase made on a board of trade for him. Thereafter Hardwick deposited more money, and directed further purchases of pork, which were made in the same manner. It was held that such facts were insufficient to establish the charge laid in the indictment. *Brown v. U. S.*, (1906) 146 Fed. 219, 76 C. C. A. 577.

**Letterheads.** — On the trial of a defendant for using the mails to defraud, where he was charged with having used a letterhead purporting to show that he was engaged in a business in which he was not in fact engaged, for the purpose of obtaining property on credit, it was error to admit in evidence against him a letterhead of a firm having the same surname, where he was not charged with using such letterheads nor with making any representations respecting his connection with the firm, and also to admit a list, supposed to be of creditors, and unreceipted bills from parties not named in the indictment, all of which were found in defendant's office, there being no evidence to show by whom the

list was made, nor whether or not he was in fact indebted to any of the parties, nor how the transactions arose. *Booth v. U. S.*, (C. C. A. 1905) 139 Fed. 252.

**Conviction of defendant's predecessor.** — On the trial of a defendant, charged with having conducted a scheme to defraud by the use of the mails, evidence that defendant's predecessor in the business had been indicted for the same offense was competent on the question of intent, if defendant was shown to have had knowledge of the fact and thereafter continued the business. *Grey v. U. S.*, (C. C. A. 1909) 172 Fed. 101.

**Burden of proof.** — In a prosecution for the use of the mails to carry out a scheme to defraud in the practice of mental healing, it being charged in the indictment that the defendant's promises to heal were impossible of performance, and evidence having been received on both sides of that issue, it was error to instruct the jury that the burden rested on the defendant to prove to their satisfaction that she possessed such power. *Post v. U. S.*, (1905) 135 Fed. 1, 67 C. C. A. 569, *rehearing denied* 135 Fed. 1022, 67 C. C. A. 679, *reversing* (1904) 128 Fed. 950.

**Order of proof.** — In a prosecution for using the mails in conducting a scheme to defraud in violation of this section, there is no hard and fast rule requiring that concert of action between two defendants should first be shown before evidence of acts of one can be admitted against the other, but the order of evidence is within the discretion of the court, and it is sufficient if the jury, before considering such evidence, are satisfied either by direct evidence or by proof of facts and circumstances from which it may be reasonably inferred that such concert existed, and that defendants were conducting a joint scheme. *Doyle v. U. S.*, (C. C. A. 1909) 169 Fed. 625.

### III. OPENING CORRESPONDENCE THROUGH POST OFFICE.

**The intended use of the United States mail.** — To constitute the offense of "using the mails to effectuate a scheme to defraud," within this statute, the scheme must have been one which contemplated the use of the post office establishment to effectuate it, and it is not sufficient that the mails were used as a mere incident to some fraudulent scheme. *U. S. v. McCrory*, (1910) 175 Fed. 802. See to the same effect, *Marrin v. U. S.*, (C. C. A. 1909) 167 Fed. 951; *Rimmerman v. U. S.*, (C. C. A. 1911) 186 Fed. 367.

The offense denounced by this section consists in the devising of a fraudulent scheme and the depositing in the mail of a letter, writing, or other paper for executing or attempting to execute such scheme. When such acts are shown, the crime is established, and while what is actually accomplished may be evidence of what was intended to be accomplished, it is not the sole evidence. The offense is complete if an attempt be made to execute by the use of the postal establishment. *Humes v. U. S.*, (C. C. A. 1910) 182 Fed. 485.

While the formation of some scheme or artifice to defraud is an essential element of the offense of using the United States mails in an intentional effort to defraud, in violation of this statute, the gist of the offense is the use, or attempted use, of the mails for the forbidden purpose, and it is therefore only essential to charge the scheme with such particularity as will enable the accused to know what is intended and to apprise him of what he will be required to meet on a trial; the indictment being sufficient if it is distinctly alleged that the United States mails were intended to be used in consummating such scheme. *Horn v. U. S.*, (C. C. A. 1910) 182 Fed. 721.

An indictment under this statute, which states the essential elements of an intent to defraud by use of the mails in the general words of the statute, but with such reasonable particularity as will apprise the accused with reasonable certainty of the nature of the accusation, so that he may prepare his defense, and will enable him to plead his conviction or acquittal as a bar to a subsequent prosecution for the same offense, and will enable the court to say that the facts stated are sufficient in law, is good. *Brown v. U. S.*, (C. C. A. 1906) 143 Fed. 60.

An indictment under this statute is not demurrable because the letter set out therein and charged to have been mailed by defendant in carrying out his alleged scheme to defraud does not contain any of the representations which the indictment charges that it was defendant's scheme to make in letters sent through the mails; all that is necessary to constitute the offense being that the letter should have been mailed pursuant to the scheme to defraud and as a step in its execution. *Rumble v. U. S.*, (C. C. A. 1906) 143 Fed. 772.

An indictment alleged that defendant and another devised a scheme to defraud certain persons named, "which said scheme to defraud was to be effected by opening correspondence and communication with such persons and by distributing advertisements, circulars, prospectuses and letters by means of the post office establishment of the United States and by inciting such persons to open a correspondence through such post office establishment, with them, the said [defendants named], concerning said scheme, which scheme was then and there as follows, to wit," etc., followed by a specification of the scheme, in which it was alleged that defendants made through the mails a number of representations, which were all false and known by them to be false, and that, in reliance upon such representations, persons named in the indictment were induced to, and did, give to defendant and his associate certain sums of money, and that, in furtherance of such scheme, a certain specified letter was placed in the mails, etc. It was held that the indictment was not fatally defective, in that it was not directly charged therein, and that it did not appear therefrom, that the alleged scheme to defraud included or contemplated a use of the mails or post office establishment of the United States.

*Ewing v. U. S.*, (1905) 136 Fed. 53, 69 C. C. A. 61.

*Sufficiency.* — Where one was tried for conspiring to use the mails to carry out a scheme to defraud, under sections 5440 and 5480, it was sufficient for the government to show that written or printed matter about the scheme charged was mailed to one of the three persons named in the indictment as the persons defendant planned to defraud, and that copies of the same printed matter were sent through the mails to a mailing list throughout the United States. *U. S. v. Marrin*, (1908) 159 Fed. 767.

As against objection to testimony or motion in arrest, an indictment for using the mails to defraud sufficiently charged that a letter was intended to be sent or delivered by the post-office department, where it stated that accused deposited and caused to be deposited in a particular post office a certain envelope, duly stamped and sealed, and addressed to certain persons. *Dyar v. U. S.*, (C. C. A. 1911) 186 Fed. 614.

*Persons to be defrauded.* — In a prosecution for using the post-office establishment in furtherance of a scheme to defraud, it is not necessary to show that any one has been in fact defrauded, nor is it necessarily conclusive against the fraudulent nature of the scheme that those named in the indictment as among those intended to be defrauded have not been so defrauded in fact. *Foster v. U. S.*, (C. C. A. 1910) 178 Fed. 165.

In an indictment for conspiring to use the mails to carry out a scheme to defraud, under sections 5440 and 5480, the names of as many persons defendant planned to defraud may be used in the indictment as the pleader may know, and all mail connected with the scheme, shown to have passed through the post office to any person whether named in the indictment or not, is evidence upon the question of the existence of the scheme. *U. S. v. Marrin*, (1908) 159 Fed. 767.

A scheme by the owner of a saloon to be effected by opening correspondence through the mails, to induce different persons to each purchase a half interest in his saloon as a partner, and to pay largely more than it was worth, by misrepresenting its value and the amount of its profits, and to thus obtain their money without their receiving any equivalent therefor, is a scheme to defraud, within the meaning of this section. *Van Deusen v. U. S.*, (C. C. A. 1907) 151 Fed. 989.

#### IV. DEPOSITING AND RECEIVING LETTERS FROM THE MAIL.

The letters mailed need not be of a nature calculated to be effective. — See to the same effect as the first paragraph of the original note, *Lemon v. U. S.*, (C. C. A. 1908) 164 Fed. 953.

In a prosecution for using the post office in furtherance of a scheme to defraud, in violation of this section, it is not necessary that the scheme charged if carried out would necessarily defraud. *Rimmerman v. U. S.*, (C. C. A. 1911) 186 Fed. 307.

**Instructions as to mailing letters.**—In a prosecution under this section it was held that the court properly charged that defendant could not be convicted for devising the scheme alone, but that the gravamen of the offense rested in the mailing of the letters alleged in the indictment, and that in order to convict the jury must find that defendant placed or caused the letters to be placed in the post office as alleged. *Brooks v. U. S.*, (1906) 146 Fed. 223, 76 C. C. A. 581.

**Opening correspondence with oneself not within statute.**—One who devises a fraudulent scheme by opening a correspondence with himself by means of the post office is guilty of no offense within this statute. *Erbaugh v. U. S.*, (C. C. A. 1909) 173 Fed. 433.

**Averments in indictments—Pursuance of scheme to defraud.**—An indictment for using the post-office establishment in the furtherance of a scheme to defraud has been held to sufficiently charge that defendants intended to effect the scheme or artifice by opening correspondence with the person sought to be defrauded through the United States mails. *Rimmerman v. U. S.*, (C. C. A. 1911) 186 Fed. 307.

It is sufficient, under this section, to allege that the scheme or artifice to defraud, having been devised by the defendant, was to be effectuated by the use of the mails, and that the defendant, in furtherance of such intention and scheme or artifice, deposited a letter which was to be delivered by medium of the post office. *U. S. v. Sherwood*, (1910) 177 Fed. 596.

The gist of the offense being the scheme to use the mails in furtherance of a purpose to defraud, and an act done to carry out the same, and not the obtaining of money by means of false representations, the indictment was not defective for failure to negative the truth of such representations. And where an indictment for misuse of the mails in furtherance of a scheme to defraud alleged that the representations made by letters, circulars, etc., sent through the mails, were utterly false and untrue in fact, and were known by defendant and his accomplice to be so, and it did not appear that defendant made any objection to the introduction of evidence on such branch of the case, he could not object for the first time on appeal that the indictment did not negative the truth of the representations alleged, on the ground that the allegations made were mere conclusions of law. *Ewing v. U. S.*, (1905) 136 Fed. 53, 69 C. C. A. 61.

Where an indictment for misuse of the mails in furtherance of a scheme to defraud charged that such scheme was to be accomplished by means of circulars and newspapers circulated in Iowa and elsewhere, it was not demurrable for failure to set out such advertisements. *U. S. v. Smith*, (1909) 166 Fed. 958.

**Date of mailing.**—In a prosecution for devising a scheme or artifice to defraud, to be effected through the post-office establishment, the date of the alleged mailing of the dif-

ferent letters, papers, or writings described in the indictment was not an essential element of the offense; it being sufficient that the letters, writings, circulars alleged, or some of them, were deposited, or caused to be deposited, by defendant, at any time within three years next prior to the finding of the indictment. *U. S. v. Dexter*, (1907) 154 Fed. 890.

**Evidence—Admissibility of letters connected with scheme.**—Upon a trial under this section, letters shown to have been mailed or received by defendant need not be effective to forward such scheme to render them admissible in evidence, but it is sufficient if it appears therefrom that they were intended to be utilized in some way in connection with it. *Walker v. U. S.*, (C. C. A. 1907) 152 Fed. 111.

Where, in a prosecution for mailing certain letters in furtherance of a scheme to defraud, defendant's participation in securing a certain false affidavit and laudatory letter appeared in the stock advertisements of the business in which defendant was engaged, such stock advertisements and copies of the affidavit and letter were admissible. *Brooks v. U. S.*, (1906) 146 Fed. 223, 76 C. C. A. 581.

In a prosecution under this section it is not necessary to prove a specific intent to defraud, where such intent is manifest from the nature of the scheme itself. *Walker v. U. S.*, (C. C. A. 1907) 152 Fed. 111.

**Sufficiency.**—On the trial of a defendant indicted, under this section, evidence that defendant published advertisements soliciting persons who read them to write to him, and that when he received letters from such persons he had made all arrangements to carry on a systematic correspondence with them through the mails, warrants a finding that the scheme or artifice was one to be effected by means of the post-office establishment of the United States, within the meaning of the statute. *U. S. v. White*, (1906) 150 Fed. 379.

Where accused had been a party to a scheme to defraud solely by means of express and telegraph companies, but was not shown to have had any connection with his former confederates after they commenced to unlawfully use the mails for such purpose, he was not guilty of violating this section. *Dalton v. U. S.*, (C. C. A. 1907) 154 Fed. 461.

**Question for jury.**—Where defendants were indicted for misuse of the mails in furtherance of a scheme to defraud by the sale of certain mining stock, and the indictment set out certain letters alleged to have been written and mailed by defendant pursuant to such scheme, whether the letters tended to connect the defendant with the scheme as alleged, or were mailed in execution or attempted execution thereof, was for the jury. *Horn v. U. S.*, (C. C. A. 1910) 182 Fed. 721.

**Evidence of the mailing of similar letters.**—In a prosecution under this section averments in the indictment of fraudulent representations made by the defendant by the use of the mails, made to characterize his al-

leged scheme to defraud, may be proved by the introduction in evidence of letters or circulars mailed by defendant other than the one set out in the indictment, and for that purpose a circular printed and sent out through the mails by an agent of defendant is admissible in evidence, where it is shown that it was known to and approved by defendant, that it contained copies of letters written by him, and that statements and representations therein made were based on those made by him to the agent. *Rumble v. U. S.*, (C. C. A. 1906) 143 Fed. 772.

In a prosecution for mailing certain letters in furtherance of a scheme to defraud, letters other than those counted on in an indictment, purporting to have been written by the company operated by defendant, to different persons throughout the country, and relating to transactions by the company with them, were admissible to show that the scheme contemplated the use of the mails, and as bearing on the intent with which the business was done, and the existence of a scheme to defraud. *Brooks v. U. S.*, (1906) 146 Fed. 223, 76 C. C. A. 581.

#### V. INDICTMENT AND SENTENCE.

**Joinder of offenses.**—Under this section making it a criminal offense to deposit a letter in a post office for the purpose of executing a scheme to defraud, the provision that "the indictment, information, or complaint may severally charge offenses to the number

of three when committed within the same six calendar months; but the court shall thereupon give a single sentence . . ." does not prevent the joinder in one indictment of counts charging offenses in different periods of six months, nor the imposition of sentence on each of such counts in case of conviction thereon. *U. S. v. McVickar*, (1908) 164 Fed. 894.

The provision of this section that an indictment may charge offenses to the number of three when committed within the same six calendar months, but the court thereupon shall give a single sentence, does not render an indictment bad because offenses not committed within the same six calendar months are joined therein, but the offenses in such case are separate and distinct, and punishable as such. *Hall v. U. S.*, (C. C. A. 1907) 152 Fed. 420.

R. S. sec. 1024 authorizes the consolidation for trial of indictments for using the mails to defraud under section 5480, notwithstanding the fact that such indictments charge offenses not committed within the same six months and which could not be joined in one indictment under the latter section, and in the aggregate more than the three offenses which may be so joined. *Booth v. U. S.*, (C. C. A. 1907) 154 Fed. 836.

**What constitutes a separate offense.**—Each mailing or taking from the post office of a letter pursuant to a scheme to defraud constituted a separate offense under this section. *Francis v. U. S.*, (C. C. A. 1907) 152 Fed. 155, *modifying* (1906) 144 Fed. 520.

## PRISONS AND PRISONERS.

### Vol. VI, p. 38, sec. 5544.

**Right of officers to parole.**—A federal prisoner sentenced to a workhouse in Ohio may be paroled by the prison authorities, as

authorized by R. S. Ohio, 1892, sec. 2102. *In re Naples*, (1905) 142 Fed. 781.

### Vol. VI, p. 40, sec. 1.

**Prior sentences.**—To the same effect as the original note. *U. S. v. Farrar*, (1905) 139 Fed. 260, 71 C. C. A. 386, *reversing* (1904) 133 Fed. 254; *U. S. v. Jackson*, (C.

C. A. 1906) 143 Fed. 783, *reversing* (1905) 140 Fed. 266; *Woodward v. Bridges*, (1906) 144 Fed. 156.

## PRIVATE LAND CLAIMS, COURT OF.

### Vol. VI, p. 56, sec. 10.

**Effect of patent.**—The acquisition of rights as a riparian proprietor which could not be displaced by a subsequent attempt to appropriate the water cannot be based upon a patent from the United States, issued pursuant to a decree of the court of private land

claims, confirming a Mexican grant to riparian lands, on the theory that such patent not only confirms the Mexican title, but releases that of the United States. *Boquillas Land, etc., Co. v. Curtis*, (1909) 213 U. S. 339, 29 S. Ct. 493, 53 U. S. (L. ed.) 822.

## Vol. VI, p. 57, sec. 12.

**"Imperfect grants."** — A Spanish grant made, in 1728, by the Governor and Captain General of New Mexico, and not shown to have been confirmed by a Spanish official, is an imperfect grant — that is, one requiring further action of the political authorities to its perfection, recognition of which is forbidden by this section, in the absence of a proceeding within two years for establishment of its validity — the Royal Regulation of the King of Spain of Oct. 15, 1752, sec. 3, providing that all persons holding grants

made after 1700 should exhibit their title to the proper officer for confirmation, and that failure to do so should result in their being deprived of and ejected from such lands, and grants of them being made to other persons, and section 12, conferring the confirmatory power on the governors of distant provinces, acting under the advice of certain other officials as to land therein. *Sena v. American Turquoise Co.*, (1908) 14 N. M. 511, 98 Pac. 171.

## Vol. VI, p. 58, sec. 13.

**Effect of recitals in patent.** — A recital in a patent from the United States, confirming a Mexican land grant to the original grantees, "their heirs, successors in interest, and assigns," that two persons named therein had acquired an undivided interest in the land, which patent was based on a decree to that effect of the court of private land claims, established by this act, is sufficient

to establish a record title in the persons so named as against others holding merely by adverse possession, although under sections 8, 13, of this act, the confirmation of the grant by that court only quitclaims the title of the United States, and saves the right of third person. *Herrick v. Boquillas Land, etc., Co.*, (1906) 200 U. S. 98, 26 S. Ct. 192, 50 U. S. (L. ed.) 388.

## Vol. VI, p. 62, sec. 14.

**To what cases applicable.** — The claim of one whose title under a Mexican land grant is perfect and complete, and who is, therefore, not bound under this act, to apply to the court of private land claims for confirmation, is not cut down to the extent that the land has been patented by the United States to third parties, because he appeared and prayed confirmation in a suit brought against him by the United States under the authority of section 8 of this act, to remove the government's doubt as to title or boundaries, on the theory that the language of section 14, giving that effect to such patents "if in any case" it shall appear that the

lands or any part thereof, decreed to any claimant under the act, shall have been sold by the United States, applies not only to the proceeding brought by the claimant himself for confirmation, but also to the proceeding on behalf of the government, in which the court is to determine the matter, subject to all lawful rights adverse to the claimant or possessor, and as between such claimant and possessor and any other claimant or possessor, and subject in this respect to all the applicable statutory provisions. *Richardson v. Ainsa*, (1910) 218 U. S. 289, 31 S. Ct. 23, 54 U. S. (L. ed.) 1044.

## PUBLIC CONTRACTS.

## Vol. VI, p. 116, sec. 3732.

Under this section, see *Hooe v. U. S.*, (1910) 218 U. S. 322, 31 S. Ct. 85, 54 U. S. (L. ed.) 1055.

## Vol. VI, p. 122, sec. 3736.

**Executed contracts.** — This section should not be construed to apply to executed contracts so as to defeat the title of the United States to land it has paid for, and an act authorizing a public improvement and ap-

propriating money therefor is sufficient authority for the purchase of land necessary or proper to such improvement. *Burns v. U. S.*, (C. C. A. 1908) 160 Fed. 631.

## Vol. VI, p. 125, sec. 1.

**Amendment.**—This Act was amended by Act of Feb. 24, 1905, c. 778, 32 Stat. L. 811, 10 Fed. Stat. Annot. 343.

**Jurisdiction of federal courts.**—An action on the bond of a contractor for government work brought under this act in the name of the United States for the use of a person who furnishes labor or materials in the prosecution of the work, is not one in which the United States is plaintiff or petitioner, within the meaning and intent of section 1 of the Judiciary Act of Aug. 13, 1888, ch. 866, 25 Stat. 433, 4 Fed. Stat. Annot. 265, but one in which it is merely a nominal party, and, in the absence of express provisions therefor in the statute giving the right of action, a federal court is without jurisdiction thereof unless the requisite diversity of citizenship and amount in controversy are affirmatively shown. *U. S. v. Barrett*, (1905) 135 Fed. 189. See also *Burrell v. U. S.*, (C. C. A. 1906) 147 Fed. 44.

But in *U. S. v. Axman*, (1906) 152 Fed. 816, an action by the United States on relation of a materialman against a government contractor and a surety to recover on the contractor's bond to the government, as required by this act, for materials furnished to enable him to perform the contract, was held to constitute a case arising under the Constitution or laws of the United States, and therefore within the jurisdiction of the federal courts, as provided by Act Cong. March 3, 1875, as amended by Act March 3, 1887, and corrected by Act Aug. 13, 1888, ch. 866, sec. 1, 25 Stat. 433, 4 Fed. Stat. Annot. 265.

**Jurisdiction of state courts.**—This Act creates rights of action in favor of laborers and materialmen, which may be enforced under the law and practice, in the courts, of the state where suit on the bond is brought. *U. S. v. U. S. Fidelity, etc., Co.*, (1906) 78 Vt. 445, 63 Atl. 581.

**Rights of sureties.**—Where a federal contractor's surety was compelled to pay labor and material claims to an amount exceeding the amount due from the government to the contractor it was held that it was entitled to subrogation to the rights of the laborers and materialmen so paid against such sum which claim was prior to that of a mere volunteer lender of funds to the contractor, not shown to have been used in the performance of the contract. *Henningsen v. U. S. Fidelity, etc., Co.*, (C. C. A. 1906) 143 Fed. 811.

**Liability of surety.**—A bond given by a contractor for government work, conditioned as provided by this Act, is in effect two separate instruments; one securing performance of the contract to the United States, and the other the payment by the contractor of bills for labor and materials furnished, and in the latter aspect the surety is not discharged from liability by a variation of the contract which might relieve it from liability to the United States, as by a change in the site of a building. *U. S. v. California Bridge, etc., Co.*, (1907) 152 Fed. 559.

The surety on a bond given by a partnership as government contractor for public work, conditioned as required by this Act, is not released from liability thereon for the claim of one who supplied labor or materials in the prosecution of the work because of the fact that other persons were associated with the firm as partners in carrying out the contract. *Philadelphia City Trust, etc., Co. v. U. S.*, (C. C. A. 1906) 147 Fed. 155.

**Scows furnished for removing stone, etc.**—The furnishing of scows to the defendant, to be used in removing the stone and in other work being prosecuted by the defendant, was held not to constitute the furnishing of "labor and materials" to the defendant, so as to entitle the plaintiff to recover the amount due under the charter party on the bond. *U. S. v. Conkling*, (C. C. A. 1905) 135 Fed. 508.

**Coal used by a building contractor to heat buildings,** covered by specifications requiring him to provide fuel for heating while the work is going on, is "material," within the implied terms of the contract, which he is bound to furnish, and hence within the scope of his bond, required by the federal statute (Act Aug. 13, 1894, ch. 280, 28 Stat. 278) for the protection of persons supplying materials. *U. S. v. U. S. Fidelity, etc., Co.*, (1910) 83 Vt. 278, 75 Atl. 280. Compare *U. S. v. U. S. Fidelity, etc., Co.*, (1909) 82 Vt. 94, 71 Atl. 1106.

This Act is broad enough to include within the protection of a bond so conditioned one who supplies coal to the contractor which is used to operate hoisting or pumping engines employed in the work. *Philadelphia City Trust, etc., Co. v. U. S.*, (C. C. A. 1906) 147 Fed. 155.

**Subcontractor taking contractor's note.**—A surety on the bond of a contractor with the United States for a public work, conditioned for the payment by such contractor of all claims for labor and materials, as required by this Act, was not released from liability to a subcontractor by the taking by the latter of a note from the contractor for his claim due in three months, but which did not mature until final settlement had been made between the contractor and the United States and a few days after receivers in insolvency had been appointed for the contractor. *U. S. v. U. S. Fidelity, etc., Co.*, (1909) 172 Fed. 268, affirming (1910) 178 Fed. 692, 102 C. C. A. 192.

**The giving of a note by a contractor for government work for the amount of an account rendered for materials furnished** does not release the surety on his bond, given pursuant to this Act, from liability for such material; an action on the bond being based on the account, and not on the note. *U. S. v. Axman*, (1906) 153 Fed. 982.

**Labor and material furnished subcontractors.**—Labor and materials used in the prosecution of a public work, whether furnished under the contract directly to the contractor or to a subcontractor, must be deemed within the obligation of a surety company under a

bond executed pursuant to this act, conditioned for the prompt payment of the contractor to "all persons supplying it labor or materials in the prosecution of the work provided for in said contract," in view of the manifest purpose of that statute to protect those whose labor or material has contributed to the prosecution of the work. *U. S. v. American Surety Co.*, 200 U. S. 197, 26 S. Ct. 168, 50 U. S. (L. ed.) 437; *Smith v. Mosier*, (1909) 169 Fed. 430.

**Attorney's fees.**—In an action on a bond given under this Act the court may in its discretion allow a statutory attorney's fee in favor of each claimant who has become a party and recovers on his claim to be taxed as costs. *Title Guaranty, etc., Co. v. Puget Sound Engine Works*, (C. C. A. 1908) 163 Fed. 168.

**"Claims for labor and material."**—Claims for patterns made for a contractor from which to make castings required for a vessel, for towing in the delivery of materials, for wharfage paid in connection with such delivery, and by a local transfer company for hauling materials, are all for labor or material, within the meaning of this Act, and recoverable on the bond; but advances of freight made to common carriers by such transfer company are not so recoverable. *Title Guaranty, etc., Co. v. Puget Sound Engine Works*, (C. C. A. 1908) 163 Fed. 168.

**Bond conditioned in language of statutes.**—Under this Act, requiring persons entering into a contract for the construction of a public building to give a bond conditioned to "promptly make payments" to all persons supplying them with labor or materials, a contractor's bond containing conditions in the language of the statute constitutes a covenant by the contractor to pay all materialmen and laborers for the material and labor furnished by them. *U. S. v. U. S. Fidelity, etc., Co.*, (1906) 78 Vt. 445, 63 Atl. 581.

**In name of United States.**—An action by a materialman on a bond given by a contractor for public building under this Act, is properly brought in the name of the United States as covenantee in the bond. *U. S. v. U. S. Fidelity, etc., Co.*, (1906) 78 Vt. 445, 63 Atl. 581.

**An agreement to supply materials to a contractor is not supplying them, and where one has agreed to supply materials, but they have never been delivered to or used by the contractor in his lifetime, or his sureties completing the work after his death, it cannot be said that the materials have been supplied to the contractor in the prosecution of the work within the meaning of the statute.** *U. S. v. Murdock*, (1904) 99 Me. 258, 59 Atl. 60.

**The words "public works," as used in this Act, relate to fixed improvements, such as fortifications, river and harbor improvements, etc., and do not include a movable article, such as a seagoing dredge; and a person supplying materials to a contractor under contract for the construction of such a dredge is not entitled to sue in the name of the United States for his benefit on a bond given by the contractor, conditioned on his paying**

persons supplying labor or materials in the prosecution of the work. *Penn Iron Co. v. Wm. R. Trigg Co.*, (1907) 106 Va. 557, 59 S. E. 329.

**Materials not becoming part of permanent structure.**—This Act does not merely give the relief afforded by the foreclosure of a mechanic's lien on a building erected for a private owner, but protects persons furnishing materials in the prosecution of the work, though they do not become a part of the permanent structure. *U. S. v. Aetna Indemnity Co.*, (1902) 40 Wash. 87, 82 Pac. 171.

**What contracts included.**—A contract to "furnish all necessary labor and materials" required in the "construction" of a government building, which also provides for work to be done, and prescribes when and how it shall be done, and in which the government agrees to pay for the construction of the building, and not merely for labor and materials, is a contract for the construction of the building, within the meaning of this Act. *U. S. v. Murdock*, (1904) 99 Me. 258, 59 Atl. 61.

**Form of action.**—A common-law action of covenant in which judgment for the amount due the use plaintiff may be assessed, instead of an action under the statute in which judgment is rendered for the penalty of the bond, is an appropriate and proper remedy to enforce the bond of a contractor under this Act. *U. S. v. U. S. Fidelity, etc., Co.*, (1906) 78 Vt. 445, 63 Atl. 581.

**Allegations necessary.**—In an action brought upon a bond given under this Act against the principal and surety therein named, demurrer was filed to the declaration because it was not averred therein that the claim of the United States thereunder, if any, had been paid. It was held that such averment was unnecessary, because the United States is not a preferred creditor under said bond. *U. S. v. Perth Amboy Shipbuilding, etc., Co.*, (1905) 137 Fed. 689.

The same declaration was also demurred to upon the further ground that it did not aver that there were no other persons having claims or demands against the defendants under said bond, or if there were such creditors, that they had been paid. It was held, further, that such averment was unnecessary, since the Act referred to confers an independent right of action upon each creditor having a claim under the bond. *U. S. v. Perth Amboy Shipbuilding, etc., Co.*, (1905) 137 Fed. 690.

**Who may sue.**—The covenant of the bond is several, and each person who supplies labor or material has a right of action on the bond for the amount due him independent of the rights of action of all other persons, and a suit brought by one materialman is no bar to an action by another. *U. S. v. U. S. Fidelity, etc., Co.*, (1906) 78 Vt. 445, 63 Atl. 581.

**Necessity for naming persons for whose benefit bond given.**—A bond given by contractors for a public building under this Act, conditioned that the contractors "shall promptly make payment to all persons who furnish them with labor or material in the prosecution of the work contemplated by the

contract," need not name the laborers and materialmen for whose benefit the bond is given, but any person who subsequently furnished the contractors labor or materials is protected by the bond. *U. S. v. U. S. Fidelity, etc., Co.*, (1906) 78 Vt. 445, 63 Atl. 581.

**For whose benefit.**—Persons who, in view of the financial embarrassment of a public contractor, undertake to superintend the completion of a public work and to furnish the necessary funds, for which they are to be paid by an assignment of the reserve fund in the hands of the government and by checks or payments under the original contract, are not subcontractors furnishing labor and ma-

terials for the fulfillment of such original contract, so as to be entitled to the protection of the bond executed pursuant to this Act, conditioned for the prompt payment by the original contractors to all persons supplying them with labor or materials in the prosecution of the work. *Hardaway v. National Surety Co.*, (1909) 211 U. S. 552, 29 S. Ct. 202, 53 U. S. (L. ed.) 321.

**Assignment of rights of laborers and materialmen.**—To the same effect as the original notes. *Title Guaranty, etc., Co. v. Puget Sound Engine Works*, (C. C. A. 1908) 163 Fed. 169.

## Vol. VI, p. 132, sec. 3744.

**Performed contract.**—To the same effect as the original note. *U. S. v. Andrews*, (1907) 207 U. S. 229, 28 S. Ct. 100, 52 U. S. (L. ed.) 185.

## Vol. X, p. 343. [*Contractors for public buildings, etc.*]

**Not retroactive.**—Those provisions, if any, governing procedure, contained in this amended Act, for the protection of persons furnishing materials and labor for the construction of public works, will not be given a retroactive effect so as to apply to existing causes of action, where such amendatory statute, which consists of but one section, contains various provisions dealing with substantive rights, which must be regarded as prospective in their operation. *U. S. Fidelity, etc., Co. v. U. S.*, (1908) 209 U. S. 306, 28 S. Ct. 537, 52 U. S. (L. ed.) 804.

Where a federal contract had been performed prior to this Act, it was held that the one-year limitation prescribed by such amendment was inapplicable to an action by a materialman against the contractor's surety. *U. S. Fidelity, etc., Co. v. U. S.*, (C. C. A. 1910) 178 Fed. 692; *U. S. v. U. S. Fidelity, etc., Co.*, (1910) 178 Fed. 721. For other cases see *U. S. v. U. S. Fidelity, etc., Co.*, (1909) 171 Fed. 247; *U. S. v. Schofield Co.*, (1910) 182 Fed. 241; *Title Guaranty, etc., Co. v. U. S.*, (C. C. A. 1911) 187 Fed. 98; *U. S. v. U. S. Fidelity, etc., Co.*, (1907) 80 Vt. 84, 66 Atl. 809; *Burton v. Seifert*, (1908) 108 Va. 338, 61 S. E. 933.

**Jurisdiction of federal courts.**—A suit brought in the name of the United States under this Act, on the bond of a public contractor, for the benefit of a person furnishing materials and labor for the construction of a public work, is governed by that part of the Act of March 3, 1887, 24 Stat. L. 552, ch. 373, as corrected by the Act of Aug. 13, 1888, 25 Stat. L. 434, ch. 866, 4 Fed. Stat. Annot. 265, which provides that no civil suit shall be brought before any federal Circuit Court "against any person, by any original process or proceedings, in any other district than that whereof he is an inhabitant." *Davidson Bros. Marble Co. v. U. S.*, (1909) 213 U. S. 10, 29 S. Ct. 324, 53 U. S. (L. ed.) 675.

This Act requires action on the contractor's bond to be brought "in the name of the United States in the Circuit Court of the

United States in the district in which said contract was to be performed . . . and not elsewhere," and that it shall be commenced "within one year after the performance and final settlement of said contract, and not later." It has been held that the jurisdiction of such court to enforce the remedy given is exclusive, and that the commencement of an action on such a bond in a state court of Colorado, which was afterward dismissed, did not extend the time for bringing a new action in the federal court by virtue of the Colorado statute (*Mills' Annot. Stat. Colo.*, sec. 2917), which in certain cases of dismissal permits a new action to be brought within one year thereafter. *U. S. v. Boomer*, (1910) 183 Fed. 727, 106 C. C. A. 164.

**District in which suit brought.**—The provisions as to the proper district for suit on the bond of a public contractor, made by this Act, do not apply where the contract with, and the bond to, the government, and the contract under which the labor and materials were furnished, all antedate the passage of the amendatory Act. *Davidson Bros. Marble Co. v. U. S.*, (1909) 213 U. S. 10, 29 S. Ct. 324, 53 U. S. (L. ed.) 675.

**A vessel building for the United States**, the title to which passes to the government as fast as paid for, is a "public work" within the meaning of this Act. *Title Guaranty, etc., Co. v. Crane Co.*, (1910) 219 U. S. 24, 31 S. Ct. 140, 55 U. S. (L. ed.) 72, *affirming* (1908) 163 Fed. 168, 89 C. C. A. 618.

**Subcontractor's profits.**—This section requiring a government building contractor to give a bond to pay all persons supplying labor and materials, makes the surety liable to a subcontractor for the subcontractor's profits, the Act not restricting liability to the value of labor and materials furnished. *Burton v. Seifert*, (1908) 108 Va. 338, 61 S. E. 933.

**Interventions.**—This Act which provides that in an action by the United States on the bond of a contractor for public work, persons having claims for labor or materials supplied to such contractor may intervene and



be made parties and have their claims adjudicated subject to the prior claim of the United States, gives them such right only subject to the ordinary rules and practice governing interventions, and such creditor will not be allowed to intervene after the action has been dismissed as to the contractor for want of service and as between the plaintiff and the surety has been fully tried and submitted for decision. *U. S. v. McGee*, (1909) 171 Fed. 209.

**Assignment of claims.**—Claims for labor and materials against a contractor for a public work may be assigned without losing the protection of the bond given conformably to this Act for the benefit of laborers and materialmen. *Title Guaranty, etc., Co. v. Crane Co.*, (1910) 219 U. S. 24, 31 S. Ct. 140, 55 U. S. (L. ed.) 72.

**Affidavit and copy of bond.**—The failure of a plaintiff, in an action on the bond of a contractor for a public work, given conformably to this Act, for the protection of laborers and materialmen, to apply, as provided in the statute, for a copy of the bond, and furnish an affidavit that labor or materials have been supplied by him for the prosecution of the work, is not fatal to the suit, where no action has been brought by the United States for more than six months from the completion of the work, and affidavits are made and copies filed by interveners, since, under the circumstances, the omission is only a formal defect. *Title Guaranty, etc., Co. v. Crane Co.*, (1910) 219 U. S. 24, 31 S. Ct. 140, 55 U. S. (L. ed.) 72, *affirming* (1908) 163 Fed. 168, 89 C. C. A. 618.

**Claims for cartage and towage to the place** where a vessel is building for the United States, and for patterns furnished to the molding department of the builder, are within the obligation of the latter's bond, given conformably to this Act. *Title Guaranty, etc., Co. v. Crane Co.*, (1910) 219 U. S. 24, 31 S. Ct. 140, 55 U. S. (L. ed.) 72.

The additional phrase, "the person or persons supplying the contractor with labor and materials," used in this Act, in describing the persons entitled to a copy of the contract and bond for the purpose of suit, does not change the rule that labor and materials used in the prosecution of a public work, though furnished to a subcontractor, are within the obligation of a bond conditioned conformably to those statutes for the prompt payment by the contractor to all persons supplying him with labor or materials in the prosecution of the work. *Mankin v. U. S.*, (1910) 215 U. S. 533, 30 S. Ct. 174, 54 U. S. (L. ed.) 315.

**Want of consideration cannot be urged** to defeat an action on the bond of a public contractor, given conformably to this Act for the protection of laborers and materialmen, because it was not executed until ten days after the contract was made—especially where the bond was under seal. *Title Guaranty, etc., Co. v. Crane Co.*, (1910) 219 U. S. 24, 31 S. Ct. 140, 55 U. S. (L. ed.) 72.

**In name of United States.**—The objection that the United States should have been made a party cannot avail to defeat the action on the bond of a contractor for a public work,

given conformably to this Act, where the suit was begun in the name of the United States, to the real plaintiff's use. *Title Guaranty, etc., Co. v. Crane Co.*, (1910) 219 U. S. 24, 31 S. Ct. 140, 55 U. S. (L. ed.) 72.

**Time to sue.**—This Act in so far as it prohibits the bringing of an action by the subcontractor prior to the expiration of six months from the completion and final settlement of the contract, is not a statute of limitations, but during such period no right of action accrues to the subcontractor; the right to sue during that time being vested exclusively in the United States. *Stitzer v. U. S.*, (C. C. A. 1910) 182 Fed. 513.

**Waiver of six months limitation.**—The nonaccrual of the cause of action in favor of a subcontractor until six months after final completion and settlement is jurisdictional, and cannot be waived by the parties. *Stitzer v. U. S.*, (C. C. A. 1910) 182 Fed. 513.

**Completion and final settlement.**—The words "completion and final settlement," as used in this Act, are not equivalent, though the latter may by inference be held to include the former, but both constitute an essential prerequisite to a subcontractor's right to sue, and hence where a contract was still open and unsettled as late as July 12, 1909, a suit on the contractor's bond, begun October 21st following, was premature and unsustainable. *Stitzer v. U. S.*, (C. C. A. 1910) 182 Fed. 513.

**"Complete performance of said contract."**—In *U. S. v. Winkler*, (1908) 162 Fed. 397, it appeared that a contractor who had given a bond, under this Act, and whose contract contained the usual provision giving the United States, in case of his default, the right to have the contract completed at his cost, became insolvent and abandoned the work. It was held that such abandonment was not a "complete performance of said contract" which gave a right of action to creditors for labor and materials on the bond under the statute, which contemplates a completion of the work, whether by the contractor or the United States, and a final settlement to determine the prior rights and claim of the United States under the contract, and the lapse of six months thereafter for the bringing of suit to enforce such rights against the bondsmen before an action can be maintained by such creditors.

**Effect of proving claim in bankruptcy against contractor's estate.**—A subcontractor for public work, entitled to sue the surety on the statutory bond given by the contractor, does not lose his right of action by proving his claim against the estate of the contractor in bankruptcy. *Title Guaranty, etc., Co. v. U. S.*, (C. C. A. 1911) 187 Fed. 98.

**Amount of liability.**—The recovery on the bond of a contractor for a public work for labor and materials furnished a subcontractor is not limited to the amounts remaining unpaid to the subcontractor when notice was given of outstanding claims, where the bond is conditioned, conformably to this Act, for the prompt payment by the contractor to all persons supplying him with labor or materials in the prosecution of the work. *Man-*

*kin v. U. S.*, (1910) 215 U. S. 533, 30 S. Ct. 174, 54 U. S. (L. ed.) 315.

**Actions by United States.**—The provision of this Act requiring bonds given by contractors for government work to contain an additional obligation securing the payment of claims for labor and materials supplied to the contractor, and providing for the enforcement of such obligation, has no relation to actions on such bonds by the United States, and, while the labor and material creditors are authorized to intervene in such actions and have their claims adjudicated subject to the prior right of the United States, the government, in commencing such an action, is not required to serve or publish notice to

such claimants, nor to bring the suit in the district where the contract was to be performed; such provisions of the Act being applicable only to suits brought thereunder. *U. S. v. McGee*, (1909) 171 Fed. 209.

**Docket fees.**—Each successful claimant in an action on the bond of a public contractor, given conformably to this Act, may be allowed the docket fee authorized by R. S. sec. 824, 2 Fed. Stat. Annot. 278, since the claims are several, and represent distinct causes of action in different parties, although consolidated in a single suit. *Title Guaranty, etc., Co. v. Crane Co.*, (1910) 219 U. S. 24, 31 S. Ct. 140, 55 U. S. (L. ed.) 72.

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## PUBLIC DEBT.

Vol. VI, p. 143, sec. 3701.

**Checks or orders of the treasurer.**—*Hibernia Sav., etc., Soc. v. San Francisco*, (1906) 200 U. S. 310, 26 S. Ct. 265, 50 U. S. (L. ed.) 495, *affirming* (1903) 139 Cal. 205, 72 Pac. 920, 96 Am. St. Rep. 100, set out in the original note.

**Bank capital invested in United States bonds.**—The immunity of national securities from state taxation is violated by a tax imposed under the authority of the Iowa Code, sec. 1322, directing that shares of stock of state banks shall be assessed to such banks,

and not to individual stockholders, the substantial effect of which is to require taxation upon the property, not including the franchises, of such banks, and to adopt the value of the shares as the measure of the taxable valuation of such property, without permitting any deduction from such valuation on account of bonds of the United States owned by the banks. *Home Sav. Bank v. Des Moines*, (1907) 205 U. S. 503, 27 S. Ct. 571, 51 U. S. (L. ed.) 901.

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## PUBLIC DOCUMENTS.

Vol. VI, p. 158, sec. 56.

The cost of printing in alip form the five hundred copies of all laws furnished the State Department under this section should not be

charged against the allotment of appropriation for printing and binding for that department. (1908) 26 Op. Atty.-Gen. 514.

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## PUBLIC LANDS.

Vol. VI, p. 212, sec. 452.

This section must be strictly construed, as it imposes a penalty or forfeiture. *Hand v. Cook*, (1907) 29 Nev. 518, 92 Pac. 3.

A special agent of the General Land Office is prevented from making a valid timber culture entry under this section. *Prosser v. Finn*, (1908) 208 U. S. 67, 28 S. Ct. 225, 52

U. S. (L. ed.) 392, *affirming* (1906) 41 Wash. 604, 84 Pac. 404.

Reliance, in making a timber culture entry, upon the opinion of the Commissioner of the General Land Office, that the provisions of this section do not embrace a special agent of the Land Office, can confer no interest

upon such special agent which will prevent the government, by its proper officer or department, from canceling his entry. *Prosser v. Finn*, (1908) 208 U. S. 67, 28 S. Ct. 225, 52 U. S. (L. ed.) 392, *affirming* (1906) 41 Wash. 604, 84 Pac. 404.

Continuing in possession after ceasing to be a special agent of the Land Office is not the equivalent of a new timber culture entry, where the original entry was invalid because made in direct violation of this section. *Prosser v. Finn*, (1908) 208 U. S. 67, 28 S. Ct. 225, 52 U. S. (L. ed.) 392, *affirming* (1906) 41 Wash. 604, 84 Pac. 404.

**Deputy surveyor.**—"The later rulings of the Land Department are to the effect that this statute is applicable to a deputy surveyor, and therefore that such an officer is prohibited from acquiring or becoming interested in the purchase of any of the public lands. *Muller v. Coleman*, 18 Land Dec. Dep. Int. 394; *In re Neill*, 24 Land Dec. Dep. Int. 393; *Floyd v. Montgomery*, 26 Land Dec. Dep. Int. 122. See also *In re McMicken*, 10 Land Dec. Dep. Int. 97, 11 Land Dec. Dep. Int. 96. In the case of *Hand v. Cook*, (1907) 20 Nev. 518, 92 Pac. 3, a majority of the Supreme Court of Nevada held that the statute in question did not apply to a deputy mineral surveyor; but the reverse was held by the Supreme Court of Utah in the case of

*Lavagnino v. Uhlig*, (1903) 26 Utah 1, 71 Pac. 1046, 99 Am. St. Rep. 808. It will not do for a court to take a strained and narrow view of the language employed by Congress in its enactments, but rather give such a construction as will carry into effect its obvious intent. We entertain no doubt that a deputy mineral surveyor is an employee 'in the General Land Office' within the meaning of the statute. That is the office in which the land laws of the United States are administered and executed, by and through the thousand and one officers and employees in and out of the particular building or buildings in which that department of the government is conducted. Nor do we see that there is any much clearer way to prohibit an act than to say expressly that it is prohibited. That Congress did in the section in question." *Waskey v. Hammer*, (C. C. A. 1909) 170 Fed. 31.

**Clerks.**—This section assumes that there must be and are clerks and other employees of the General Land Office, and the specification of them after the word "officers" clearly indicates that Congress did not intend that they should be comprehended within that term, or that they should be officers of the General Land Office. *U. S. v. Schlierholz*, (1904) 133 Fed. 333.

## Vol. VI, p. 212, sec. 453.

The Land Department of the federal government is the tribunal specially designated by law to receive and consider the evidence and thereupon determine the rights growing out of settlements on public lands, with a purpose to secure them to those who have complied with the laws regulating the disposition of them; and if its officers err in the interpretation of the law applicable to the facts presented or a fraud is practiced by one rival claimant on the other by which the latter is deprived of his right if the officers themselves are chargeable with fraudulent practices which have resulted in their granting title to the wrong party, their action may be reviewed and annulled by a court of equity at the instance of the aggrieved claimant, and the wrongful holder of the title may be compelled to surrender it, but for mere errors of judgment on the weight of the evidence produced before them in any case, the only remedy is by appeal. On such questions their rulings are final and conclusive on all courts whatsoever. *Kennedy v. Dickie*, (1906) 34 Mont. 205, 85 Pac. 982.

The Commissioner of the General Land Office and the Secretary of the Interior, although powerless to adopt a regulation which is in any wise inconsistent with, or repugnant to, the public land laws, are empowered to enforce, by appropriate regulations, every part of those laws as to which it is not otherwise specially provided. *Leonard v. Lennox*, (C. C. A. 1910) 181 Fed. 760.

**Power to correct errors.**—The Secretary of the Interior will not be compelled by mandamus to deliver a patent for public land to

an entryman, where it appears that the entry was canceled by the Commissioner of the General Land Office on the ground that it was of unsurveyed land; and that the decision of the office was affirmed on appeal by the entryman to the secretary, who directed that no patent should issue, but, by mistake of a clerk, a patent was prepared in violation of such direction, and passed to execution and record, without discovery of the mistake. The secretary has the power to correct such a mistake before the patent has actually passed out of his possession. *Garfield v. U. S.*, (1908) 31 App. Cas. (D. C.) 338.

The decision of the Secretary of the Interior on an appeal to him in a controversy over a land entry is conclusive as to questions of fact, in the absence of fraud or gross mistake, but not upon questions of law, and if through an error of law he directed a patent to issue to the wrongful claimant, the patentee will be held in equity as a trustee for the rightful owner. *Le Marchal v. Teggarden*, (C. C. A. 1909) 175 Fed. 682, *reversing* (1907) 152 Fed. 662.

The Secretary of the Interior, having complete jurisdiction of a contest before the Land Department, is not bound by findings of fact made by his predecessor at a previous stage of the controversy. *Greenmeyer v. Coate*, (1909) 212 U. S. 434, 29 S. Ct. 345, 53 U. S. (L. ed.) 587, *affirming* (1907) 18 Okla. 160, 88 Pac. 1054.

Findings of the Secretary of the Interior to the effect that a designated party to a controversy in the Land Department had the right to enter the land as a homestead does not prevent such department, if patent has

not issued, from instituting further inquiry, and, upon such inquiry, finally awarding the land to the party held to have a better right. *Love v. Flahive*, (1907) 205 U. S. 195, 27 S. Ct. 486, 51 U. S. (L. ed.) 768, *affirming* (1905) 33 Mont. 348, 83 Pac. 883.

A second contest will not be entertained by the Interior Department against an entry of public lands on a charge which has once been investigated or decided by the depart-

ment. *Parryman v. Cunningham*, (1905) 16 Okla. 94, 82 Pac. 822.

When a patent has once issued for public lands of the United States, the duties of the Interior Department have been fully performed, and it cannot lawfully further consider the rights of contesting parties to such land. The department has no power to set aside or cancel the patent. *Johnson v. Pacific Coast Steamship Co.*, (1904) 2 Alaska 224.

## Vol. VI, p. 216, sec. 458.

**Patent passes title.**—A patent to public land, duly issued upon the decision of the proper officers and recorded in the record book kept in the Land Department of the government for that purpose, passes the title, and a delivery to the patentee is not necessary. *U. S. v. Laam*, (1906) 149 Fed. 581; *Lonabaugh v. U. S.*, (C. C. A. 1910) 179 Fed. 476, *reversing* (1907) 158 Fed. 314.

Title by patent from the United States is title by record, and delivery of the patent to patentee is not, as in a conveyance by a private person, essential to pass title. *Rogers v. Clark Iron Co.*, (1908) 104 Minn. 198, 116 N. W. 739.

**Compliance with statute is imperative.**—To entitle one to a patent under the public laws, it is necessary that he comply with all the requirements of the statute and the authoritative regulations of the Land Department. *Leonard v. Lennox*, (C. C. A. 1910) 181 Fed. 760.

**Presumption of compliance with statute.**—A patent to land is the judgment of the Land Department and the conveyance of the title in execution of it to the party adjudged

entitled, and, when the land described was within the jurisdiction and subject to the disposition of the Land Department, it is impervious to collateral attack. *Neff v. U. S.*, (C. C. A. 1908) 165 Fed. 273.

A patent issued by the federal government is *prima facie* evidence that all the pre-requisites of the law necessary to its issuance have been complied with. *Bradshaw v. Edelen*, (1906) 194 Mo. 640, 92 S. W. 691.

**Void patent.**—A federal patent purporting to grant lands in which the government has no title is void as an evidence of title and may be so declared in an action at law at the instance of any one in possession lawfully or under color of title. *Tapia v. Williams*, (Ala. 1911) 54 So. 613.

Where public lands, patented under the general land laws, had previously been reserved or otherwise appropriated by Act of Congress, the patent is void, and the land may be recovered by the true owner by an action at law, where he has such title as will support an action in ejectment. *Eastern Oregon Land Co. v. Brosnan*, (1906) 147 Fed. 807.

## Vol. VI, p. 229, sec. 2238.

No commissions for selling the lands ceded by the Osage Indians to the United States by the treaty of Sept. 29, 1865 (14 Stat. 687), to be sold for their benefit, beyond what brings his annual compensation to the legal maximum of \$2,500, can be claimed by a register of the Land Office who received his appointment after the Secretary of the Interior, acting through the Commissioner

of the General Land Office, had charged the various registers and receivers with the duty of selling such lands, and had limited their annual compensation for this and all other services to the existing legal maximum. *Stewart v. U. S.*, (1907) 206 U. S. 185, 27 S. Ct. 631, 51 U. S. (L. ed.) 1017, *affirming* (1904) 39 Ct. Cl. 321.

## Vol. VI, p. 233, sec. 2246.

The courts will take judicial notice of the qualification of the receiver of the Land Office to administer an oath. *U. S. v. Eddy*,

(1905) 134 Fed. 119. See also *U. S. v. Brace*, (1907) 149 Fed. 869.

## Vol. VI, p. 285, sec. 2289.

**Requisites to valid entry.**—Where a person had occupied public lands, but failed to file within three months after the land was surveyed his declaratory statement as required by the pre-emption laws, he acquired no right or title, and the land became subject to disposition by the United States as before its occupancy. *Rio Grande Western R. Co. v. Stringham*, (Utah 1910) 110 Pac. 868.

The regulation of the Land Department Nov. 19, 1901, requiring applicants under the nonmineral laws to support their applications by showing that the land is nonsaline, is a valid regulation, and an applicant must comply with that regulation. *Leonard v. Lennox*, (C. C. A. 1910) 181 Fed. 760.

**Who may enter homestead.**—One who was within the Ponca Indian reservation before the hour of twelve noon, central standard

time; of Dec. 16, 1893, and made the race from said reservation into that part of the Cherokee outlet which was opened to settlement on that day, is not, by reason thereof, disqualified from settling upon and filing a homestead entry on a quarter section of land within the country then declared opened to settlement. *Saylor v. Frantz*, (1906) 17 Okla. 37, 86 Pac. 432.

The fact that a settler, who is actually residing on public land with the *bona fide* intention of acquiring title thereto under the homestead law, purchased his improvements from a prior settler, does not affect his right to so acquire the land. *Trodick v. Northern Pac. R. Co.*, (C. C. A. 1908) 164 Fed. 913.

The Secretary of the Interior has authority to deny an application to make a homestead entry, made by a person who has no equities in the land, when such land is covered by an Indian allotment, even though such Indian allotment has been erroneously made, when the equities in favor of the allottee are such that a great injustice would be done him if the allotment should be canceled. *Baldwin v. Keith*, (1904) 13 Okla. 624, 75 Pac. 1124.

**Homestead rights coextensive with boundaries.**—The possession of a homestead entryman under the public land laws are coextensive with the boundaries of his land, and extend over shore lands of navigable waters abutting thereon. *U. S. v. Roth*, (1904) 2 Alaska 257.

As between two simultaneous applications for entry of homestead land, the question as to which of the applicants has made the prior settlement is a question of fact for the determination of the Land Department. *Love v. Flahive*, (1905) 33 Mont. 348, 83 Pac. 882.

**Rights of entryman.**—One having homestead entry on lands of the United States is entitled to possession until his entry is canceled, so that no right of action accrues to the successful contestant for unlawful detainer until the homestead entry is canceled. *Bilyeu v. Pilcher*, (1905) 16 Okla. 228, 83 Pac. 546.

So long as a homestead entry valid on its face remains uncontested and uncanceled, the land is withdrawn from the public domain and cannot be granted by the United States to a subsequent claimant. *Jameson v. James*, (1909) 155 Cal. 275, 100 Pac. 700.

Even though land belonged to the United States when the state conveyed it to the plaintiff, yet he having inclosed, improved, cultivated, and been in the actual possession

of it, it was not subject to entry under the United States homestead laws. *Carmichael v. Campodonico*, (1908) 7 Cal. App. 597, 95 Pac. 164.

A homestead entry, valid on its face, constitutes such an appropriation of the land as to segregate it from the public domain, and, so long as it remains a subsisting entry, precludes it from subsequent entry. *Holt v. Murphy*, (1904) 15 Okla. 12, 79 Pac. 265.

An attempt to enter lands under the homestead laws after the lands had been patented to prior entrymen does not confer any interest therein, the land having been withdrawn by the patent from the jurisdiction of the Land Department. *Linebeck v. Vos*, (1908) 160 Fed. 540.

Where the defendants were in actual possession of public land of the United States inclosed by a substantial fence, and were using it for agricultural purposes, claiming title thereto, it is not subject to homestead entry. *Gragg v. Cooper*, (1907) 150 Cal. 584, 89 Pac. 346.

Where at the time the complainant attempted to move on public land in controversy, he knew that the defendants were then in open and undisturbed possession thereof, and had been for several years, claiming to own it under a contract of purchase from a railroad company, the complainant is not entitled to enter the land as a homestead, nor will his entry create any rights therein. *Dockendorf v. Bassett*, (1908) 160 Fed. 543.

One who settles on public land covered by a valid homestead entry is a mere trespasser, and acquires no rights against a contestant who secures the cancellation of the first entry and is awarded the preference right to enter the land. *Gourley v. Countryman*, (1907) 18 Okla. 220, 90 Pac. 427.

A homestead entry on public land then in the open and undisturbed possession of another constitutes an unlawful trespass on such possession, and gives the entryman no rights or interest in the land as against a *bona fide* possessor to whom a patent had been duly issued. *Lyle v. Patterson*, (1908) 160 Fed. 545.

**Right of actual settler.**—While one who settles on segregated land embraced in a homestead entry acquires no rights as a settler thereby, yet on the relinquishment of the entryman, there being no intervening superior rights, the rights of the settler attached, and, if qualified, he is entitled to the homestead entry if he applies within ninety days from the time his rights attach. *Gourley v. Countryman*, (1907) 18 Okla. 220, 90 Pac. 427.

## Vol. VI, p. 290, sec. 2290.

**"Entry" defined.**—In statutes and in common parlance the word "entries," when applied to proceedings in the Land Office under the homestead law, is used with various meanings—sometimes in the sense of preliminary entries, at other times in the sense of final entries, and again in the sense of the proceedings as a whole. *Stearns v. U. S.*, (C. C. A. 1907) 152 Fed. 902.

**Not applicable to mineral, coal, and saline lands.**—This section is a part of the general homestead law and relates to the enforcement of its restrictive provisions, but not to the enforcement of the prohibitive or qualifying provisions of the mineral, coal, and saline land laws. As to the latter, the means of enforcement are not specially prescribed by statute, and so may be designated by execu-

tive regulation under sections 441, 453, and 2478 of the Revised Statutes, which empower the commissioner, under the direction of the secretary, to enforce, "by appropriate regulations," every part of the public land laws as to which it is not otherwise specially provided. *Leonard v. Lennox*, (C. C. A. 1910) 181 Fed. 760, 767.

**Who may enter homestead.**—One M., an alien, who had not declared his intention of becoming a citizen of the United States, but who was an occupant of a tract of public land, executed a deed, by which he purported to convey to defendant railroad company a strip for right of way over such land. The land was at that time within the limits of a railroad grant and had been reserved from entry or sale. Subsequently the grant was forfeited and the land restored to the public domain, and M., who had in the meantime declared his intention to become a citizen, made a homestead entry thereof and later received a patent under which complainants acquired title. It was held that the right-of-way deed was a nullity, both because M. was an alien, who could not under the policy of the land laws acquire any right in the land, and because it was at the time reserved and not subject to disposition thereunder, and that, being void as against public policy, the subsequent title acquired by him did not relate back to give it validity. *Call v. Los Angeles-Pac. Co.*, (1908) 162 Fed. 926.

**Compliance with law necessary.**—An entryman on public lands secures no title to the land he desires to homestead until he has complied with the law and earned his patent. *Knapp v. Alexander-Edgar Lumber Co.*, (1911) 145 Wis. 528, 130 N. W. 504.

One who takes possession of a tract of public land with a view to becoming an entryman under the homestead law, except as to the limited statutory time allowed him preceding actual entry at the land office, is a mere "squatter" having no rights in the land as against the government or others. *U. S. v. Bagnell Timber Co.*, (C. C. A. 1910) 178 Fed. 795.

It is not a compliance with the homestead law for a man to file on a tract of land with no intention of making it his home, with no purpose to live there, and with no intention of cultivating any part of it and acquiring it for a place of residence; but there must be a combination of act and intent to make the property entered his actual place of abode. *U. S. v. Richards*, (1906) 149 Fed. 443.

No vested right is obtained in a piece of government land, by reason of an application for a homestead entry thereon, when such application is denied. *Baldwin v. Keith*, (1904) 13 Okla. 624, 75 Pac. 1124.

To establish a residence under the homestead law there must be a combination of act and intent, the act of occupying and living upon the claim, and the intention of making the place a home to the exclusion of a home elsewhere. *Whaley v. Northern Pac. R. Co.*, (1908) 167 Fed. 664.

The homestead law plainly confers the right of possession upon the entryman when the preliminary entry is made, for it makes ac-

tual settlement, followed by the residence and cultivation for a period of five years, a condition to obtaining the title. *Stearns v. U. S.*, (C. C. A. 1907) 152 Fed. 902.

The purpose of the homestead laws is to induce settlement, cultivation, and the establishment of homes upon the public lands. The law requires the homesteader to reside upon his land at least one year before he may make his proof of title. *Ware v. U. S.*, (C. C. A. 1907) 154 Fed. 577, 584.

**Entry cannot be made on land in actual possession of another.**—Only unoccupied and unimproved lands of the United States are subject to pre-emption or homestead settlement, though the possession of the prior occupant was wrongful as against the United States. *Harvey v. Holles*, (1908) 160 Fed. 531.

**Quantity of land which one person may enter.**—A homesteader who initiates a right as to either surveyed or unsurveyed land, and complies with the legal regulations, may, when he enters the land, embrace in his claim land in contiguous quarter sections, if he does not exceed the quantity allowed by law, and provided that his improvements are upon some portion of the tract, and that he does such acts as put the public upon notice of the extent of his claim. *St. Paul, etc., R. Co. v. Donohue*, (1908) 210 U. S. 21, 28 S. Ct. 600, 52 U. S. (L. ed.) 941.

**An agreement to convey part of the homestead is absolutely void and unenforceable.** *Harris v. McCrary*, (1909) 17 Idaho 300, 105 Pac. 558.

The use of the land entered by a homesteader, together with adjacent lands by another person, for grazing purposes, until the entryman makes his final proof or disposes of his holdings, without the reservation or application of any part of the land or of its use to cultivation or to residence thereon, is inconsistent with the purpose and spirit and violative of the provisions of the law, and an agreement to procure homesteaders to make entries of public lands in order that third persons may obtain such use from them is an unlawful agreement. It is a contract to induce homesteaders to make applications to enter lands, not for their exclusive use and benefit, but for the use and benefit of another in violation of the oaths they are required to take when they make their applications to enter. If qualified homesteaders could lawfully lease or grant the use of the lands they might enter to others, without restriction or reservation, until they should prove up or dispose of their holdings, third parties might appropriate to themselves by the use of successive homesteaders, who would dispose of their holdings before they made proof of title, large tracts of the public domain for indefinite periods, and might thereby retard or prevent the use or sale of these lands by the United States. *Ware v. U. S.*, (C. C. A. 1907) 154 Fed. 577, 584.

**Fraudulent entry.**—Evidence that the defendant induced another man, who was old, destitute, and decrepit, to make a homestead entry of land near his own, paid the entry fees and for the relinquishment of a prior

entry, kept the entryman in supplies until the entry was commuted, furnished the money to pay the commutation price, taking a mortgage therefor and possession of the land, and a deed as soon as a patent was issued, and that the proof of improvement and cultivation on which the commutation was allowed was false, to defendant's knowledge, is sufficient to establish that the entry was made for defendant's benefit and was fraudulent, and to authorize the cancellation of the patent. *Gilson v. U. S.*, (C. C. A. 1911) 185 Fed. 484.

**Title conferred by receiver's receipt.**—Although title does not pass from the United States to a homestead entryman until the issuance of a patent, the receiver's receipt issued to an entryman in possession and claiming land under this section constitutes

sufficient title to enable him to maintain or defend a suit concerning the land. *Thompson v. Basler*, (1906) 148 Cal. 646, 84 Pac. 161.

**False oath.**—An indictment for subornation of perjury in procuring another to make a false oath or affidavit before the receiver of a land office to secure an entry of land, which avers that such oath or affidavit was made in support of "a certain application in writing to enter under the homestead laws of the United States, subject to entry at said land office," certain land described, is sufficient, after verdict, as showing that the land described was at the time public land of the United States subject to homestead entry at such land office. *Nurnberger v. U. S.*, (C. C. A. 1907) 156 Fed. 721.

## Vol. VI, p. 292, sec. 2291.

**Status after final proof.**—After final proof on public land entered as a homestead according to the federal law, its status is fixed by state laws, though legal title does not pass from the federal government until issuance of the patent, which is a mere ministerial act. *Eckert v. Schmitt*, (1910) 60 Wash. 23, 110 Pac. 635.

The issuance of a patent, or such other act as passes the legal title from the government, is the final act, and the expression and entry of the final judgment, of the officers of the Land Department, and marks the termination of the jurisdiction of these officers. *Peyton v. Desmond*, (C. C. A. 1904) 129 Fed. 2.

One who purchases from an entryman, on the faith of a final receipt or patent certificate, before the issuance of a patent, takes only the equity of his vendor, subject to the authority of the Land Department to cancel the entry, while the legal title remains in the United States, if it is found that the entry is based upon an error of law or a clear misapprehension of the facts, which, if not corrected, will lead to the transfer of the government's title to one not entitled to it. *Peyton v. Desmond*, (C. C. A. 1904) 129 Fed. 2.

A state statute, purporting to regulate the effect of final receipts issued by the Land Department of the United States, cannot restrict the authority of the officers of that department in the disposition of the public lands, or withhold from the grantees of the United States any of the incidents of the transfer of the government title. *Peyton v. Desmond*, (C. C. A. 1904) 129 Fed. 2.

**Final proof creates vested right.**—Where a government homestead entryman, after five years' residence, made final proof before the expiration of seven years, as required by this section, he thereby acquired a vested right to the land which he was entitled to convey; and this though such proofs were not forwarded to the land office because of the entryman's failure to pay the necessary fees, so that a duly recorded conveyance of the land by the entryman prior to the forwarding of such proofs constituted a valid conveyance and notice as against the holder of a deed of trust subsequently executed by the entryman

and recorded after he had received his final receipt from the Land Office. *Dale v. Griffith*, (1908) 93 Miss. 573, 46 So. 543.

**Patent relates back to time of entry.**—A patent issued on a homestead entry relates back to the time of the entry only. *U. S. v. Bagnell Timber Co.*, (C. C. A. 1910) 178 Fed. 795.

A patent issued under the homestead laws relates back to the initiation of the claim, and gives the patentee the right to recover the value of timber wrongfully cut and removed from the land after the initiation of his claim, as established by the patent proceedings, and prior to the issuance of the patent. *Peyton v. Desmond*, (C. C. A. 1904) 129 Fed. 2.

**Patent not subject to collateral attack.**—Where public land is patented to a homestead entryman as agricultural land, the patent constitutes a judgment establishing the character of the land, which cannot thereafter be collaterally attacked. *Paterson v. Ogden*, (1903) 141 Cal. 43, 74 Pac. 443.

**Erroneous recitals in a patent from the government to a homesteader, the presence of which is not required by law, are not binding on the grantee.** *McCorkell v. Herron*, (1905) 128 Ia. 324, 103 N. W. 988.

**Identity of patentee as entryman.**—The issuing of a patent to homestead land by the Interior Department necessarily involves a finding by the department that the patentee is the same person who applied to enter the land, which finding is conclusive on the court in collateral proceedings. *Redwater Land, etc., Co. v. Reed*, (S. D. 1910) 128 N. W. 702.

**Affidavit of nonalienation.**—A homestead entryman, on making final proof, must file an affidavit that he has not directly or indirectly alienated, or agreed to alienate, said land. *Harris v. McCrary*, (1909) 17 Idaho 300, 105 Pac. 558.

**Agreement to sell.**—An agreement to sell land entered by a homesteader, made prior to his acquisition of the patent, in violation of the homestead law, need not be in writing, nor of sufficient form or of a nature to be enforced in a court of law; but it is sufficient that the minds of the applicant and some

other person have met definitely and understandingly, so that there was a mutual consent that, when the applicant acquired title to the land from the United States, it should inure to the benefit of the other for a consideration. *U. S. v. Richards*, (1906) 149 Fed. 443.

Any agreement by a homesteader to transfer his claim or any interest therein, before final proof, except as expressly authorized by the homestead law of the United States, is contrary to public policy and void. *Cascade Public Service Corp. v. Railsback*, (1910) 59 Wash. 376, 109 Pac. 1062.

But an entryman may acquire a valid title under the homestead law, though his entry was made with a view of disposing of the land after he had completed his purchase, provided that at the time and before the completion thereof he had not entered into any agreement whereby such other should receive any of the benefit of such purchase. *U. S. v. Richards*, (1906) 149 Fed. 443.

A contract by which one proceeding under the pre-emption law agreed, in consideration of an advance of a portion of his expenses to be incurred in perfecting the entry, to pay a specified sum for locating him on the land, and a further amount, to be determined by the proceeds of any sale which he might make after acquiring title, is not invalid under R. S. sec. 2262, 6 Fed. Stat. Annot. 278, relating to pre-emptions. *Hafemann v. Gross*, (1905) 199 U. S. 342, 26 S. Ct. 80, 20 U. S. (L. ed.) 220.

**Mortgage not alienation.**—In *Hafemann v. Gross*, (1905) 199 U. S. 342, 26 S. Ct. 80, 50 U. S. (L. ed.) 220, it was said: "It has been held that a contract to convey the whole or part of the land, made prior to the perfection of his equitable right, by one seeking pre-emption or a homestead, is void, and will not be enforced in the courts (Anderson v. Carkins, (1890) 135 U. S. 483, 34 U. S. (L. ed.) 272, 10 S. Ct. 905), and, if known to the department, will prevent the passing of the legal title. Such has been the uniform ruling of the Land Department, as well as of the courts, state and federal. With respect to a mortgage or deed of trust executed under like circumstances, the decisions of the Land Department have been all to the effect that such mortgage or deed of trust is not an alienation within the scope of the homestead statute, or forbidden by the pre-emption law, especially where, in the case of a pre-emption, the mortgage is given to secure money borrowed to complete the purchase of the land. See, in reference to pre-emptors, *Larson v. Weisbecker*, 1 Land Dec. 409, Opinion of Secretary Teller; *Re Ray*, 6 Land Dec. 340, Opinion of Acting Secretary Muldrow; *Haling v. Eddy*, 9 Land Dec. 337, Opinion of Secretary Noble; *Murdock v. Ferguson*, 13 Land Dec. 198, Opinion of Assistant Secretary Chandler. With reference to a homestead entryman, see *Mudgett v. Dubuque*, etc., R. Co., 8 Land Dec. 243, Opinion of Secretary Vilas; *Dawson v. Higgins*, 22 Land Dec. 544, Opinion of Secretary Smith; *Kezar v. Horde*, 27 Land Dec. 148, Opinion of Secretary Bliss. In addition, see *Lawson v. Reynolds*, 28 Land Dec. 155, in

which Secretary Hitchcock held that a 'written agreement executed by a homesteader, and operating as a mere lease of part of the premises and the grant of an easement, the use of which would tend to improve and increase the value of the land as a homestead, is not an alienation of any part of such land, and no bar to the perfection of the entry.' See also *Kingston v. Eckman*, 22 Land Dec. 234, in respect to an entry under the Timber and Stone Act of June 3, 1878 (20 Stat. L. 89, ch. 151), as amended by the Act of Aug. 4, 1892 (27 Stat. L. 348, ch. 375), the provisions of which statute in reference to the oath of the applicant are similar to those in the Pre-emption Act. There has been some division in the courts upon the question. In *Brewster v. Madden*, (1875) 15 Kan. 249, the Supreme Court of that state, in an opinion delivered by the writer of this, held that a mortgage given by a pre-emptor prior to the entry of the lands was void, reaching this conclusion largely on the proposition that, at the time the Pre-emption Act [5 Stat. L. 453, ch. 16] was passed (1841), mortgages, always in form conveyances, were then regarded by the profession generally as conditional alienations. To like effect were the early rulings of the Supreme Court of Minnesota (*McCue v. Smith*, 9 Minn. 252, 86 Am. Dec. 100; *Woodbury v. Dorman*, 15 Minn. 338), though these rulings were subsequently distinctly overruled by the same court, *Jones v. Tainter*, 15 Minn. 512; *Lang v. Morey*, (1889) 40 Minn. 396, 12 Am. St. Rep. 748, 42 N. W. 88. *Bass v. Buker*, (1887) 6 Mont. 442, 12 Pac. 922, deciding the same way, was also overruled in *Norris v. Heald*, (1892) 12 Mont. 282, 33 Am. St. Rep. 581, 29 Pac. 1121. The large majority of state decisions follow these later rulings. See, in case of pre-emptions, *Wilcox v. John*, (1895) 21 Colo. 367, 52 Am. St. Rep. 246, 40 Pac. 880; *Christy v. Dana*, (1868) 34 Cal. 548; *Christy v. Dana*, (1871) 42 Cal. 174; *Camp v. Grider*, (1882) 62 Cal. 20; and in reference to homesteads, *Fuller v. Hunt*, (1878) 48 Ia. 163; *Dickerson v. Bridges*, (1898) 147 Mo. 235, 48 S. W. 825; *Weber v. Laidler*, (1901) 26 Wash. 144, 90 Am. St. Rep. 726, 66 Pac. 400; *Spiess v. Neuberg*, (1888) 71 Wis. 279, 5 Am. St. Rep. 211, 37 N. W. 417; *Kirkaldie v. Larrabee*, (1866) 31 Cal. 455, 89 Am. Dec. 205; *Orr v. Stewart*, (1885) 67 Cal. 275, 7 Pac. 693; *Stark v. Duvall*, (1898) 7 Okla. 213, 54 Pac. 453. In *Orrell v. Bay Mfg. Co.*, (1903) 83 Miss. 800, 36 So. 561, the court held that the prohibition of the alienation of public land by parties who have taken the preliminary steps to acquire the same under the homestead laws, and who have not perfected their entries, has reference to an absolute sale of the land, or some part of it, and in that case the leasing of trees on the land for turpentine purposes, and the sale of trees, was held not an alienation within the meaning of the statute. Obviously, the trend of the authorities is strongly in favor of the proposition that a mortgage or deed of trust by one seeking an entry under the pre-emption or homestead laws of the United States, made prior to the perfection of his equitable right, is valid."



A mortgage, being merely security for a debt, conveys no title, and is not an alienation within this section. *Stark v. Morgan*, (1906) 73 Kan. 453, 85 Pac. 567; *Adam v. McClintock*, (N. D. 1911) 131 N. W. 394.

**Grant of water privilege.**—A contract for the transfer by a homesteader, before final proof, of a water flume for power purposes to generate electricity is void and not subject to specific performance. That the original contract was extended and ratified after final proof will not make it enforceable, since the original contract is the basis of the action, and it is on grounds of public policy that courts refuse to specifically enforce such contracts. *Cascade Public Service Corp. v. Railroad*, (1910) 59 Wash. 376, 109 Pac. 1062.

But it has been held that an entryman's deed which does not purport to convey the land, or any part thereof, but only a portion of certain water flowing in a stream, and a right of way over the land to convey the water by ditch or otherwise, not made in contemplation of the homestead entry, is not prohibited by this section. *Mt. Carmel Fruit Co. v. Webster*, (1903) 140 Cal. 183, 73 Pac. 827.

**A sale of timber by a homestead entryman** before the completion of the requisite improvements, and before the receipt of a patent or final certificate, to carry out in good faith the acquisition and enjoyment of a homestead, even though a profit does incidentally result from the sale, is not void. *King-Ryder Lumber Co. v. Scott*, (1904) 73 Ark. 329, 84 S. W. 487.

**A sale of standing timber by a homestead settler** prior to the issuance of his final certificate, although in direct violation of the rights vested in him by his inchoate entry, is not an alienation of a "part of the land." *Orrell v. Bay Mfg. Co.*, (1903) 83 Miss. 800, 36 So. 561.

**Cutting timber.**—A homesteader may lawfully cut and remove such timber from the public lands he enters as it is necessary for him to remove and enable him to reside upon, improve, and cultivate the land before his final proof. But the cutting of the timber or any other use of the land or of its products by him prior to his final proof must be incident to his actual cultivation, improvement, and living upon the land in good faith, to procure his homestead for his own benefit. *Conway v. U. S.*, (1899) 95 Fed. 615, 619, 37 C. C. A. 200, 204; *Grubbs v. U. S.*, (1900) 105 Fed. 314, 320, 321, 44 C. C. A. 513, 519, 520; *Ware v. U. S.*, (C. C. A. 1907) 154 Fed. 577, 584.

A settler applying for a homestead, on making and filing the affidavit required, and paying a certain sum proportionate to the amount of land applied for, acquires the right to occupy the land, to protect it from trespass by others, and to use it for all purposes incidental to its cultivation; also to cut and remove timber when necessary for the improvement of the land and the preparation of it for tillage, but not to fell timber, or permit it to be done by his vendee, for purposes of speculation or profit, as such act is prohib-

ited by, and renders him and his vendee liable to prosecution under R. S. sec. 2461. *Orrell v. Bay Mfg. Co.*, (1903) 83 Miss. 800, 36 So. 561.

**Death of entryman.**—Where a homestead entryman at his death has complied with the homestead law, except as to presenting final proof, his rights are to be determined as if his patent had in fact issued. *Hays v. Wyatt*, (1911) 19 Idaho 544, 115 Pac. 13.

The inchoate rights of a decedent cannot be sold for the payment of his debts; and an attempted sale by the administrator does not vest in the purchaser the right to oust a settler settling on the land after the claimant's death with the intention of taking it as a homestead. *Towner v. Rodegeb*, (1903) 33 Wash. 153, 74 Pac. 50.

The doctrine of relation cannot successfully be invoked to confer any right or interest in the land under the operation of the state laws upon the daughter of a deceased homestead settler, as against his widow, to whom, in accordance with the provisions of this section, the patent has issued. *McCune v. Essig*, (1905) 199 U. S. 382, 26 S. Ct. 78, 50 U. S. (L. ed.) 237.

In *Bergstrom v. Svenson*, (N. D. 1910) 126 N. W. 497, it appears that the plaintiff's brother in 1896 made a homestead entry, and in 1897 died, leaving surviving plaintiff, who is a citizen of the United States, and a resident of the state, and his mother, who is an alien and a citizen of Sweden. In 1903 plaintiff made final proof and received a receiver's receipt and a patent was issued running to the heirs of plaintiff's brother. It was held that the mother, being an alien, was incapable of making final proof, and not qualified to receive title from the government, and that the title passed to plaintiff, the sole heir capable of making such proof.

**The estate of a deceased** has no interest in the homestead, and the administrator no right to make final proof or perfect entry for a patent. *Demars v. Hickey*, (1905) 13 Wyo. 371, 80 Pac. 521, *rehearing denied* 13 Wyo. 386, 81 Pac. 705.

**Cancellation of patent for fraud.**—In *U. S. v. Mills*, (1909) 169 Fed. 686, it appears that the defendant, a young unmarried man, without means, working by the day, his compensation including his board, filed a homestead claim on government land a few miles distant from his place of employment. He went upon the land, built a house, chicken house, and horse stable, and inclosed a small part of the land. During the five years before making final proof he had tenants, mostly negroes living in the house and cultivating the land on shares. He boarded and slept for the most part where he worked, but visited the land every few days, and once in every four or five months slept there. It was held that such facts were not sufficient to establish fraud in the entry or final proof, which entitled the government to a cancellation of the patent issued for the land, there being no substantial evidence that the defendant did not act in good faith and in the belief that he had complied with the law.

## Vol. VI, p. 300, sec. 2. [Act of May 14, 1880.]

**To whom right of entry enures.**—The right of entry given by this section enures to the benefit of one who, by his contest, induced the relinquishment in the local land office of a homestead entry of land in Oklahoma territory *prima facie* valid, but made by one in fact disqualified to make the entry, although a settlement was made intermediate the homestead entry and the initiation of the contest, since such entry, though ineffectual to vest any rights in the entryman, was sufficient to

prevent the acquisition of homestead rights by another until it had been set aside. *Hodges v. Colcord*, (1904) 193 U. S. 192, 24 S. Ct. 433, 48 U. S. (L. ed.) 677, *affirming* (1902) 12 Okla. 313, 70 Pac. 383.

**Not applicable to stone and timber claims.**—This section has no application to land sought to be purchased as a stone and timber claim. *Howell v. Sappington*, (1908) 165 Fed. 944.

## Vol. VI, p. 301, sec. 3.

**The failure to file an application within the statutory time does not affect the settler's right**, except as against another claimant who has acquired or initiated some right before the application is in fact made. *Trodick v. Northern Pac. R. Co.*, (C. C. A. 1908) 164 Fed. 913.

**Right of possession protected.**—Any person qualified can lawfully settle upon unsurveyed public lands, and, if such settlement is made with the intent of claiming the lands under such homestead law, such settler ac-

quires a prior right to file thereon which carries with it the right to possession and to be protected in his right of possession when unlawfully disturbed by another, and a court of equity has jurisdiction of a suit of which the subject-matter is the right to the possession of the land claimed. *Huffman v. Smyth*, (1906) 47 Ore. 573, 84 Pac. 80.

No right of action accrues to a successful contestant of a homestead entry for unlawful detainer until the entry is canceled. *Bilyeu v. Pilcher*, (1905) 16 Okla. 228, 83 Pac. 546.

## Vol. VI, p. 303, sec. 2292.

**Right of children to patent.**—Where a husband deserts his wife, and makes a homestead entry under the United States statutes, and a patent is issued to the guardian of the entryman's illegitimate children after his death, the widow has no equity to have a trust declared in the homestead in her favor, where she did nothing to aid in acquiring the rights under the statute. *Douglass v. Stephens*, (Fla. 1911) 54 So. 455.

This section only intended to give to minors exclusively when there are no other heirs. *Stadin v. Garfield*, (1908) 32 App. Cas. (D. C.) 49; *Holloman v. Bullock*, (1903) 82 Miss. 405, 34 So. 355.

So that, where one of several children of a deceased entryman is an adult, the other children, although minors, will not be entitled to a patent. *Stadin v. Garfield*, (1908) 32 App. Cas. (D. C.) 49.

It is left to the option of the homesteader, either to leave his homestead to his adult heirs, where he has no widow or minor children, without making a will; or, if he prefers to devise the homestead to some one other than his heirs, he may do so, and thereby cut off the adult children. *Hays v. Wyatt*, (1911) 19 Idaho 544, 115 Pac. 13.

## Vol. VI, p. 304, sec. 2294.

**The clerk of the District Court who takes homestead or other land proofs must do so in his official capacity**, and all fees collected by him for such service, whether for "preparing the depositions" or administering the oath and affixing the jurat, are provided for

by the statute, and are collected by him in his official capacity, and by virtue of his office, and must be accounted for and paid over to the county. *Rhea v. Washington County*, (1906) 12 Idaho 455, 88 Pac. 89.

## Vol. VI, p. 307, sec. 2296.

**When this section applies.**—This section does not apply after the final proof has been made, and the receiver's final certificate has been issued therefor. *Shelby v. Ziegler*, (1908) 22 Okla. 799, 98 Pac. 989.

The issuance of the patent, and not the issuance of a final receipt to the homesteader entitling him to a patent, fixes the time from which the property may become liable for subsequent debts of the homesteader. *In re Cohn*, (1909) 171 Fed. 569.

Land acquired under the homestead laws is not subject to a judgment obtained on a note given between the making of final proof and the issuance of patent. *Sprinkle v. West*, (1911) 62 Wash. 587, 114 Pac. 430.

**Liability for entryman's torts.**—The exemption of lands acquired under the homestead laws and the timber culture laws from any debt contracted previous to their acquisition does not exempt them from liabilities for the torts of the entrymen previously

perpetrated. *Brun v. Mann*, (C. C. A. 1906) 151 Fed. 145.

**Mortgage debt.**—A person may make a valid mortgage on public lands on which he has made a homestead entry before securing a patent to the land. *Klempp v. Northrop*, (1902) 137 Cal. 414, 70 Pac. 284; *Rogers v. Minneapolis Threshing Mach. Co.*, (1907) 48 Wash. 19, 92 Pac. 774.

But no title, legal or equitable, is acquired by a mortgage which is void under this section. *Hall v. Slaughter*, (1908) 155 Ala. 625, 47 So. 103.

**Effect of fraudulent sale.**—Where a homesteader commuted his land and paid for it, but before he had received a patent therefor, conveyed it, it was held that such conveyance and surrender of possession were not such an abandonment of the homestead as to destroy

the federal exemption, but it was available to him after the conveyance was set aside as fraudulent. *McCorkell v. Herron*, (1905) 128 Ia. 324, 103 N. W. 988.

**Proceeds of sale not exempt.**—The rule that where a homestead, exempt under the state laws, is sold, the proceeds are exempt from garnishment for a reasonable time while in transition from the homestead sold to another purchaser, does not include proceeds arising from the sale of a federal homestead; the federal exemption being in the nature of a condition attached to the grant, under the federal power relating to the primary disposal of the land, and not extending to the proceeds of a sale. *Ritzville Hardware Co. v. Bennington*, (1908) 50 Wash. 111, 96 Pac. 826.

## Vol. VI, p. 310, sec. 2297.

**Jurisdiction of Land Department over contests.**—The conclusiveness on the courts of a finding of the Land Department, made in allowing a homestead entry, of the sufficiency of settlement, residence, and improvements, is not affected by a later decision, in a second contest between the same parties, that the alienation of the land was a bar to supplemented proofs offered in aid of a premature commutation entry. *Hill v. McCord*, (1904) 195 U. S. 395, 25 S. Ct. 96, 49 U. S. (L. ed.) 251, *affirming* (1903) 117 Wis. 306, 94 N. W. 65.

**Abandonment** consists in the intention to abandon and the external act or acts by which the intention is carried into effect. The abandonment of possessory rights upon the public domain is a question of fact as well as of intent. To find that real property has been abandoned, the evidence must show that the premises were left vacant without any intention of claiming possession, and with an intention to leave them open for the occu-

pancy of any one who might choose to enter. *Burr v. House*, (1909) 3 Alaska 641.

Where a settler on public lands of the United States has established an actual residence and made improvements on the land, his removal therefrom and enforced absence by reason of conviction for crime will not work an abandonment. *Huffman v. Smyth*, (1906) 47 Ore. 573, 84 Pac. 80.

So long as a homestead entry of public land, valid on its face, remains of record, no entry can be made by another, and no rights can be acquired by occupancy, even though there has been an actual abandonment by the homestead entryman. *U. S. v. Bagnell Timber Co.*, (C. C. A. 1910) 178 Fed. 795.

**A residence for voting purposes** in another precinct from that in which a homestead entry lies precludes the entryman from claiming residence at the same time on the land for homestead purposes. *Small v. Rakestraw*, (1905) 196 U. S. 403, 25 S. Ct. 285, 49 U. S. (L. ed.) 527, *affirming* (1903) 28 Mont. 413, 72 Pac. 746.

## Vol. VI, p. 317, sec. 2301.

**Proof.**—In *Hallock v. U. S.*, (C. C. A. 1911) 185 Fed. 417, it was said: "We can find no indication of a purpose to adopt the particular method of making proof required in homestead cases. The law says an entry may be commuted 'upon making proof of settlement and of residence and cultivation.' No provision appearing in the law the matter of witnesses to make the proof would properly be the subject of a departmental regulation, and, in the absence of one, the officials of the Land Office would be fully justified in following the practice that formerly obtained. An entryman would appear to be a competent witness of his own settlement, residence, and cultivation, and his false testimony respecting the same the subject of perjury."

This section prescribes, as requisite to commutation, proof only that the entryman has made settlement, cultivation, and residence for fourteen months, and does not require him to make oath that he has not alienated any por-

tion of the land. *Gilson v. U. S.*, (C. C. A. 1911) 185 Fed. 484.

**Payment.**—Where a homestead settler on ceded lands of the Nez Perce Indian reservation, required to pay a stated price per acre by Act Aug. 15, 1894, ch. 290, 28 Stat. L. 326, and entitled to commute under this section, commuted, but paid less than the price required by the plain provision of the statute, and neither he nor a grantee, whose deed was not recorded and who had not taken possession, although notified of the suspension of his entry, tendered further payment until several months after his entry had been canceled and a new entry accepted on a relinquishment filed by him, a bill by the grantee to recover the land from the new entryman was held to show no equity which gave a court jurisdiction to review the action of the Land Department. *Bailey v. Sanders*, (C. C. A. 1910) 177 Fed. 667.

## Vol. VI, p. 318, sec. 1.

The right to confirmation under this Act, of a commutation entry under the homestead laws, which was only invalid because prematurely made, in actual ignorance of the amendment of R. S. sec. 2301, by Act March 3, 1891, ch. 561, 26 Stat. L. 1098, is not defeated by the entryman's subsequent efforts to pro-

tect his grantees by taking a reconveyance, and residing again upon the land, for the purpose of enabling him to make proof to secure the title for them. *Hill v. McCord*, (1904) 195 U. S. 395, 25 S. Ct. 96, 49 U. S. (L. ed.) 251, *affirming* (1903) 117 Wis. 306, 94 N. W. 65.

## Vol. VI, p. 321, sec. 2302.

Mineral lands not open to entry.—It is good ground for denying an application to make final proof and to procure a patent under the federal homestead law that the

land is of mineral character, and hence, under this section, not open to entry. *Jameson v. James*, (1909) 155 Cal. 275, 100 Pac. 700.

## Vol. VI, p. 324, sec. 2306.

Coal lands.—Public lands known to be chiefly valuable for their deposits of coal are not subject to acquisition under this section. *Leonard v. Lennox*, (C. C. A. 1910) 181 Fed. 760.

Sale of certificate.—A soldier's additional homestead certificate may be sold and assigned by the soldier, and the assignee may enter land with it in Alaska. *Gavigan v. Crary*, (1905) 2 Alaska 370.

A purchaser in good faith and for value of a soldier's additional homestead scrip is not, as against the government issuing to him a patent, a *bona fide* purchaser, but the government may sue to cancel the patent. *U. S. v. Gridley*, (1911) 186 Fed. 544.

Contract to convey.—A contract by an entryman, under a soldier's additional homestead scrip, to convey title to a portion of the land when patent issues as agricultural land, is valid and enforceable, where the other party to the agreement was not disqualified to secure a patent as agricultural land. *Murray v. White*, (1911) 42 Mont. 423, 113 Pac. 754.

To induce the sale of an alleged additional homestead right, granted by this section, the defendant guaranteed that the documents which he then offered to sell were genuine and entitled the holder to acquire eighty acres of unappropriated government land, and that, if they should prove invalid, he would replace the same with other valid evidences or refund the money. This was held a guaranty of the validity as a matter of law of the documents, and that they would be accepted by the Land Department for the purposes stated. *Lamson v. Coffin*, (1907) 102 Minn. 493, 114 N. W. 248.

An assignment by a soldier of his right, under this section, to make an additional homestead entry of public land, which expressly designates the land to be entered, does not give the assignee the right, so far as the government is concerned, to locate other public land than that so designated; and where

he is erroneously denied by the Land Office the right to make an entry of the land designated, and he acquiesces in such action, his transferee cannot, by mandamus, thirty years afterwards, compel the Secretary of the Interior to permit him to make entry of other public land under the assignment. *U. S. v. Ballinger*, (1910) 35 App. Cas. (D. C.) 392.

A soldier's additional homestead scrip is personal property and assignable, notwithstanding the opposed practice of the federal land office. *Rogers v. Clark Iron Co.*, (1908) 104 Minn. 198, 116 N. W. 739.

The assignee of a soldier's additional homestead certificate, on filing an application for a specific tract of land at the government office, acquires an equitable title therein, which ripens into a legal title, relating back to the date of application on issuance of a government patent. *Gilbert v. McDonald*, (1905) 94 Minn. 289, 102 N. W. 712.

On the issuance of a patent to land as a soldier's additional homestead to one, his heirs and assigns, who had theretofore assigned his soldier's additional homestead scrip with an irrevocable power of attorney to make entry and to convey the land entered for the sole benefit of the person owning the right, the beneficial ownership passed to the assignee by the doctrine of relation or of enforced estoppel. *Rogers v. Clark Iron Co.*, (1908) 104 Minn. 198, 116 N. W. 739.

Void certificate.—Where complainant applied to enter public land with a void soldier's additional certificate, and his invalid application was rejected, such application was not an entry of the land, but a mere application to enter, and, having been rejected, complainant was not entitled to additional time within which to obtain another right with which to enter the land as against the holder of a valid application for the land received and pending at the time complainant made his application for additional time. *Robinson v. Lundrigan*, (C. C. A. 1910) 178 Fed. 230.

## Vol. VI, p. 326, sec. 1. [Act of June 16, 1880.]

Award by secretary not subject to review.—The Secretary of the Interior is authorized by this section "to repay to such innocent parties the fees and commissions and excess

payments paid by them," and his award is not subject to the approval or review of the accounting officers. *Denny v. U. S.*, (1910) 45 Ct. Cl. 162.

## Vol. VI, p. 326, sec. 2.

A mortgagee, who has foreclosed his mortgage and purchased the mortgaged property at sheriff's sale under a decree of the court, is an "assign" within the meaning of this section. *U. S. v. Commonwealth Title Ins., etc., Co.*, (1904) 193 U. S. 651, 24 S. Ct. 546, 48 U. S. (L. ed.) 830, *affirming* (1902) 37 Ct. Cl. 532.

A surrender of the duplicate receipt required by this section, as a condition of the repayment of the purchase price, where an entry of public land has been canceled for conflict, will be presumed from a finding that the Secretary of the Interior ordered repayment "on the relinquishment by the claimants of all claim to the land so canceled," and a further finding that the relinquishment

was made "as required by the rules and regulations of the Land Office." *U. S. v. Commonwealth Title Ins., etc., Co.*, (1904) 193 U. S. 651, 24 S. Ct. 546, 48 U. S. (L. ed.) 830, *affirming* (1902) 37 Ct. Cl. 532.

**When money will not be refunded.**—Where the money paid to the defendants' officers at the time of making an entry was that of a coal company, to whom the person making the entry had previously quitclaimed the land, he cannot maintain an action to recover it back under this section though the entry was subsequently set aside by the Secretary of the Interior, and the money is still in the Treasury. *Stoiber v. U. S.*, (1906) 41 Ct. Cl. 269.

Vol. VI, p. 327. [*Invalid soldiers' additional homestead entries may be commuted.*]

This statute confines the right to purchase the land to cases where homestead entries have been made or initiated on a certificate of the Commissioner of the General Land Office of the right to make such entry, and

then only in cases where there is no adverse claimant, and the department therefore has no power to make a rule cutting off the right of an adverse claimant. *Robinson v. Lundrigan*, (C. C. A. 1910) 178 Fed. 230.

## Vol. VI, p. 330, sec. 2315.

An exception from a railroad grant of lands which should be found to be "occupied by homestead settlers . . . or otherwise disposed of" includes lands so occupied with an intention to obtain title thereto under the homestead law, although no application for entry thereof had been made; and

also lands for which such application had been made and accepted, whether occupied by the claimant at the time or not, such lands being within the term "otherwise disposed of." *U. S. v. Oregon, etc., R. Co.*, (1904) 133 Fed. 953.

## Vol. VI, p. 332, sec. 2355.

**Description of land.**—This section requires the applicant to describe in a written application the tract he desires to enter "by the proper number of the section . . . and of the township and range." Upon this application, according to the established practice of the Land Department, the register is

required to act in issuing the patent certificate, and it will be presumed that he performed his legal duty and issued the certificate in exact conformity to the description of the land given in the application. *Le Marchal v. Tegarden*, (C. C. A. 1909) 175 Fed. 682.

## Vol. VI, p. 339, sec. 2372.

An application for a change of entry of public land on the ground of a mistake in the description is necessarily governed by this section which is the only statute applicable, in whatever form the question may be presented; the entry can only be transferred to a tract which is "unsold," and where it will not affect the right of third persons; and a decision of the Secretary of the In-

terior transferring such an entry to a tract upon which a homestead entry has subsequently been made in good faith by another who has made valuable improvements, completed his residence, made final proof, and received his final certificate which vested in him the equitable title, is wholly unauthorized and erroneous in law. *Le Marchal v. Tegarden*, (C. C. A. 1909) 175 Fed. 682.

## Vol. VI, p. 344, sec. 2387.

The word "disposal," as used in this section, must be construed to mean "distribution" when applied to lots actually occupied and possessed, for such lots are already disposed of; that is, they became the property

of the occupants. *Scully v. Squier*, (1907) 13 Idaho 417, 90 Pac. 573.

**Nature of trust and title, and authority of trustees.**—On the establishment of a town site on public land, a legal title is

vested in the trustee in his official and public capacity, and, simultaneously with the entry, there is vested in the beneficiaries an absolute right in the trust. *McCloskey v. Pacific Coast Co.*, (C. C. A. 1908) 160 Fed. 794.

The trustee takes title for the individual occupants of the town, and also for the occupants collectively as a community, and therefore has no power as against the individual occupants to dedicate land in the site to public use for street purposes. *McCloskey v. Pacific Coast Co.*, (C. C. A. 1908) 160 Fed. 794.

A certificate of title to townsite land, executed by the county judge to one who never occupied the land certified to him and who never had any right to occupy it, conveyed no title. *Roberts v. Ward*, (1906) 3 Cal. App. 101, 84 Pac. 430.

Portions of the public land which have been settled upon and occupied as a town site may be entered by the probate judge or mayor in trust for the several use and benefit of the occupants thereof, according to their respective interests. *Boise City v. Wilkinson*, (1909) 16 Idaho 150, 102 Pac. 148.

A district judge who acts as trustee of a town site under this section, acts by virtue of his office as judge, and he is not an inferior officer to his associate judge of the district. *Jennett v. Stevens*, (Nev. 1910) 111 Pac. 1025.

**Occupancy and rights of occupants.**—The "occupants" for whom the trustees take the legal title under the Act are those who were such at the time the town site was entered. *Globe v. Slack*, (1908) 11 Ariz. 408, 95 Pac. 126.

A person who uses a lot in Alaska, and occupies it in good faith with buildings or other improvements, which show his intention to possess and claim it under the town-site law, although he may not reside on it, can acquire title thereto. *Sawyer v. Van Hook*, (1900) 1 Alaska 108.

Whoever enters on a vacant town lot, and makes the first act of settlement or occupancy in good faith, with the intention of following it up and claiming the benefit of the law, is the first settler or occupant, and

is entitled to acquire the title. *Sawyer v. Van Hook*, (1900) 1 Alaska 108.

**Legislative regulations.**—The execution of the trust as to the disposal of the town lots and the proceeds of the sale thereof, is authorized to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same is situated. *Boise City v. Wilkinson*, (1909) 16 Idaho 150, 102 Pac. 148.

A local statute providing the method of executing the trust, and requiring the payment by the "claimant" to the trustee of the purchase price of five dollars per lot before he is entitled to a deed, applies to actual occupants, and not only to those who merely claim the right to possession; and an occupant, to be entitled to his deed, must be a claimant, file his statement, and pay to the trustee the purchase price. *Robertson v. Martin*, (1904) 8 Ariz. 422, 76 Pac. 614.

The rights of the occupants of town-site lots, fixed by the extent of their occupancy, cannot be diminished by conveyances from the mayor trustee according to the plat made and filed under a local act, enacted pursuant to this section to provide for the disposal of the lots—especially where the state Supreme Court construes such statute as not giving the power to make a survey or plat which did not conform to the lines of occupation. *Scully v. Squier*, (1909) 215 U. S. 144, 30 S. Ct. 51, 54 U. S. (L. ed.) 131, affirming (1907) 13 Idaho 417, 90 Pac. 573.

**Streets.**—The streets contemplated by this Act, and as to which a public right attaches, are those which in fact existed at the time of the town-site entry either by actual use or dedication; the trustee being without authority by any act of his own to dedicate a street. *McCloskey v. Pacific Coast Co.*, (C. C. A. 1908) 160 Fed. 794.

It is competent for the legislature, under this section, to authorize the trustee of such town sites to divide unoccupied land within the town sites into lots and blocks and dispose of them for the public benefit, and to that end establish streets and alleys to such unoccupied land. *Globe v. Slack*, (1908) 11 Ariz. 408, 95 Pac. 126.

## Vol. VI, p. 351, sec. 2392.

**Mining claim.**—A town-site entry can give no title to a valid mining claim, though it was not known at the time that the claim contained minerals of sufficient value to justify expenditure for extracting them. *Callahan v. James*, (1903) 141 Cal. 291, 74 Pac. 853.

A valid and subsisting mining claim on land covered by a town-site patent at the time the patent was issued does not pass thereunder, nor is the title or right of pos-

session affected thereby. *Golden v. Murphy*, (1909) 31 Nev. 395, 103 Pac. 394.

But a town-site patent issued by the Land Office officials cannot be collaterally attacked by private parties locating mining claims subsequent to the entry of the town site and issuance of the patent, on the theory that the land covered by the patent was known to be mineral at the time of its entry, and hence did not pass by the patent under this section. *Board of Education v. Mansfield*, (1903) 17 S. D. 72, 95 N. W. 286.

## Vol. VI, p. 355, sec. 1.

A rule of the Secretary of the Interior, which requires a contestant before town-site trustees, appointed under this section, to de-

posit a certain sum with the treasurer of the board before a cause will be heard, is a reasonable rule, which a court of equity will

uphold; but a failure to comply with such rule will not render void a judgment of a court of general common law and chancery jurisdiction, where the court had jurisdiction of the subject-matter, and of the parties to the action. *Thurston v. Washington*, (1907) 18 Okla. 382, 90 Pac. 16.

**Use of public street.**—The selection of a lot in a projected town site in Oklahoma, in accordance with a plat agreed upon by a portion of the occupants at or near the date of the opening to settlement, does not vest such an unconditional title in the selector as will prevail against the right of Oklahoma City to the use and occupation of the lot as a public street under a subsequent survey, made or approved pursuant to this Act by trustees appointed to make town-site entries for the several use and benefit of the occupants, the selector not being an occupant thereof when

the trustees made entry of the land, nor when the conveyance to them was made by the government. *Oklahoma City v. McMaster*, (1905) 196 U. S. 529, 25 S. Ct. 324, 49 U. S. (L. ed.) 587, *reversing* (1903) 12 Okla. 570, 73 Pac. 1012.

**Appeal from decision of trustees.**—Neither the Commissioner of the General Land Office nor the Secretary of the Interior can entertain an appeal from a decision of a board of town-site trustees, appointed in pursuance of this Act, after a deed to a town lot has been made and delivered, notwithstanding an appeal was pending at the time of such issuance and delivery. The functions and jurisdiction of that department necessarily close when the title has passed from the government. *Brooks v. Garner*, (1908) 20 Okla. 236, 94 Pac. 694.

## Vol. VI, p. 361, sec. 1.

**Opening and occupation of land.**—Whatever uncertainty may have existed as to the intention of Congress as to when mineral claimants might lawfully enter upon these lands for the purpose of prospecting for minerals and locating mineral claims prior to the enactment of this statute, there can be no serious contention now as to what the purpose of the law-making power was as drawn from the provision of both Acts; Congress left the manner of the opening to settlement and entry of these lands to be determined by the President, and made it his duty to incorporate the rules and regulations adopted by him into the proclamation to be issued announcing the opening; and every person, whether seeking to discover minerals or to acquire settlement as a homestead claimant, was prohibited from settling upon, occupying, or entering any of said lands until sixty days after the time for opening the same to settlement and entry had ex-

pired. *Bay v. Oklahoma Southern Gas, etc., Co.*, (1903) 13 Okla. 425, 73 Pac. 938.

**The proclamation of the President** was issued July 4, 1901, and fixed the opening day on Aug. 6, 1901, and contains the express warning that "no person shall be permitted to settle upon, occupy, or enter any of said lands except in the manner prescribed in this proclamation until after the expiration of sixty days from the time when the same are opened to settlement and entry." *Bay v. Oklahoma Southern Gas, etc., Co.*, (1903) 13 Okla. 425, 73 Pac. 936.

**The board of county commissioners** of Comanche county, Okla., has no power or authority to allow any claim against the county revenues and issue a warrant prior to Dec. 15, 1903, unless the contracting or incurring of such indebtedness was first authorized by the Secretary of the Interior. *Indian Territory Bank v. Eckles*, (1907) 19 Okla. 159, 91 Pac. 695.

## Vol. VI, p. 363, sec. 2395.

**Public lands** are to be surveyed into townships six miles square, and each in turn subdivided into thirty-six sections of a mile square, except where a line of an Indian reservation, or the tracts of land theretofore surveyed or patented, or the course of navigable rivers, may render this impracticable, and in that case this rule must be departed from no further than such particular circumstances require. *Johnson v. Johnson*, (1908) 14 Idaho 561, 95 Pac. 499.

Even after a principal meridian and a base line are established and the exterior lines of the township surveyed, the sections or subsections do not have a legal existence, until they are established by an approved survey under authority of Congress. *Smith v. Los Angeles*, (1910) 158 Cal. 702, 112 Pac. 307.

**Lost corners.**—There is no provision relating to the rules to be followed where corners have been lost, either in the statute or in the circular of instructions approved by the Sec-

retary of the Interior, Oct. 16, 1896 (23 Land Dec. Dep. Int. 361), relating to lost or obliterated corners, for a proportionate measurement based on the deficiency in acreage of adjoining parcels of land; and, where there is no question as to the establishment of a lost corner, the exact boundaries as shown on the government plat must prevail, and they will control a further description by quantity. *Somers v. McMordie*, (1909) 155 Cal. xvi mem., 99 Pac. 482.

**Meandered waters.**—Where lands front upon navigable streams, and a line meandering the margin of such stream is run for the purpose of ascertaining the quantity of land to be paid for, such meander line is not regarded as a boundary line, but only points out the sinuosities of the bank for the purpose of arriving at the area of land to be paid for. *Johnson v. Johnson*, (1908) 14 Idaho 561, 95 Pac. 499.

## Vol. VI, p. 367, sec. 2396.

**Statute prevails over department rule.**—The Act naturally prevails over a rule of the Land Department where an inconsistency arises. *O'Connor v. Detroit*, (1910) 160 Mich. 193, 125 N. W. 277.

A surveyor who establishes the line between the southeast and southwest quarters of a section containing no quarter section posts set by the United States surveyors by surveying only the south half of the section, and ascertaining the north quarter section corner between the two quarter sections by running a line from the southeast corner of the section to the northeast corner of the quarter section, and from the southwest corner of the section to the northwest corner of the quarter section, and connecting the two quarter section corners by a line running east and west, and dividing that line equally between the two quarter sections, does not adopt the method prescribed by this section, and such survey does not establish the boundary. *Phillips v. Hink*, (1908) 21 S. D. 561, 114 N. W. 899.

An east and west quarter section line is not necessarily the same as a division line between the north half and the south half of a donation land claim. *Bernheim v. Talbot*, (1909) 54 Ore. 30, 100 Pac. 1107.

Government lots bordering on a nonnavigable stream are bounded by the thread of the stream, and not by the meander line on the bank. *Kirby v. Potter*, (1903) 138 Cal. 686, 72 Pac. 338.

Excess should be divided among the owners on the basis of a line, extending from a point on the south line of the quarter section equidistant from its corners to a like point

on the north line. *Hootman v. Hootman*, (1907) 133 Ia. 632, 111 N. W. 61.

**Swamp lands.**—The title to lands embraced within patents from the United States in pursuance of the Swamp Land Act of Sept. 28, 1850, ch. 84 (9 Stat. L. 520), cannot be affected by a resurvey of the land covered by water at the time of the original survey, and patents granted, pursuant to such resurvey, for tracts below the original water line. *Kean v. Calumet Canal, etc., Co.*, (1903) 190 U. S. 452, 23 S. Ct. 651, 47 U. S. (L. ed.) 1134.

**Survey will not be enjoined.**—The courts cannot interfere with the executive administration of the Land Department by enjoining, at the instance of persons claiming to be the owners of the land, a survey, under the direction of such department, of certain lands lying between an alleged meander line and the actual waters of a lake, which are claimed by the department to be unsurveyed public lands of the United States. *Kirwan v. Murphy*, (1903) 189 U. S. 35, 23 S. Ct. 599, 47 U. S. (L. ed.) 698.

The prevention of irreparable injury and of a multiplicity of suits cannot be invoked as grounds for equitable relief against a threatened survey, under direction of the Land Department, of lands to which complainants assert title, but which the department claims to be unsurveyed public lands of the United States, where such survey can be made without material injury to the soil or timber, and the persons directly interested in such survey are not made parties, are not numerous, and assert separate and independent rights. *Kirwan v. Murphy*, (1903) 189 U. S. 35, 23 S. Ct. 599, 47 U. S. (L. ed.) 698.

## Vol. VI, p. 380, sec. 2414.

A location of land under a military land warrant accompanied by a record of entry in the proper office removes the land from the general domain of the government open to purchase or settlement, and the legal title is held by the government in the nature of a trust for the one showing himself entitled to the benefit of the location. *Herrick v. Sargent*, (1908) 140 Ia. 590, 117 N. W. 751.

After the issuance of a military bounty land warrant and the location of land thereunder, and approval of the location by the

Land Department, the locator obtains such an equity as the state and federal courts will protect, and one which gives him an absolute right to the patent and the legal title, rendering a patent issued to another in violation of his equity void. *Price v. Dennis*, (1909) 159 Ala. 625, 49 So. 248.

**Assignment of warrant.**—Bounty warrants issued in recognition of service to the government are assignable. *Wilcox v. Phillips*, (1906) 199 Mo. 288, 97 S. W. 886.

Vol. VI, p. 392, sec. 1. [*Reclamation and purchase of desert lands, etc.*]

This Act applies only to waters of the United States.—*Winters v. U. S.*, (C. C. A. 1906) 143 Fed. 740.

**Water on two tracts of land.**—Where an owner of land consisting of two tracts, one of which was his brother's pre-emption, which had been transferred to him, and the other a claim taken by him under the Desert Land Act, made an appropriation prior to any other person of certain water of a stream, the head of which was on his brother's pre-emption, it was held that the appropriation

entitled the appropriator to a sufficient amount of water to irrigate the land to which the appropriation was intended to be applied at the time, whether it was on the desert land claim or the pre-emption. *Williams v. Altnow*, (1908) 51 Ore. 275, 95 Pac. 201, 97 Pac. 539.

An unreserved decree perpetually enjoining a water company from maintaining a dam or any other obstruction, and from preventing the waters of the lake from reaching another's premises as they were wont to do in



their natural condition, is conclusive on the rights of the water company, and in a separate suit it cannot assert any rights inconsistent with the decree, and cannot urge that the waters of the lake were, under this Act, public and open to appropriation at the time it diverted the water. *Spokane Valley Land, etc., Co. v. Jones*, (1909) 53 Wash. 37, 101 Pac. 515.

A local law providing that a portion of the water of nonnavigable streams and bodies of water shall be reserved to that part of the public using or needing the water on abutting

property, is not inconsistent with this Act. *State v. Superior Ct.*, (1907) 47 Wash. 310, 91 Pac. 968.

**Relinquishment of desert land.** — One in possession of desert land open to filing under the Desert Land Act may surrender the possession to another, and file a relinquishment of his right to file thereon, and the latter taking possession may file thereon, and obtain a patent on complying with the law. *Moore v. Grofftholdt*, (1909) 10 Cal. App. 714, 103 Pac. 149.

## Vol. VI, p. 394, sec. 2.

This section conditions the right to make the preliminary entry upon the making of a declaration under oath of an intention to reclaim the land by conducting water upon the same, and conditions the right to make

final entry upon the making of satisfactory proof of reclamation by that means. *Snyder v. Colorado Gold Dredging Co.*, (C. C. A. 1910) 181 Fed. 62.

## Vol. VI, p. 399, sec. 2479.

**Grant in presenti.** — This Act is a grant *in presenti* of the equitable title to all swamp and overflowed lands within the boundary of any state; to perfect the legal title it is necessary that the Secretary of the Interior at the request of the governor should patent the same to the state, and on that patent the fee simple to such land is vested in the state as of the date of the passage of the Act. *Kittel v. Florida Internal Imp. Fund*, (1905) 139 Fed. 941.

The title of the state does not depend on the actual issuance to it of a patent. *Foss v. Johnstone*, (1910) 158 Cal. 119, 110 Pac. 294.

As soon as the land inures to the state as swamp land the title refers back to the dates of the original grants. *Hartigan v. Weaver*, (1910) 126 La. 492, 52 So. 674.

A title by patent from the United States is a title by record without a delivery to the patentee, and a patent from the United States to a state of swamp lands is competent evidence as against the objection that it does not show that it was ever received by the state or any officer authorized to receive it. *Warner Valley Stock Co. v. Morrow*, (1906) 48 Ore. 258, 86 Pac. 369.

**Ratification by state.** — A grant by the United States of land that has passed to the State under this Act may be ratified and affirmed by the state. *Railroad Lands Co. v. Shreveport*, (1906) 117 La. 140, 41 So. 443.

The acceptance by the state of lands certified to it by the Secretary of the Interior as swamp and overflowed is conclusive on the state as to the title to and character of the lands so certified and subsequently sold by the state as such. *Chauvin v. Louisiana Oyster Commission*, (1907) 121 La. 10, 46 So. 38.

## Vol. VI, p. 404, sec. 2480.

**Identification and patent perfect title in state.** — The swamp land grant to the states does not attach to any particular lands pass-

ing thereunder, until they have been identified as swamp lands by the Secretary of the Interior or other competent authority of the

Whether land is swamp land is a question of fact, solely for the determination of the Land Department of the United States, and its judgment thereon is final, in the absence of fraud or mistake. *Morrow v. Warner Valley Stock Co.*, (1909) 56 Ore. 312, 101 Pac. 171.

Where land has been identified by the federal authorities intrusted with that duty, as land which did not pass to the state under this Act, parol evidence is not admissible to prove that the land was in fact swamp land in 1850, so that, by virtue of the grant, it became the property of the state. *Foss v. Johnstone*, (1910) 158 Cal. 119, 110 Pac. 294.

**Swamp lands, as distinguished from over-**

**flowed lands,** are such as require drainage to dispose of needless water or moisture on or in the lands, in order to make them fit for successful and useful cultivation. *State v. Gerbing*, (1908) 56 Fla. 603, 47 So. 353.

**Overflowed lands** are those that are covered by nonnavigable waters, or are subject to such periodical or frequent overflows of water, salt or fresh (not including lands between ordinary high and low water marks of navigable waters) as to require drainage or levees or embankments to keep out the waters and thereby render the lands suitable for successful cultivation. *State v. Gerbing*, (1908) 56 Fla. 603, 47 So. 353.

Lands belonging to the United States, that were not covered by navigable waters at ordinary high-water mark, and that required drainage or leveeing to render them suitable for the ordinary purposes of husbandry at the time this Act was passed are included in the Act. *State v. Gerbing*, (1908) 56 Fla. 603, 47 So. 353.

United States. *U. S. v. Chicago, etc., R. Co.*, (1906) 148 Fed. 884; *U. S. v. Chicago, etc., R. Co.*, (C. C. A. 1908) 160 Fed. 818.

The state does not take the equitable title to or any interest in any particular tract of land under this Act until the same has been identified by the list made or approved by the Secretary of the Interior, and can make no conveyance of any such title or right as against the general government. *Kerns v. Lee*, (1906) 142 Fed. 985.

As title to the state does not vest in the state any particular tract of lands until identification by the Secretary of Interior as swamp land, under the absolute power of Congress to legislate for disposal of public domain, it could have withdrawn any particular tract from the operation of Swamp Land Acts, and could have provided for its disposition under any general law. *Morrow v. Warner Valley Stock Co.*, (1909) 58 Ore. 312, 101 Pac. 171.

**Survey necessary.**—Swamp lands cannot be selected by the state and approved by the Secretary of the Interior under this Act until a survey thereof has been made. *State v. Warner Valley Stock Co.*, (1910) 56 Ore. 283, 106 Pac. 780, 108 Pac. 861. See also *Hall v. Bossier Levee Dist.*, (1904) 111 La. 913, 35 So. 976.

## Vol. VI, p. 407, sec. 2481.

Where a subdivision of land was granted to the state as swamp lands, the grant carried all the land in the subdivision, whether dry or overflowed, since those Acts provide

A purchaser from the state of swamp lands granted to it by this Act, who receives from the state a certificate of purchase prior to the state obtaining a patent from the federal government, obtains the equitable title. *Hibben v. Malone*, (1908) 85 Ark. 584, 109 S. W. 1008.

The title of a patentee to swamp land under a patent issued by the state relates back, on the issuance of a patent by the United States, to the date of the grant to the state. *Warner Valley Stock Co. v. Morrow*, (1906) 48 Ore. 258, 86 Pac. 369.

One who purchased swamp land from the United States after the swamp land grant, but before the confirmatory Act of 1857, obtained a good title. *Cotton Belt Lumber Co. v. Kelly*, (1905) 74 Ark. 400, 86 S. W. 436, *rehearing denied* 74 Ark. 405, 86 S. W. 827.

The office of a patent of swamp and overflowed lands granted to the state by this Act, is to make the description of the lands definite and conclusive as between the United States and the state, for identification is necessary to determine whether any particular tract comes within the general description of swamp and overflowed land so as to pass by the grant. *Foss v. Johnstone*, (1910) 158 Cal. 119, 110 Pac. 294.

that all subdivisions shall be granted, the greater part of which is swamp land subject to overflow. *Hall v. Bossier Levee Dist.*, (1904) 111 La. 913, 35 So. 976.

## Vol. VI, p. 409, sec. 2483.

Patents for swamp lands issued by the state are conclusive evidence of the legal title, unless something to the contrary is shown.

*Belcher v. Harr*, (1910) 94 Ark. 221, 126 S. W. 714.

## Vol. VI, p. 411, sec. 2488.

A grant to the state of swamp lands unfit for cultivation, and requiring the Secretary of the Interior to make a list of the lands described and cause a patent to be issued to the state, is conditional and is limited to the lands listed by the Secretary of the Interior as lands described, and this Act does not alter the binding effect of the decision as to the lands described; and, where a decision is sought to be revised on the ground of fraud or mistake, the revision must be by direct proceeding for that purpose. *Foss v. Johnstone*, (1910) 158 Cal. 119, 110 Pac. 294.

This Act supersedes all previous rules and methods of identifying swamp lands, and

land represented on an official township plat, approved by the United States Surveyor-general, and acquiesced in by the state authorities, as land covered by the waters of a permanent pond, so as to belong to the United States, is a determination that the land is not swamp land; and an applicant to purchase the land from the state acquires no title as against a prior patentee from the federal government of the land bordering on the pond, since the survey made in pursuance of the applicant's application is not a segregation map within the prescribed method of identifying swamp lands. *Foss v. Johnstone*, (1910) 158 Cal. 119, 110 Pac. 294.

## Vol. VI, p. 412, sec. 2490.

The legal title of the state will not relate back to the date of the act, thereby giving stability to deeds of the state made prior to the receipt of the patent by the state, where

the effect would be to invalidate the title of persons who had taken the lands under the homestead and pre-emption laws after the passage of the Swamp Land Act, but before

the issuance of the patent. *Morrow v. Warner Valley Stock Co.*, (1909) 56 Ore. 312, 101 Pac. 171.

Prior to the selection and approval by the Secretary of the Interior of swamp and overflowed lands, the United States can dispose of such lands under the general laws, and the state cannot, by any contract with third parties prior to such action by the Secretary of the Interior, interfere with the acts of intending settlers under the land laws. *Morrow v. Warner Valley Stock Co.*, (1909) 56 Ore. 312, 101 Pac. 171.

Swamp lands transferred to the state under this section may be taken under the homestead law after the passage of the Act granting the swamp lands to the state, and before the land taken under such homestead law has been identified by the Secretary of the Interior as swamp land, and as belonging to the state under the grant. *Morrow v. Warner Valley Stock Co.*, (1909) 56 Ore. 312, 101 Pac. 171.

The state has no duty to perform in such

selection, and a selection of swamp lands made by its officers under an Act of its Legislature is not binding upon the United States, unless approved and confirmed by the Secretary of the Interior, and gave the state no equitable title to or vested right in any of the lands so selected, which it could convey to another, where the selection has not been ratified and confirmed by the Secretary. *Kerna v. Lee*, (1906) 142 Fed. 985.

This Act does not operate against the will of the state; and where the state fails to select, and the Secretary of the Interior fails to approve, certain lands as falling within the terms of those statutes, and such lands have been certified to and accepted by the state under the Act of Congress of 1856 (11 Stat. L. 18), granting lands in aid of railroads, the title thus acquired by the railroads cannot be defeated by an individual claiming to have purchased the lands as swamp lands, and whose title has been annulled at the suit of the state. *Vicksburg, etc., R. Co. v. Tibbs*, (1904) 112 La. 151, 36 So. 223.

### Vol. VI, p. 414, sec. 18.

A homestead entry on land in Oklahoma Territory, which is valid upon its face, although made by one in fact personally disqualified to make a valid entry, prevents the initiation of homestead rights by another while it remains uncanceled of record by some direct action of the Land Office or by relinquishment. *McMichael v. Murphy*, (1906)

197 U. S. 304, 25 S. Ct. 460, 49 U. S. (L. ed.) 766, *affirming* (1902) 12 Okla. 155, 70 Pac. 189.

The territory of Oklahoma received no title to sections 16 and 36 in each township in said territory. *Territory v. Choctaw, etc., R. Co.*, (1908) 20 Okla. 663, 95 Pac. 420.

### Vol. VI, p. 416, sec. 20.

One holding land by virtue of a receiver's final certificate prior to issue of patent is not seised in fee simple of the land described in such certificate, and is not on account

thereof prohibited from entering public lands in the territory, under this section. *Gourley v. Countryman*, (1907) 18 Okla. 220, 90 Pac. 427.

### Vol. VI, p. 423, sec. 2.

Who are settlers.—This Act recognizes only the right of an individual settler who was in actual occupation of a portion of a military reservation prior to the location of the reservation, or prior to Jan. 1, 1884, in good faith, for the purpose of securing a home. *State v. Tanner*, (1905) 73 Neb. 104, 102 N. W. 235.

The rights acquired by actual occupation and settlement of land subsequently set

apart as a military reservation, recognized by this Act, are the "lawful rights" which it is declared shall not be prejudiced in Act Cong. March 3, 1893, ch. 200, 27 Stat. L. 555, granting lands from an abandoned military reservation to the state as indemnity school lands, in lieu of other lands theretofore lost. *State v. Tanner*, (1905) 73 Neb. 104, 102 N. W. 235.

### Vol. VI, p. 425, sec. 1.

This Act does not impair the rights of the state to select indemnity school lands within the time and manner contemplated by

Act Cong. March 3, 1893, ch. 200, 27 Stat. L. 555. *State v. Tanner*, (1905) 73 Neb. 104, 102 N. W. 235.

### Vol. VI, p. 429. [*Patents for lands granted for construction of wagon roads in Oregon.*]

The selection by a road company to which the state granted its right and the filing of the selection list did not pass the title from

the government until the selection was approved by the Secretary of the Interior. *Boe v. Arnold*, (1909) 54 Ore. 52, 102 Pac. 290.

Vol. VI, p. 433. [*Rights of licensed settlers on railroad lands, etc.*]

The right given a settler is not defeated by the fact that after the withdrawal has been set aside the land is included within the boundaries of a forest reservation, created by

proclamation of the president, before it has been surveyed so as to give the settler an opportunity to purchase. *Holmes v. U. S.*, (C. C. A. 1902) 118 Fed. 995.

## Vol. VI, p. 433, sec. 1.

The sole scope and purpose of this Act is to restore to the Land Department of the government its exclusive jurisdiction to primarily determine all questions affecting rights to the public lands, which through fraud or mistake it has lost by an erroneous certification or patenting with respect to the lands in question, and such act confers no jurisdiction on the courts to determine, in a suit brought thereunder, the right of the railroad company grantee to the lands in-

volved or of an adverse claimant thereto. *Sage v. U. S.*, (C. C. A. 1905) 140 Fed. 65.

**Validity.**—This Act and the Act of March 2, 1896, ch. 39, 29 Stat. L. 42 [6 Fed. Stat. Annot. 449], are independent acts passed by Congress in the exercise of its constitutional power to protect the property of the United States, and their validity is not dependent on any reservation of the power of repeal in the original granting acts. *U. S. v. Southern Pac. R. Co.*, (1907) 157 Fed. 96.

## Vol. VI, p. 435, sec. 2.

This section authorizes the Secretary of the Interior to adjust railroad land grants heretofore unadjusted; and it provides that, if it shall appear that any lands have been erroneously patented to any railroad company, the secretary is authorized to make demand for relinquishment or reconveyance of the same; and it also provides that, if the grantee company shall refuse to reconvey within ninety days, then it shall be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel such patents and restore the title to the United States. *U. S. v. Oregon, etc., R. Co.*, (1903) 122 Fed. 541. See also *Lyle v. Patterson*, (C. C. A. 1910) 176 Fed. 909.

A court of equity has jurisdiction of a suit by the United States against a railroad company, its mortgagees, and others to ascertain and determine what portion of lands erroneously patented to the company under a grant have been sold to *bona fide* purchasers, the rights of other purchasers holding under executory contracts to obtain a confirmation of the title of such *bona fide* purchasers, and for the cancellation of the patents to the lands which have not been so disposed of, and an accounting from the company for moneys received for lands sold, in accordance with the provisions of this Act, such court being the only one which can furnish a plain, complete, and adequate remedy which will reach the ends of justice with reference to all the parties and issues. *Southern Pac. R. Co. v. U. S.*, (1904) 133 Fed. 651, 66 C. C. A. 581, *affirming* (1902) 117 Fed. 544; *U. S. v. Southern Pac. R. Co.*, (1907) 157 Fed. 96.

Even irrespective of this Act the federal government has the right to sue a railroad company to recover the value of lands erroneously patented to such company, and sold by it to persons who dealt with it in good faith. *Southern Pac. R. Co. v. U. S.*, (1906) 200 U. S. 341, 26 S. Ct. 296, 50 U. S. (L. ed.) 507, *affirming* (1904) 133 Fed. 651, 66 C. C. A. 581.

But such suit is authorized only after a determination by the Land Department that the land has been sold by the company to a *bona fide* purchaser, whose purchase is protected by the acts, on a claim made by or on behalf of such purchaser; and where no such claim has been made, but it appears that there is a basis for one, equity has jurisdiction of a suit by the United States against the company to recover the land or the price, as the facts may appear. *Oregon, etc., R. Co. v. U. S.*, (C. C. A. 1906) 144 Fed. 832, *affirming* (1904) 133 Fed. 953.

The decree, in a suit by the United States against a railroad company to determine its right to certain lands under a grant, in which the only question determined was that the lands did not pass to defendant under the grant, but were erroneously patented to it, is not a bar to a second suit brought under this section to recover from the company the price of the lands on an allegation that they had been sold by defendant to *bona fide* purchasers whose title had been confirmed under the provisions of this Act. *Southern Pac. R. Co. v. U. S.*, (C. C. A. 1911) 186 Fed. 737.

Where lands have been erroneously certified or patented by the United States, to or for the use of a railroad company, by, through, or under grant from the United States, to aid in the construction of a railroad, then it became the duty of the Secretary of the Interior to demand the relinquishment or reconveyance of such lands to the United States, whether within granted or indemnity limits; and if such demand was not complied with by a named time, then the Attorney-General was to institute the necessary proceedings to cancel all patents, certificates, or other evidence of title issued for such lands, and to restore the title to the United States. Provision was made for the protection, by patents, of purchasers in good faith from the grantee company, and the Secretary of the Interior was required to demand, on behalf of the United States, "payment from the company which has so disposed of such lands of

an amount equal to the government price for similar lands;" and if payment was refused, within a time named, "the Attorney-General was to institute suits against the company for such amount." *U. S. v. Chicago, etc., R. Co.*, (1910) 218 U. S. 233, 31 S. Ct. 7, 54 U. S. (L. ed.) 1015.

Where it is shown that a tract of land was certified and patented under a railroad grant while an application for a homestead entry thereon was pending on appeal in the Land Department which, through mistake, had not been entered upon the records, thus depriving the department of the power to determine the homestead claimant's rights on the merits, a case of erroneous patenting is made out, which entitles the government to a cancellation of the patent in a suit brought therefor under this Act. *Sage v. U. S.*, (C. C. A. 1905) 140 Fed. 65.

Certain public lands having been conditionally reserved for Indians at the date of a railroad grant, and which did not pass thereunder, were, nevertheless, in accordance with the then existing construction of such grants by the government Land Department, certified as a part of the grant; the lands having been

withdrawn from the reservation at the time the railroad's line was definitely located. Both parties assumed that the lands were properly covered by the grant for several years, during which time the railroad company paid taxes thereon in excess of the government price, and sold the lands to innocent purchasers for value. After filing the railroad's map of definite location, the United States disposed of more than 23,000 acres of lands which were available to the railroad company under its grant in lieu of the land in question, and the railroad failed to obtain its full quota of land because of a deficiency existing on a part of its line to the extent of five times the amount of the value of the land alleged to have been wrongfully certified. The United States had made no other disposition of the lands, and the rights of no others had intervened. It was held that the United States was not entitled in equity either to a cancellation of the patents for such land, nor to recover from the railroad company the minimum government price of \$1.25 per acre therefor. *U. S. v. Grand Rapids, etc., R. Co.*, (1907) 154 Fed. 132.

### Vol. VI, p. 436, sec. 3.

In a suit in equity by the United States to cancel a patent to lands, the rule as to what constitutes a *bona fide* purchaser is no dif-

ferent from what it would be if the complainant were an individual. *U. S. v. Chicago, etc., R. Co.*, (1909) 172 Fed. 271.

### Vol. VI, p. 436, sec. 4.

**Bona fide purchasers.**—A homestead entry on public land, in the open and undisturbed possession of another, constitutes an unlawful trespass on such possession, and gives the entryman no rights or interest in the land as against a *bona fide* purchaser from such prior possessor to whom a patent had been duly issued. *Dockendorf v. Bassett*, (1908) 160 Fed. 543; *Lyle v. Patterson*, (1908) 160 Fed. 545.

A purchaser of land certified by the Secretary of the Interior to the state of Minnesota in aid of railway construction, and conveyed by that state to a railway company, occupies the position of a purchaser in good faith, protected as such by this section, although the certification was erroneous, and might have been avoided and the land recovered back by the government while in the hands of the railway company, where such purchaser had no notice, actual or constructive, of the claim of the government. *U. S. v. Chicago, etc., R. Co.*, (1904) 195 U. S. 524, 25 S. Ct. 113, 49 U. S. (L. ed.) 306.

But the protection afforded by this section to *bona fide* purchasers from any grantee railway company to whom lands have been erroneously certified or patented does not extend to one who purchased, after the date of this Act, certain unearned lands included in the grant made by the Act of May 12, 1864 (13 Stat. L. 72, ch. 84, secs. 1, 2, 3), to the state of Iowa, in aid of railway construction, the title to which the state, before the passage of the Adjustment Act, had first resumed

by legislative enactment, upon the railway company's default, and then relinquished to the United States. *Knepper v. Sands*, (1904) 194 U. S. 476, 24 S. Ct. 744, 48 U. S. (L. ed.) 1083.

A homestead claimant whose rights attached before any interest in the land was acquired by a railway company under a congressional grant is not concluded by an adjudication against the government in a suit brought by it to cancel certain patents issued to the railway company, including one for the land in question, to which suit he was not made a party, although he may have been an active member of a Settler's Protective Association, which may have made such representations to, and brought such facts to the attention of, the government as to induce the government to bring the suit. *Brandon v. Ard*, (1908) 211 U. S. 11, 29 S. Ct. 1, 53 U. S. (L. ed.) 68.

The legislature of Iowa, having by Act March 16, 1882 (Laws 1882, p. 102, ch. 107), resumed title to all unearned lands of the grant to the Sioux City & St. Paul Railroad Company, made by Act Cong. May 12, 1864, ch. 84, 13 Stat. L. 72, to the state, and by the state to the company by Act April 3, 1866 (Laws Iowa 1866, p. 143, ch. 134), on account of the default of the company, a purchaser of such lands from the company thereafter could acquire no rights, and is not protected as a *bona fide* purchaser by this section, as against one who entered the lands under the land laws of the United States, to which the lands were

subsequently relinquished by the state, nor is he entitled to purchase such lands from the United States under section 5; the *bona fide* character of his purchase from the railroad company being as essential under one section as the other. *Ostrom v. Wood*, (1905) 140 Fed. 294.

Certain land in controversy was within the limits of a railroad grant, and, though the railroad company earned the land, it accepted other land in lieu thereof, and then failed to complete the road for which the grant was made, by reason of which the land in controversy reverted to the United States. The railroad knew that it had no title or equitable claim to the land when it contracted to sell the same to plaintiff's assignor in September,

1888, and, when plaintiff took his assignment, he knew that suit was then pending by the United States to quiet its title, and in October, 1899, he made an agreement with the railroad company, reciting the pendency of such suit, and agreeing that if the government was successful, as it subsequently was, he would receive from the railroad company the amount paid on the original agreement, with interest, and release all claims for failure of title. After defendant had taken possession as a homestead entryman in 1890, plaintiff took no steps to regain possession until he sued to recover the land. It was held that the plaintiff was not a purchaser in good faith within this section. *Logan v. Davis*, (1910) 147 Ia. 441, 124 N. W. 808.

### Vol. VI, p. 438, sec. 5.

The preferential right of purchase from the government given by this section to "bona fide purchasers" from a railway company of lands excepted from the operation of its congressional land grant, inures to the benefit of a person seeking to bring settlers on such lands, who was given, by written agreement with the railway company, the right to purchase for himself and others lands within the indemnity limits of its grant when title thereto should be acquired by the company. *Gertgens v. O'Connor*, (1903) 191 U. S. 237, 24 S. Ct. 94, 48 U. S. (L. ed.) 163, *affirming* (1902) 85 Minn. 481, 89 N. W. 866.

Where land in a section granted to a railroad company, and subsequently excepted from the grant by reason of a prior pre-emption entry which the pre-emptor abandoned prior to the grant, was sold by the railroad company to a *bona fide* purchaser, it was held that such purchaser had a prior right to purchase the land from the United States under such section, as against an applicant to enter the land as a homestead within four months after the cancellation of the enlistment of the land by the railroad company. *Ramsay v. Tacoma Land Co.*, (1903) 31 Wash. 351, 71 Pac. 1024.

Delay cannot successfully be urged to prevent *bona fide* purchasers from a railway company of land excepted from its grant from exercising the right to purchase the same from the government, where the application to purchase was made within ten months after the land had been stricken from the company's list, pursuant to a decision of

the Land Department, and prior to such decision both the railway company and the Land Department had assumed that the land was already the property of its railway company's grantee by virtue of its purchase from that company. *Ramsay v. Tacoma Land Co.*, (1905) 196 U. S. 360, 25 S. Ct. 286, 49 U. S. (L. ed.) 513, *reversing* (1903) 31 Wash. 351, 71 Pac. 1024.

But the protection afforded to *bona fide* settlers by this Act does not cover a subsequent settlement of land within the indemnity limits of such grant, made with knowledge that it had been withdrawn from entry, and had been selected to supply deficiencies claimed to exist within the place limits. *Gertgens v. O'Connor*, (1903) 191 U. S. 237, 24 S. Ct. 94, 48 U. S. (L. ed.) 163, *affirming* (1902) 85 Minn. 481, 89 N. W. 866.

Lands granted by Congress to a state and by the state to a railroad company on condition, and which were afterwards resumed by the state for the failure of the company to comply with such condition and reverted to the United States, are not lands "excepted from the operation of the grant," within the meaning of this section; and a purchaser from the company acquires no right under said section to purchase the lands from the United States. *Ostrom v. Wood*, (1905) 140 Fed. 294.

A state corporation is a citizen of the United States, within the meaning of this section. *Ramsay v. Tacoma Land Co.*, (1905) 196 U. S. 360, 25 S. Ct. 286, 49 U. S. (L. ed.) 513.

### Vol. VI, p. 442, sec. 1.

Where a withdrawal of public lands along the route of a railroad, in aid of which a grant of lands has been made by Congress, is made by the chief officers of the Land Department in advance of the definite location of the route of such road, in order that the lands may be preserved for the ultimate satisfaction of the grant, such withdrawal, if not made in opposition to the terms of the grant or other congressional enactment, is a reservation made by competent authority. The

reservation, during its continuance, removes the lands embraced therein from the category of public land, and excludes them from subsequent railroad land grants containing no clear declaration of an intention to include them, even though it subsequently transpires that the withdrawal was ill-advised, or that the lands are not required for the satisfaction of the prior grant. *Northern Lumber Co. v. O'Brien*, (C. C. A. 1905) 139 Fed. 614.

**Lands granted to Northern Pacific Railroad Company.** — No such reservation of lands within that portion of the grant to the Northern Pacific Railroad Company under Act July 2, 1864, ch. 217 (13 Stat. L. 365), which was forfeited to the United States by this Act, as to except from the grant made to that company by the joint resolution of May 31, 1870 (16 Stat. L. 378), the lands common to both grants, was effected by the transmission to the Secretary of the Interior in 1865 by the president of the company of a map of the general line of the road, which was not authorized by the company, and which was not accepted by the Land Department, and the filing, two months after the date of such resolution, of two maps of gen-

eral route, which included the line authorized by the resolution. *U. S. v. Northern Pac. R. Co.*, (1904) 193 U. S. 1, 24 S. Ct. 330, 48 U. S. (L. ed.) 593.

**Reinvests United States with title.** — This Act reinvests the United States with the legal title to the unearned lands; and therefore such lands may be reconveyed. *Doe v. Pugh*, (1903) 137 Ala. 346, 34 So. 377.

This Act does not operate to confirm the title of the companies to lands opposite completed portions of their roads against all contingencies and reserved conditions, whether precedent or subsequent, nor as a waiver of forfeiture for condition broken. *U. S. v. Oregon, etc., R. Co.*, (1911) 186 Fed. 861.

### Vol. VI, p. 448, sec. 1.

**Rights acquired by settlement and improvement upon unsurveyed land, duly and timely asserted, will, as against an intervening indemnity railroad selection, made under this Act, be protected in their entirety,**

even though the lands claimed lie in different quarter sections and the improvements of the settler are shown to be confined to a single quarter section. *Donohue v. St. Paul, etc., R. Co.*, (1907) 101 Minn. 239, 112 N. W. 413.

### Vol. VI, p. 448, sec. 2.

**The relinquishment of a homestead entry after the final decision of the Secretary of the Interior in favor of the entryman in a contest with a railway company claiming under a subsequent selection of indemnity lands**

does not inure to the benefit of the railway company, in view of the provision of this Act. *St. Paul, etc., R. Co. v. Donohue*, (1907) 210 U. S. 21, 28 S. Ct. 600, 52 U. S. (L. ed.) 941.

### Vol. VI, p. 449, sec. 1.

**This section is not invalid as creating an indebtedness by a retrospective Act, nor as condemning the companies to pay a debt without a hearing, the debt having been created when a company sold land to which it had no right and which was patented to it through mistake, and a recovery being dependent on proof of such facts in the suit.** *Southern Pac. R. Co. v. U. S.*, (C. C. A. 1904) 133 Fed. 651.

**Original grants not changed.** — This Act does not purport to alter or repeal the original grants, but is an independent act passed by Congress in the exercise of its constitutional power to protect the property of the United States, and its validity is not dependent on any reservation of the power of repeal in the original granting Acts. *U. S. v. Southern Pac. R. Co.*, (1907) 157 Fed. 96.

**Suits to annul patent.** — This Act, when read with the Act of March 3, 1891, ch. 561, sec. 8, 6 Fed. Stat. Annot. 526, puts all patents, whether issued in pursuance of railroad grants or otherwise, in the same category, and suits by the government to cancel cannot be maintained except as thereby provided. A suit to annul patents reaches back of the patents; the purpose being to forfeit the entire grants, so far as the lands are held by the railroad company, for failure to observe the condition requiring the company to sell to actual settlers. The patents are only evidentiary of the grant; it is the grant that confers title. If the grant is rendered subject to forfeiture for want of the observance of a

condition subsequent, the breach whereof may have occurred later than the issuance of many patents, the forfeiture should not be defeated because suits were not instituted to annul the patents within the time fixed by the statute. Should the grant be annulled, the annulment would carry with it, it is true, the avoidance of the patents. But the conditions of the grant must be read into the patents, so the patents cannot stand in the way of the enforcement of such conditions. *U. S. v. Oregon, etc., R. Co.*, (1911) 186 Fed. 861, 890.

**Action to recover price of land.** — Irrespective of the Adjustment Acts of March 3, 1887 (24 Stat. L. 556, ch. 376), and this Act, the federal government has the right to sue a railroad company to recover the value of lands erroneously patented to such company, and sold by it to persons who dealt with it in good faith. *Southern Pac. R. Co. v. U. S.*, (1906) 200 U. S. 341, 26 S. Ct. 296, 50 U. S. (L. ed.) 507.

A suit by the United States brought under this Act to recover from a railroad company the price of lands erroneously patented to the company under a grant and resumed by the former Act, but which had in the meantime been sold to *bona fide* purchasers whose titles were protected by such Acts, is within the cognizance of a court of equity, where the sales cover numerous tracts and were made during a series of years, and the bill prays for a discovery and accounting with respect

thereto, and, having obtained jurisdiction for such purpose, the court, from the evidence so obtained, may determine the amount due the complainant and render judgment therefor. *U. S. v. Southern Pac. R. Co.*, (1907) 157 Fed. 96.

The suit may be brought against the corporation for the recovery of money only, in case the purchaser has been found to be a *bona fide* purchaser upon a claim made by

himself, or on his behalf, to the Secretary of the Interior. *Oregon, etc., R. Co. v. U. S.*, (C. C. A. 1906) 144 Fed. 832, 833.

It is no defense to an action to recover such price that some of the lands involved were sold by the company for less than the government price, where it received a larger average price for the lands, taken as a whole. *Southern Pac. R. Co. v. U. S.*, (C. C. A. 1904) 133 Fed. 662.

## Vol. VI, p. 450, sec. 2.

The confirmation of title in the good-faith purchasers is intended to right the wrongs done such purchasers at the cost of the companies responsible therefor to the extent of the government price of the lands surrendered by the United States for that purpose. It does not ratify the wrong done to the United States, but provides relief for the innocent purchaser against its consequences at the cost

of the wrongdoer. These companies will not be heard in a court of equity to say: "We did not agree to pay for these lands. We took them and sold them without right. Your remedy is against our innocent grantees to get back what we had no right to convey. You cannot ratify their title without condoning our wrong." *U. S. v. Oregon, etc., R. Co.*, (1904) 133 Fed. 953, 958.

## Vol. VI, p. 451, sec. 2.

The mode of determining what is mineral land adopted in *U. S. v. Richmond Min. Co.*, (1889) 40 Fed. 415, wherein the court said: "The defendant, a corporation engaged in mining, reducing ores, and refining bullion, purchased wood and charcoal for use at its reduction works. The cord wood, and the wood from which the charcoal was manufactured, were cut upon unsurveyed public mineral lands, mineral in character, of little or no value except for the mineral therein, and within organized mining districts, or not far remote from known mines. This was mineral land, within the meaning of the Act of Congress of June 3, 1878, permitting timber to be taken therefrom for 'building, agricul-

tural, mining, or other domestic purposes,' and that defendant could lawfully purchase such wood and coal for said use under the license given by said Act," was probably considered and approved by Congress in this Act. *U. S. v. Mullan Fuel Co.*, (1902) 118 Fed. 666.

A ruling by the Secretary of the Interior that the classification of land as mineral, by land commissioners appointed under this Act, does not prevent the Land Department from making such disposition of the lands as would be proper, on a subsequent showing that the land was not in fact mineral, was upheld in *Lynch v. U. S.*, (C. C. A. 1905) 138 Fed. 535.

## Vol. VI, p. 456, sec. 1.

A court of equity will not undertake to determine in advance of the final action of the Land Department, the respective rights of grantees from the Northern Pacific Railway Company of land claimed to be within the indemnity limits of the land grant of July 2, 1864, and settlers and purchasers from the United States or their grantees, whether holding patents or not, who claim the protection of this Act, by permitting any purchaser or settler claiming in good faith, under any law of the United States or ruling of the Land Department, any land so situated that a right thereto in the railroad grantee or its successor in interest attached by reason of definite location or selection, to elect whether to retain or transfer his claim, and requiring the Secretary of the Interior to furnish the company with a list of the lands so retained, and allowing the company to select other lands in lieu thereof upon executing a proper relinquishment. *Humbird v. Avery*, (1904) 195 U. S. 480, 25 S. Ct. 123, 49 U. S. (L. ed.) 286.

Sales or contracts made by the Northern Pacific Railway Company after its acceptance

of this Act, cannot defeat the operation of the provisions of that Act, enacted to settle disputes arising out of conflicting rulings in the Land Department with reference to the eastern terminus of the railroad as affecting the Northern Pacific land grant, by permitting any purchaser or settler claiming, in good faith, under any law of the United States or ruling of the Land Department, any land so situated that a right thereto in the railroad grantee or its successor in interest attached by reason of definite location or selection, to elect whether to retain or transfer his claim, and requiring the Secretary of the Interior to furnish the company with a list of the lands so retained, and allowing the company to select other lands in lieu thereof upon executing a proper relinquishment, although the statute contains a provision that the railroad grantee or its successor in interest shall not be bound to relinquish lands sold or contracted for. *Humbird v. Avery*, (1904) 195 U. S. 480, 25 S. Ct. 123, 49 U. S. (L. ed.) 286.

The relinquishment by the railroad in favor of a settlement made on unsurveyed lands



after the passage of the Act is optional with it, and not mandatory, and the settler may not complain of the refusal to relinquish. *Cameron v. Lyen*, (1910) 57 Wash. 384, 106 Pac. 1111.

**Withdrawal.** — Under the grants to the Northern Pacific Railroad Company, the Secretary of the Interior has no authority to

withdraw or suspend from sale or entry lands within the indemnity limits of grants which had not been previously selected with his approval, to supply deficiencies within the place limits of the grant, and such withdrawals and suspensions are ineffectual. *Hoyt v. Weyerhaeuser*, (C. C. A. 1908) 161 Fed. 324.

## Vol. VI, p. 461, sec. 1947.

**Lands reserved**, under this section, in each township for common schools are public lands of the United States not "reserved for public uses," within section 2477, 6 Fed. Stat. Annot. 498, granting a right of way for the construction of highways over public lands

"not reserved for public uses," and hence a highway which has existed over such lands for over seven years is a public highway under the Washington statute. *Peterson v. Baker*, (1905) 39 Wash. 275, 81 Pac. 681.

## Vol. VI, p. 462, sec. 2275.

**Land is within a reservation** under this section, where it has been withdrawn by the Secretary of the Interior "pending determination as to the advisability of including the same within a forest reservation." *Alberger v. Kingsbury*, (1907) 6 Cal. App. 93, 91 Pac. 674.

The title of the state is not a mere passive trust, which the statute of uses would

execute, thereby placing the legal title in the inhabitants of the township, but the state is a purchaser for valuable consideration, with full power to sell or lease the school lands for the use of schools, as the legislature might provide and as might be considered most beneficial for the public. *Black v. Chicago, etc., R. Co.*, (1909) 237 Ill. 500, 86 N. E. 1065.

## Vol. VI, p. 473, sec. 10.

The state of Washington on coming into the Union acquired ownership of the shores and bed of all navigable waters up to the line which in the surveys of the public lands of the United States constituted the boundary between land and water; which survey fixed *prima facie* the limits of the public land which might be disposed of by the United States, and outside of which only

could the state claim ownership of the shores and beds of navigable water. *Corrigan v. Brown*, (1907) 169 Fed. 477.

**Eminent domain.**—The title in fee to state school lands granted by this section of the enabling act cannot be acquired by eminent domain. *State v. District Ct.*, (1910) 42 Mont. 105, 112 Pac. 706.

## Vol. VI, p. 474, sec. 11.

**Adverse possession.**—A local statute making limitations prescribed by it applicable to actions by the state, etc., the same as to actions between individuals, does not authorize the acquisition of title to school lands by

adverse possession, since such construction would make the statute repugnant to this act. *O'Brien v. Wilson*, (1908) 51 Wash. 52, 97 Pac. 1115.

## Vol. VI, p. 476, sec. 17.

This section refers only to the manner of disposing of the lands, and must be construed with reference to the limitations prescribed in section 11, so that a local Act creating a state normal school fund, so far as it appropriates the proceeds of lands sold for the erection of normal schools, instead of the income thereof, is void. *State v. Rice*, (1906) 33 Mont. 365, 83 Pac. 874; *State v. Maynard*, (1903) 31 Wash. 132, 71 Pac. 775.

The power to determine or limit the manner of the use of the land granted by this section is purely legislative, and cannot be

delegated to a commission. *State v. Budge*, (1905) 14 N. D. 532, 105 N. W. 724.

The state may appropriate to one institution more than its proportionate part of the land. *State v. Callvert*, (1904) 34 Wash. 58, 74 Pac. 1018.

**University land.**—Though section 14 of this Act, *supra*, grants seventy-two sections of land to the state for a university, the university is not excluded from the benefits of this section. *State v. Callvert*, (1904) 34 Wash. 58, 74 Pac. 1018.

**Vol. VI, p. 478, sec. 4.**

The interest or income from the proceeds of the sale of lands can only be used in the support and maintenance of the university, in the payment of the current expenses thereof, and charges for conducting the same. Roach v. Gooding, (1905) 11 Idaho 244, 81 Pac. 642.

This section vests title in the state and contemplates that lieu or indemnity lands may be selected for such lands as had been sold or disposed of at the time of the admis-

sion of the state. Balderston v. Brady, (1910) 17 Idaho 567, 107 Pac. 493.

**Removal of timber.**—Prior to an official survey, the title to land which, when surveyed, would constitute school sections in the several townships, remains in the United States; and hence, prior to such survey, the state cannot grant any authority to remove timber therefrom, nor prevent the United States from recovering the value of timber so removed. U. S. v. Bonners Ferry Lumber Co., (1910) 184 Fed. 187.

**Vol. VI, p. 486, sec. 6.**

A grant in *præsentis* is made by this section, and on a selection by the state of land within its terms, which selection is afterward approved by the Secretary of the In-

terior, the state's title relates back to the date of the grant, or at least to the date of such selection. Brigham City v. Rich, (1908) 34 Utah 130, 97 Pac. 220.

**Vol. VI, p. 487, sec. 8.**

Only such saline lands as should be selected as a part of the other lands granted, and not specifically located, were granted to the state of Utah by this act. Montello Salt

Co. v. Utah, (1911) 221 U. S. 452, 31 S. Ct. 706, 55 U. S. (L. ed.) 810, *reversing* (1908) 34 Utah 458, 98 Pac. 549.

**Vol. VI, p. 483, sec. 10.**

**Proceeds of sale.**—This section is not intended to apply to the proceeds derived from the sale of university lands, which were en-

tirely governed by section 8. State v. Candland, (1909) 36 Utah 406, 104 Pac. 286.

**Vol. VI, p. 498, sec. 2477.**

The word "highways," as used in this section, should be construed in accordance with recognized local laws, customs, and usages, so that a highway dedicated thereby is not limited to the beaten path or track, but is sixty feet wide, when so provided for the establishment of ordinary highways by the local law. Butte v. Mikosowitz, (1909) 39 Mont. 350, 102 Pac. 593.

**Grant in *præsentis*.**—A dedication of public land for highways, under this section, is a grant to the public as a continuing body, so that, so long as the roadway remains a rural one, it is under the supervision of the county as trustee for the public; and as soon as the territory comes within the limits of an incorporated city, is passed to the city as trustee for the same public. Butte v. Mikosowitz, (1909) 39 Mont. 350, 102 Pac. 593.

This section is a present grant, and, if accepted by the legislature or the public in an effectual manner while the land is a part of the public domain, a highway is established. Tholl v. Koles, (1902) 65 Kan. 802, 70 Pac. 881.

**Local laws considered.**—This section does not operate to grant rights of way and establish highways contrary to the laws of the state or territory in which the lands affected are located. Tucson Consol. Copper Co. v. Reese, (1909) 12 Ariz. 226, 100 Pac. 777.

This section becomes effective in a particular county as of the date of the grant, upon the passage of a local law declaring all

section lines in that county public roads; such legislation being, in effect, an acceptance of the grant. Walbridge v. Russell County, (1906) 74 Kan. 341, 86 Pac. 473.

**Acceptance — Necessity.**—The grant remains in abeyance until a highway is established under some public law authorizing it and takes effect from that time. McAllister v. Okanogan County, (1909) 51 Wash. 647, 100 Pac. 146.

Where, in ejectment by a city to recover possession of land for a street, the evidence was sufficient to establish a highway by prescription if the land over which it passed had been subject to private ownership, it is sufficient to show an acceptance of the dedication of the right to use public land over which the street passed for street purposes, made by this section. Butte v. Mikosowitz, (1909) 39 Mont. 350, 102 Pac. 593.

A resolution of the board of supervisors accepting a right of way for the construction of highways over public lands as far as the grant related to a certain road described, which resolution was recorded in the office of the county recorder, does not make the road described a public highway, where it did not appear that the resolution was made on petition of taxpayers, nor that the road as laid off was recorded. Tucson Consol. Copper Co. v. Reese, (1909) 12 Ariz. 226, 100 Pac. 777.

An order of a board of county commissioners, otherwise regular, undertaking to establish a highway across public land of the

United States, operates as an effectual acceptance of the congressional grant of a right of way for the construction of a highway, and one deriving title to such land through a settlement subsequently made takes it subject to the easement so created. *Molyneux v. Grimes*, (1908) 78 Kan. 830, 98 Pac. 278.

*User.*—An acceptance of the dedication of land of the general government for public roads may be made either by this section or by the acts of the public authorities, or of the public itself. *Van Wanning v. Deeter*, (1907) 78 Neb. 282, 110 N. W. 703, *affirmed on rehearing* 78 Neb. 284, 112 N. W. 902.

This statute is an express dedication of a right of way, and an acceptance of the grant while the land is a part of the public domain may be effected by public user alone, without any action of the public highway authorities, and, when an acceptance thereof has once been made, the highway is legally established, and is thereafter a public easement upon the land, and subsequent entrymen and claimants take subject to such easement. *Montgomery v. Somers*, (1907) 50 Ore. 259, 90 Pac. 674.

Where the general public had used a highway for seven years over public lands before the same were entered by a homesteader, it was held that such user constituted an acceptance of the grant without any resolution of the board of county commissioners accepting the highways. *Okanogan County v. Cheetham*, (1905) 37 Wash. 682, 80 Pac. 262.

But the desultory use by private persons of a logging road over public lands is not sufficient to make the road a highway under this section. *Rolling v. Emrich*, (1904) 122 Wis. 134, 99 N. W. 464.

And see *Cross v. State*, (1906) 147 Ala.

## Vol. VI, p. 501, sec. 1.

*Who entitled to benefit of act.*—A railroad company having built a road prior to the act may also take advantage of this act. *Rio Grande Western R. Co. v. Stringham*, (Utah 1910) 110 Pac. 868.

A decree rendered on demurrer, dismissing, on the merits, a suit to establish a trust in certain lands in favor of a railway company which set up, as a basis of its alleged title in fee simple, the Railroad Land Grant Act of July 2, 1864 (13 Stat. L. 365, ch. 217), prevents the successor in interest of such railway company from asserting, in an action of ejectment involving the same property, brought by the defendant in the former suit, that such company had acquired title under this section or under the state statute of limitations. *Northern Pac. R. Co. v. Slaght*, (1907) 205 U. S. 122, 27 S. Ct. 442, 51 U. S. (L. ed.) 738.

The grant has the attributes of a fee; that is, perpetuity and exclusive use and possession. *Oregon Short Line R. Co. v. Stalker*, (1908) 14 Idaho 362, 94 Pac. 56.

This act is a grant in *præsentis*, differing only from an absolute present grant, in that the thing granted is indefinite and the name of the grantee unknown. *Oregon Short Line*

125, 41 So. 875, wherein it was said that a roadway used by the public over government land does not become a public highway from mere use for twenty years, or by prescription, under this section.

*Effect of acceptance.*—Where a territorial public highway was established over public lands under this section, the status of the highway became permanently fixed, and it is not changed by the subsequent establishment of a government forest reserve embracing land over which it passed, notwithstanding Act June 4, 1897, ch. 2, 30 Stat. L. 35, 36, which vests the control of highways over forest reservations in the Secretary of the Interior. *Duffield v. Ashurst*, (1909) 12 Ariz. 360, 100 Pac. 821.

This section operating with a statute of the state declaring section lines in a county containing public lands to be highways constitutes a dedication and acceptance of public land for a highway, so that when it passed into private ownership it was taken subject to the easement. *Tholl v. Koles*, (1902) 65 Kan. 802, 70 Pac. 881.

An acceptance of a dedication of public land for streets relates back to the date of the dedication. *Butte v. Mikosowitz*, (1909) 39 Mont. 350, 102 Pac. 593.

*Lands subject to right of way grant.*—Land of the general government not reserved for public purposes may be used for public roads. *Van Wanning v. Deeter*, (1907) 78 Neb. 282, 110 N. W. 703, *affirmed on rehearing* 78 Neb. 284, 112 N. W. 902.

*Land reserved by R. S. U. S., sec. 1947.*—In each township for common schools are public lands of the United States not "reserved for public uses," within this section. *Peterson v. Baker*, (1905) 39 Wash. 275, 81 Pac. 681.

*R. Co. v. Stalker*, (1908) 14 Idaho 362, 94 Pac. 56.

The grant is a base, qualified, or limited fee, and is more than an easement, and a reversionary interest remains in the United States to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the railroad. *Oregon Short Line R. Co. v. Stalker*, (1908) 14 Idaho 362, 94 Pac. 56.

*Compliance with statute—necessity.*—The grant of a right of way and station grounds on public lands of the United States to railroad companies becomes operative only when a railroad company specifically indicated as a grantee, by compliance with this section, has definitely located its right of way and station grounds. *Comford v. Great Northern R. Co.*, (1909) 18 N. D. 570, 120 N. W. 875.

*Manner.*—The definite location of the right of way and station grounds of a railroad company may be made by acts of the company operating as unmistakable evidence of appropriation, such as the construction of its railroad, station buildings, and other appurtenances, or by filing with the register of the Land Office where the land is located

a profile of its route and station grounds, approved by the Secretary of the Interior, in compliance with section 4 of this act. *Comfort v. Great Northern R. Co.*, (1909) 18 N. D. 570, 120 N. W. 875.

Actual construction of a railroad definitely locates only a right of way extending 100 feet on each side, and definite location of station grounds outside of such right of way must be made by other and further acts of the railroad company, operating as unmistakable notice to an intending settler of an appropriation by the company for that purpose. *Comfort v. Great Northern R. Co.*, (1909) 18 N. D. 570, 120 N. W. 875.

**Effect.** — A railroad, on compliance with this act becomes a grantee as specifically and definitely as if it had been named in the act. *Oregon Short Line R. Co. v. Stalker*, (1908) 14 Idaho 362, 94 Pac. 56.

Where a railroad selects land in the mode prescribed by the Interior Department, and advises the department of such selection by filing its maps, it has done all the law requires of it, and the grant then becomes a fixity, not only as to the grantee, but as to the thing granted. *Oregon Short Line R. Co. v. Stalker*, (1908) 14 Idaho 362, 94 Pac. 56.

**Change of location.** — A railroad company which has obtained the approval of a profile of its road by the Interior Department may change a portion of its location, providing such change does not affect intervening rights. *Phoenix, etc., R. Co. v. Arizona Eastern R. Co.*, (1906) 9 Ariz. 434, 84 Pac. 1097.

**Lands subject to grant** — *Lands twenty miles distant from a railroad right of way* are not "adjacent" within the meaning of this act. *U. S. v. St. Anthony R. Co.*, (1904) 192 U. S. 524, 24 S. Ct. 333, 48 U. S. (L. ed.) 548.

**An abandoned mining claim** becomes public land to which the right of way of a railroad company attaches, so that the relocation is subject to the easement of the railroad company. *Bonner v. Rio Grande Southern R. Co.*, (1903) 31 Colo. 446, 72 Pac. 1065.

**Irrigation lands.** — Lands within a reservation withdrawn under the Reclamation Act (Act June 17, 1902, ch. 1093, 32 Stat. L. 388, 7 Fed. Stat. Annot. 1098) for the furtherance of an irrigation project and resting under valid subsisting homestead filings are no longer "public lands," and are therefore exempt from the operation of this act. *U. S. v. Minidoka, etc., R. Co.*, (1910) 176 Fed. 762; *Minidoka, etc., R. Co. v. Weymouth*, (1911) 19 Idaho 234, 113 Pac. 455.

**Grant subject to prior settlers.** — A railroad acquires no title to a right of way appropriated by it as against an actual settler on public lands until it acquires such settler's rights by condemnation, and a patent issued to him prior to condemnation vests in

him the full legal title free from any claim on the part of the railroad. *Slaght v. Northern Pac. R. Co.*, (1905) 39 Wash. 576, 81 Pac. 1062.

A homestead entry, valid on its face, constitutes such an appropriation and withdrawal of land as to segregate it from public domain, and precludes it from subsequent appropriation for right of way for railroad purposes. *Enid, etc., R. Co. v. Kephart*, (1907) 19 Okla. 1, 91 Pac. 1049.

This act confers no easement in land occupied by a homestead whose possessory right attached before the railroad was actually constructed, and before its map of definite location had been approved by the Secretary of the Interior, though the company had qualified to take under the act and had determined by a final survey the exact location for its road across the settler's land before the latter acquired any rights. *Doughty v. Minneapolis, etc., R. Co.*, (1906) 15 N. D. 290, 107 N. W. 971.

Where A. made a homestead entry and B. entered thereon and made a settlement, and a railroad appropriated a strip across the tract for its right of way, and its profile maps having been approved by the Secretary of the Interior under Act Cong. March 2, 1899, 30 Stat. L. 990, ch. 374, and thereafter B. by contest secured the relinquishment of A. to be filed in the Land Office, and thereafter made homestead entry for such land under a preference right, and complied with all the provisions of the law, the cancellation of A.'s entry did not cause a reversion of the right of way to the railroad company, under this act. *Enid, etc., R. Co. v. Kephart*, (1907) 19 Okla. 1, 91 Pac. 1049.

Where a railroad built its line through public land, and, where the land had been filed upon, condemned a way 100 feet wide and filed a map under this act, and at that time there was nothing of record in the United States Land Office showing that the land in controversy was within a Mexican grant, as against one claiming under the grant, which was valid, it was held that the railroad acquired a right of way 100 feet wide, and not merely the land occupied by its roadbed. *Ainsa v. New Mexico, etc., R. Co.*, (1911) 13 Ariz. 320, 114 Pac. 971.

**The value of timber unlawfully cut** from the public domain by a railroad company at the time when, and the place where, it was cut, is the measure of damages in a suit by the United States to recover its value, where the cutting was done on the advice of counsel, and in the belief that the lands from which it was cut were "adjacent" to the line of the road, within the meaning of this act. *U. S. v. St. Anthony R. Co.*, (1904) 192 U. S. 524, 24 S. Ct. 333, 48 U. S. (L. ed.) 548.

## Vol. VI, p. 505, sec. 2.

This section has no application to a case where a railroad company does not seek to occupy a roadbed in common with another railroad company, and the situation does not make such occupancy necessary, but seeks to condemn a longitudinal strip of the other

company's right of way, on account of its being necessary because of the contracted situation and peculiar topography of the place. *North Coast R. Co. v. Northern Pac. R. Co.*, (1908) 48 Wash. 529, 94 Pac. 112.

## Vol. VI, p. 506, sec. 4.

Prior to the filing of a right of way map of definite location and the approval thereof, as provided for in this section, the lands covered by the map are free from the right of way, and are subject to mineral location. *Southern California R. Co. v. O'Donnell*, (1906) 3 Cal. App. 382, 85 Pac. 932.

Complainant had fully complied with section 1 of this act, but the Secretary of the Interior had not given his approval nor acted upon the matter pursuant to the provisions of this section; it was held that, while not so expressly deciding, the rule apparently is that the approval of the Secretary is not necessary in order to pass the fee, or such title or estate as Congress intended to grant, and, in this view, there is a complete remedy by an action for possession, and equity cannot intervene when the remedy is adequate at law. It was also held that, if the statute is not subject to this construction, and the approval of the Secretary is necessary to complete the grant, the court is without jurisdiction to interfere, so long as the matter is pending before the Department, to any greater extent than is necessary to preserve the *status quo* pending the decision of the matter by that tribunal, the necessity for which in this case is not disclosed by the bill. *Wallula Pac. R. Co. v. Portland, etc., R. Co.*, (1906) 154 Fed. 902.

**Filing of profile.** — No rights can be initiated before a profile map of the road has been filed in the local Land Office and approved by the Secretary of the Interior — unless actual construction is sooner begun — in view of the provisions of this section. *Minneapolis, etc., R. Co. v. Doughty*, (1908) 208 U. S. 251, 28 S. Ct. 291, 52 U. S. (L. ed.) 474, *affirming* (1906) 15 N. D. 290, 107 N. W. 971.

The proceedings relative thereto are governed by the rules of the Interior Department approved Jan. 13, 1888 (12 L. ed. 423), providing that, if a railroad desires to avail itself of that act as to station buildings, etc., it must file for approval a plat showing the surveyed limits of the ground desired, and that, on the approval of the plat by the Secretary of Interior, the local land officers shall note the same on the plats in their office and note on the certificate of entry of any such lands, in addition to the note concerning the right of way, that the entry is permitted subject to the use and occupation of the railroad for station purposes. *Oregon Short Line R. Co. v. Stalker*, (1908) 14 Idaho 362, 94 Pac. 56.

The fact that the profile of a surveyed line of a railroad over public lands was sent directly to the Secretary of the Interior, instead of being transmitted to him through the District Land Office, is immaterial as far as establishing the right of the railroad in such right of way. *Moran v. Chicago, etc., R. Co.*, (1907) 83 Neb. 680, 120 N. W. 192.

Where rival claimants for the same right of way through the public lands filed profiles covering it, it is the duty of the Secretary of the Interior to determine from the facts

which company has superior claim to the approval of its profile. *Phoenix, etc., R. Co. v. Arizona Eastern R. Co.*, (1906) 9 Ariz. 434, 84 Pac. 1097.

While a contest is pending before the Secretary of the Interior between rival railroad companies seeking approval of conflicting profiles of their roads through public lands, the court should not assume jurisdiction to determine the ultimate right of possession of the rights of way in controversy. *Phoenix, etc., R. Co. v. Arizona Eastern R. Co.*, (1906) 9 Ariz. 434, 84 Pac. 1097.

The rule that the one most at fault must suffer where two innocent persons are involved has no application to defeat a railroad which has filed a map of the public land it desires for station purposes. *Oregon Short Line R. Co. v. Stalker*, (1908) 14 Idaho 362, 94 Pac. 56.

On approval by the Secretary of the Interior of the profile of a proposed railroad through public lands in accordance with this section, the title to the right of way vests in the railroad company, and a subsequent patent of land including the right of way, though not made subject thereto, does not divest the title so acquired. *Rio Grande Western R. Co. v. Stringham*, (Utah 1910) 110 Pac. 868.

Any party entering the land over which a survey extends after such approved map was filed in the District Land Office took subject to a right of way for the road extending 100 feet from the center of its track on the side thereof. *Moran v. Chicago, etc., R. Co.*, (1909) 83 Neb. 680, 120 N. W. 192.

Where a railroad complies with the act and the regulations of the Interior Department, its right cannot be defeated through the neglect of the local Land Office officers to make the notation, etc., required to be made on the plats and books of that office. *Oregon Short Line R. Co. v. Stalker*, (1908) 14 Idaho 362, 94 Pac. 56.

Legal title to right of way sought by a railroad company vests on the approval of the Secretary of the Interior of the profile of the road, and not prior thereto. *Phoenix, etc., R. Co. v. Arizona Eastern R. Co.*, (1906) 9 Ariz. 434, 84 Pac. 1097.

The approval of the map showing the profile is equivalent to a patent, and vests in the corporation title to the definite right of way shown thereon. Such title, however, dates from the time of such approval, and does not relate back to the date of the filing of the articles of incorporation or to the time of survey, and, as between two companies each seeking to secure the same right of way in whole or in part, the one whose map is first approved obtains the title. *Oregon Trunk Line v. Deschutes R. Co.*, (1909) 172 Fed. 738.

The approval of the Secretary of Interior of the plat is an adjudication that the land is necessary for station purposes, and the grant attaches and relates back to the filing of the plat. *Oregon Short Line R. Co. v. Stalker*, (1908) 14 Idaho 362, 94 Pac. 56.

Where a grant of a right of way had been made to a railroad company by an Act of Congress, and a railway company had filed its map of definite location with the Secretary of the Interior, it had done everything

required of it to obtain title to its right of way, and in a suit against a party other than the United States, approval by the President must be presumed. *Missouri, etc., R. Co. v. Watson*, (1906) 74 Kan. 494, 87 Pac. 687.

### Vol. VI, p. 506, sec. 5.

**Requiring bond.**—Under this section, taken in connection with the Act of March, 1899, ch. 427, the Secretary of the Interior may grant or refuse to grant a railroad corporation a right of way over forest reservations. If he may do this, he may no doubt impose as a condition of granting the right of way

that the railroad corporation shall execute a bond such as is issued on in this case. The bond is not contrary to good morals nor to any law, and therefore cannot be said to have been extorted from the railway company. *U. S. v. Bailey*, (1910) 178 Fed. 302.

### Vol. VI, p. 513. [*Right of way over public lands, reservations, and public parks, etc.*]

**Act Cong. March 3, 1891, ch. 561, secs. 18–21, 26 Stat. L. 1101, 1102, 6 Fed. Stat. Annot. 508, 510,** providing that one may have the right of way through the public lands for the use of a canal or ditch for irrigating purposes, where a map of the same is

filed with the Secretary of the Interior for his approval within twelve months after the land has been surveyed by the government, is not inconsistent with this act. *U. S. v. Lee*, (1910) 15 N. M. 382, 110 Pac. 607.

### Vol. VI, p. 514, sec. 2448.

**Lands in an Indian reservation are not "public lands,"** within this section; nor are patents issued to Indian allottees of reser-

vation lands issued pursuant to a law of the United States within such section. *Meeker v. Kaelin*, (1909) 173 Fed. 216.

### Vol. VI, p. 516, sec. 2288.

**The right to transfer land for a railroad right of way conferred on a bona fide settler under the pre-emption, homestead, or other settlement law, by this section, applies to homestead land within a reclamation district, and hence the United States, after such transfer, is only entitled to have the railroad so constructed as not to interfere with the irrigation reservoirs, ditches, and canals.** *U. S. v. Minidoka, etc., R. Co.*, (1910) 176 Fed. 762.

Where homestead claimants within land withdrawn for a reclamation project, transfer land to a railroad company for a right of way, the fact that the entryman might forfeit or abandon his entry does not constitute such an interest in the land as to entitle the government to an injunction restraining the railroad company from constructing its railroad across the lands and canals embraced in the reclamation project. *U. S. v. Minidoka, etc., R. Co.*, (1910) 176 Fed. 762.

**Transfer for church and cemetery purposes.**—B. entered a tract of public land under the homestead laws of the United States, and gave to the defendant, pursuant to this section, a contract to convey to it two acres of the tract for church and cemetery purposes. B., by an arrangement with G.,

relinquished his entry, and G. then entered the tract and received a patent therefor. G., at the time he secured such relinquishment, had notice of the contract, and agreed to carry it out. The defendant thereafter, with his knowledge and consent, entered into the possession of the two acres, and made valuable and permanent improvements thereon. It was held that G. held the legal title to the two acres in trust for the defendant, and that the plaintiff had notice of the defendant's rights when he acquired the tract. *Eimer v. Wellsand*, (1904) 93 Minn. 444, 101 N. W. 612.

**Transfer of water flume.**—Where a contract for the transfer by a homesteader, before final proof, of a water flume for power purposes to generate electricity is void and not subject to specific performance, that the original contract was extended and ratified after final proof will not make it enforceable, since the original contract is the basis of the action, and it is on grounds of public policy that courts refuse to specifically enforce such contracts. *Cascade Public Service Corp. v. Railsback*, (1910) 59 Wash. 376, 109 Pac. 1062.

**Permitting an irrigation ditch across land** is not a transfer thereof within this section. *Methow Cattle Co. v. Williams*, (Wash. 1911) 117 Pac. 239.

## Vol. VI, p. 529, sec. 2478.

**Power to make rules.**—The Land Department of the United States has the power to make reasonable rules and regulations not inconsistent with any valid law, for the purpose of giving effect to the provisions of this section. *Van Gesner v. U. S.*, (C. C. A. 1907) 153 Fed. 46.

**Disposition of the public lands of the United States** is vested in the officers of the General Land Office, and they may make such reasonable rules relating to the administration of the laws of the United States regulating the disposition of the public lands as they think fit; and the courts have no authority to interfere. *Eastern Banking Co. v. Lovejoy*, (1908) 81 Neb. 169, 115 N. W. 857.

Congress may authorize the Secretary of the Interior to make rules and regulations for the carrying into effect of the provisions of a law as to the public lands, the enforcement of which devolves on his department. *Clyde*

*v. Cummings*, (1909) 35 Utah 461, 101 Pac. 106.

The Commissioner of the General Land Office and the Secretary of the Interior can enforce by appropriate regulations every part of the public land laws as to which it is not otherwise specially provided. *Leonard v. Lennox*, (C. C. A. 1910) 181 Fed. 760.

Where the rules, practice, and decisions of the federal Land Department accord with a federal statute as interpreted by a state court, the state court will give the departmental rulings such weight as they are entitled to. *Cameron v. Lyen*, (1910) 57 Wash. 384, 106 Pac. 1111.

**Force of rule.**—A rule by the Secretary of the Interior, the import of which is to carry into effect the provisions of an Act relating to the public lands, is valid, and has the same binding force as the law itself. *Clyde v. Cummings*, (1909) 35 Utah 461, 101 Pac. 106.

## Vol. VI, p. 533, sec. 1.

The obvious intention of the statute was to make unlawful any exclusive use and occupancy of any of the public lands without claim or color of title, or asserted right under the land laws, whether by inclosing the same or otherwise. *Bircher v. U. S.*, (C. C. A. 1909) 169 Fed. 589.

The word "made," as used in this section, has a more comprehensive meaning than the words "constructed" or "erected." A person "makes" an inclosure so long as he maintains it, and therefore the statute is violated where a person maintains the inclosure of land to which he has no claim, color of title, or asserted right, and consequently an indictment charging such an inclosure is not defective for failure to allege that, at the time the inclosure was constructed, defendant had no claim or color of title to the land made or acquired in good faith, or a right thereto asserted with a view to entry. *Bircher v. U. S.*, (C. C. A. 1909) 169 Fed. 589.

**What is inclosure.**—Where defendant constructed a fence inclosing public lands in violation of this Act, evidence that he took advantage of a lake to make a part of his inclosure, and that, though the fence extended into the lake, cattle could get around the ends thereof at periods of low water, and that there was a gap of three-quarters of a mile across an impassable cañon, was insufficient to establish that the inclosure was not complete. *Thomas v. U. S.*, (1905) 136 Fed. 159, 69 C. C. A. 157.

A settler upon public land in advance of surveys who incloses no greater area than the land laws permit him to enter is not a trespasser, nor is his inclosure unlawful, as this Act was not intended to prevent actual *bona fide* settlers from occupying and inclosing an entryman's proportion of the public lands. *McAllister v. Okanogan County*, (1909) 51 Wash. 647, 100 Pac. 146.

Defendant owned a tract of 5,000 acres of

grazing land with a mountain range to the east and north of it. He built a fence from the range on the east, westward to the south of his land, and then northwestward to the north range, inclosing between such fence and the mountains his own land and also public lands, which he used for a pasture. There were two breaks in the fence through which, as well as over the mountains, trails led into the pasture, but for practical purposes the fence and mountains prevented defendant's stock from straying out and other stock from coming in. It was held that such fence did not constitute an unlawful inclosure of public lands. *U. S. v. Johnston*, (1908) 172 Fed. 635.

Where defendant constructed a fence, inclosing public lands in violation of this Act, it is no defense that only a part of the fence forming the inclosure belonged to him, if, by joining his fence to the fence constructed by others, he availed himself of the latter to make a complete inclosure. *Thomas v. U. S.*, (1905) 136 Fed. 159, 69 C. C. A. 157.

**By unlawfully inclosing government lands** with his own, one acquires no right to the exclusive possession of such government lands; nor can he, by the inclosure, deprive others from peaceably turning cattle thereon. *Clemmons v. Gillette*, (1905) 33 Mont. 321, 83 Pac. 879; *Hardman v. King*, (1906) 14 Wyo. 503, 85 Pac. 382. See also *Lingle v. Snyder*, (C. C. A. 1908) 160 Fed. 627; *Homer v. U. S.*, (C. C. A. 1911) 185 Fed. 741; *Hanley v. U. S.*, (C. C. A. 1911) 186 Fed. 711.

A person inclosing a section of land of the public domain for the purpose of pasturing his stock thereon has no right to recover damages for the pasturing of the land by another and the consequential injury resulting from his being compelled to allow his stock to run at large on the common range; the title to the land being in the federal government, and it alone having a right to sue for an injury to it. *Clemmons v. Gillette*, (1905) 33 Mont. 321, 83 Pac. 879.

Where cattle were pastured on an inclosed portion of the public domain, in violation of this section, a note given in payment therefor was based on an illegal consideration, and was therefore unenforceable, though purporting to have been for expenses incurred for the service of cowboys in connection therewith. *Tandy v. Elmore-Cooper Live Stock Commission Co.*, (1905) 113 Mo. App. 409, 87 S. W. 614.

**Indictment.**—Where an indictment charged that defendant unlawfully, etc., maintained and controlled an inclosure of the public lands of the United States situated, etc., and that such inclosure consisted of posts and wire fences, it sufficiently alleged that the lands described were surrounded by posts and wire fences, and was not demurrable for failure to charge that the fences were connected with natural barriers, so as to surround the land, etc. *Simpson v. U. S.*, (C. C. A. 1911) 184 Fed. 817. See also *Krause v. U. S.*, (1906) 147 Fed. 442, 78 C. C. A. 642.

**Evidence.**—On the trial of an indictment for inclosing and asserting an exclusive right to public land without claim or color of title, acts, conduct, and statements of defendants

tending to show the assertion of a right to exclude the general public or others from the lands described are competent evidence. *Krause v. U. S.*, (1906) 147 Fed. 442, 78 C. C. A. 642.

On the trial of a defendant charged with maintaining an unlawful inclosure of public lands, a deed from a railroad company to defendant for unsurveyed public lands, described by section and subdivision as though surveyed, is inadmissible to show color of title, since it creates no right to any particular land. *Carroll v. U. S.*, (C. C. A. 1907) 154 Fed. 425.

**Verdict.**—On the trial of an indictment for violation of this section, containing three counts, the first charging the unlawful erection and construction of an inclosure of certain public lands, the second the unlawful maintenance and control of such inclosure, and the third the unlawful prevention and obstruction of free passage over said lands by means of fencing and inclosing the same, a verdict of not guilty on the first and third counts is not inconsistent with one of guilty on the second. *Carroll v. U. S.*, (C. C. A. 1907) 154 Fed. 425.

## Vol. VI, p. 535, sec. 2.

**Suit to abate fences.**—This section applies to the inclosure and appropriation to private use of such lands by fences built on other lands, and the government may main-

tain a suit thereunder to abate such fences. *Cardwell v. U. S.*, (1905) 136 Fed. 593, 69 C. C. A. 367.

## 1909 Supp., p. 541. [*Railroad rights of way, etc.*]

This Act is effective and complete without any judicial or other or further proceedings on the part of the government, and the questions of fact upon which the forfeiture depends may be inquired into and determined

in any judicial proceedings in which rights claimed under the original grants are involved. *Columbia Valley R. Co. v. Portland, etc., R. Co.*, (1908) 48 Wash. 472, 93 Pac. 1067.

# PUBLIC MONEYS.

## Vol. VI, p. 547, sec. 3617.

This section was cited in *U. S. v. Mason*, (1910) 218 U. S. 517, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133, *affirming* 177 Fed. 552.

## Vol. VI, p. 555, sec. 3625.

**The constitutional principles.**—To the same effect as the second paragraph of the original note. *U. S. v. Dillin*, (C. C. A. 1909) 168 Fed. 813.

**Officers whose terms have expired.**—R. S. sec. 3625 *et seq.*, which provide that, whenever an officer who has received public money before it is paid into the Treasury of the United States fails to render his account or pay over the same, as required by law, a distress warrant shall be issued by the Solicitor of the Treasury against the delinquent

officer and his sureties, which shall be levied on his property, and if his goods and chattels shall not be sufficient to satisfy the warrant it may be levied on the person of such officer, who may be committed to prison, cannot be construed to apply only to persons who are officers of the government at the time the warrant is issued, so as to exclude from their operation officers who are found delinquent at the close of their terms of office. *U. S. v. Dillin*, (C. C. A. 1909) 168 Fed. 813.



**Vol. VI, p. 557, sec. 3627.**

**Defendant at large on bail.**—The fact that a person is under indictment for embezzlement of public money as an officer of the United States and has given bail does not exempt him from being imprisoned on a Treasury distress warrant for the collection

of such indebtedness, where he is in the custody of the marshal of the same court, which can order his production for trial on the indictment at any time, and where neither the court nor the prosecuting officer objects. *U. S. v. Dillin*, (C. C. A. 1909) 168 Fed. 813.

**Vol. VI, p. 561, sec. 3639.**

**Liability for money lost in transmission.**—Under this section, which requires all collectors of customs to retain the sums collected till the same are ordered by the proper department or officer transferred or paid out, and then to make the transfer or payment as directed, and the regulations of the Treasury Department, made pursuant thereto, requiring collectors to deposit customs dues collected with the Treasurer or an Assistant Treasurer, using therefor a designated express company and forms of vouchers and

way bills provided by the department, a collector who has followed such directions in making up a package, and in taking the receipt for the same from the express company, cannot be held liable on his bond for the loss of any part of the contents of such package before it reaches the Assistant Treasurer, to whom it is properly addressed. *U. S. v. Brendel*, (C. C. A. 1905) 136 Fed. 737.

This section was cited in *U. S. v. Mason*, (1910) 218 U. S. 517, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133, *affirming* 177 Fed. 552.

**Vol. VI, p. 563, sec. 3646.**

**Amendment.**—This section was amended by Act of Feb. 23, 1909, ch. 174, 35 Stat. L. 643, 1909 Supp. Fed. Stat. Annot. 566.

**Vol. VI, p. 564, sec. 3647.**

**Amendment.**—This section was amended by Act of Feb. 23, 1909, ch. 174, 35 Stat. L. 643, 1909 Supp. Fed. Stat. Annot. 566.

**Vol. VI, p. 571, sec. 3658.**

**The existence of a collector of customs,** under R. S. sec. 2550, 2 Fed. Stat. Annot. 539. for the Georgetown district, which is defined in that section as comprising "all the waters and shores of the Potomac river within the state of Maryland and the District of Columbia, from Pomonkey creek to the head of the navigable waters of that river," precludes the Secretary of the Treasury from appointing,

with a right to compensation, a disbursing agent for the funds appropriated for a post office at Washington, under section 3658, which authorizes such appointments only where there is no collector at the place of location of a public work. *Bartlett v. U. S.*, (1905) 197 U. S. 230, 25 S. Ct. 433, 49 U. S. (L. ed.) 735.

**Vol. VI, p. 573, sec. 5489.**

This section was cited in *U. S. v. Mason*, (1910) 218 U. S. 517, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133, *affirming* 177 Fed. 552.

**Vol. VI, p. 573, sec. 5490.**

This section was cited in *U. S. v. Mason*, (1910) 218 U. S. 517, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133, *affirming* 177 Fed. 552.

**Vol. VI, p. 575, sec. 5493.**

This section was cited in *U. S. v. Mason*, (1910) 218 U. S. 517, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133, *affirming* 177 Fed. 552.

**Vol. VI, p. 576, sec. 5497.**

**Scope of statute.**—This section extends the crime of embezzlement of public money to "every . . . person . . . who uses, transfers, converts, appropriates, or applies any portion of the public money for any purpose

not described by law." *U. S. v. Greene*, (1906) 146 Fed. 778.

This section was cited in *U. S. v. Mason*, (1910) 218 U. S. 517, 31 S. Ct. 28, 54 U. S. (L. ed.) 1133, *affirming* 177 Fed. 552.

## PUBLIC OFFICERS.

### Vol. VI, p. 595, sec. 1765.

Compensation for the services of an inspector of electric light plants in the Treasury Department, rendered in connection with the installation of an electric light plant for the buildings of the Interior Department, at the request of the Secretary of the Interior, and by the direction of the Secretary of the Treasury, is forbidden by this section, although such services were valuable, and were

performed after hours, and in addition to a full discharge of regular duties, since the case is one of the performance of extra services which the law did not specially require, and for which it did not fix the remuneration, and not a case of the filling of two distinct places, offices, or employments. *Woodwell v. U. S.*, (1909) 214 U. S. 82, 29 S. Ct. 577, 53 U. S. (L. ed.) 919.

### Vol. VI, p. 606, sec. 1782.

**Constitutionality.** — The powers of the federal government were not exceeded by the enactment of this section, making it a misdemeanor for a United States senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested. *Burton v. U. S.*, (1906) 202 U. S. 344, 26 S. Ct. 688, 50 U. S. (L. ed.) 1057.

**Authority of the Senate of the United States over its members** is not interfered with by this section. *Burton v. U. S.*, (1906) 202 U. S. 344, 26 S. Ct. 688, 50 U. S. (L. ed.) 1057.

**Interference with discharge of senatorial duties.** — The discharge by a senator of the United States of his legitimate duties is not interfered with by this section, making it a misdemeanor for a United States senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested. *Burton v. U. S.*, (1906) 202 U. S. 344, 26 S. Ct. 688, 50 U. S. (L. ed.) 1057.

**Separate offenses.** — The agreement to receive, and the receipt of, the forbidden compensation, are made two separate and distinct offenses by this section, making it a misdemeanor for a United States senator to receive or agree to receive compensation for services rendered before any department, in relation to any proceeding in which the United States is interested. *Burton v. U. S.*, (1906) 202 U. S. 344, 26 S. Ct. 689, 50 U. S. (L. ed.) 1057.

**Venue of crime.** — The physical absence of an accused from the state of Missouri when the acceptance by a St. Louis corporation of his offer to render services in consideration of the compensation forbidden by this section was despatched by mail or telegram, was held not to deprive the Circuit Court of the United States for the Eastern District of Missouri of jurisdiction of the offense, on the theory that the crime was not committed in that district, within the meaning of U. S.

Const., art. 3, sec. 2, and Sixth Amendment, requiring the trial of all crimes against the United States to be held in the state and district where such crimes shall have been committed. *Burton v. U. S.*, (1906) 202 U. S. 344, 26 S. Ct. 688, 50 U. S. (L. ed.) 1057.

**Sufficient indictment.** — An indictment charged an offense under this section, where it averred that the accused, being a senator, received compensation for services rendered before the Post Office Department for the purpose of indicating a decision favorable to his client in a fraud order inquiry pending before that department. *Burton v. U. S.*, (1905) 196 U. S. 295, 25 S. Ct. 243, 49 U. S. (L. ed.) 482, reversing (1904) 131 Fed. 552.

Where an indictment alleged that the defendant, being then and there a clerk in the employ of the government in the United States Land Office at D., during his continuance in office, did wrongfully and unlawfully agree to receive compensation for services rendered to a public land entryman, etc., it was held to sufficiently allege that accused was an official or clerk of the government. *U. S. v. Long*, (1911) 184 Fed. 184.

Where an indictment against a clerk of a government Land Office for unlawfully agreeing to receive compensation for services rendered to an entryman alleged that the services were rendered in relation to a proceeding and claim in which the United States was a party and interested, before the United States Land Office, to obtain title to certain government land from the government, it sufficiently appeared that the land concerning which the alleged agreement was had was the property of the United States. *U. S. v. Long*, (1911) 184 Fed. 184.

**Joinder of offenses.** — Charges against the same defendant for conspiracy to defraud the United States, based on R. S. sec. 5440, 2 Fed. Stat. Annot. 247, and for receiving money from their alleged coconspirator for aiding to procure a contract from the government, and for services rendered in relation to the same, based on section 1781, 1

Fed. Stat. Annot. 712, and this section, defendants being clerks in a department, and such charges all relating to the same transaction, may properly be joined in different counts in the same indictment under R. S. sec. 1024, 2 Fed. Stat. Annot. 337. *McGregor v. U. S.*, (C. C. A. 1904) 134 Fed. 187.

**Disqualification for holding office.**—Senators of the United States do not hold their places "under the government of the United States," within the meaning of the declaration in this section, that any one convicted under its provisions shall be incapable of holding any office of honor, trust, or profit under that government. *Burton v. U. S.*, (1906) 202 U. S. 344, 26 S. Ct. 689, 50 U. S. (L. ed.) 1057.

**A fraud order inquiry pending before the Post Office Department** is a proceeding in which the United States, although having no direct money or pecuniary interest in the result, is "directly or indirectly interested" within the meaning of this section. *Burton v. U. S.*, (1906) 202 U. S. 344, 26 S. Ct. 689, 50 U. S. (L. ed.) 1057.

**Death of defendant after judgment.**—A judgment entered against a defendant convicted under this section, which provides that any person violating the same shall be deemed guilty of a misdemeanor and shall be imprisoned and fined, is wholly penal, and the death of a defendant after judgment and while the case is pending in an appellate court on writ of error operates to abate the entire cause of action, and the fine is not collectible from the defendant's estate. *U. S. v. Dunne*, (C. C. A. 1909) 173 Fed. 254.

**Former jeopardy.**—An acquittal upon the charge of having received the compensation forbidden by this section from a specific person, described in the indictment as an officer and employee of a corporation, will not sustain a plea in bar of a prosecution upon the charge of having received such compensation from the corporation, where the accused declined to plead further after his demurrer to the answer, alleging that the two offenses are not, in legal effect, identical, was overruled. *Burton v. U. S.*, (1906) 202 U. S. 344, 26 S. Ct. 689, 50 U. S. (L. ed.) 1057.

**Receiver of Land Office.**—This section applies to a receiver of a Land Office in respect to matters before his own office or which may come before it for his action thereon either

judicial, executive, or merely clerical, and without regard to the question whether the service rendered or to be rendered is proper or improper, and a receiver commits an offense under said section by receiving compensation for giving advance information to the person paying the same of the restoration of lands to the public domain through the action of the Land Department, which lands thereby become subject to entry by means of scrip or otherwise in his district. *U. S. v. Booth*, (1906) 148 Fed. 112.

**Clerk in Land Office.**—Since an application to purchase lands from the government under the Timber and Stone Act (Act June 3, 1878, ch. 151, 20 Stat. L. 89, 7 Fed. Stat. Annot. 300) is in effect the inauguration of a proceeding through which land is acquired from the government in which the government is an interested party, it has been held that such act covered an agreement by a clerk in the employ of the government in a local Land Office to receive compensation for services rendered in informing an entryman when certain land belonging to the United States would be open for entry under such act, and in assisting him to obtain title thereto from the United States under such act. *U. S. v. Long*, (1911) 184 Fed. 184.

**A clerk in one of the departments** is subject to indictment under this section as an "officer and clerk of the United States." *McGregor v. U. S.*, (C. C. A. 1904) 134 Fed. 189.

**Evidence of payment.**—An averment in an indictment, charging a United States senator with having received certain checks at St. Louis, Missouri, as compensation for services rendered before the Post Office Department, in violation of this section, and alleging the payment to him of the money thereon at that place, was not supported by evidence that the checks, drawn on a St. Louis trust company, were received by him in the city of Washington, and were by him there indorsed and deposited with a local bank, and were afterwards paid at St. Louis, and that the amount of each check was, immediately upon deposit, credited by the Washington bank to the account of defendant, who had the right to draw against the account without waiting for payment at St. Louis. *Burton v. U. S.*, (1905) 196 U. S. 295, 25 S. Ct. 243, 49 U. S. (L. ed.) 482, reversing (1904) 131 Fed. 552.

## Vol. VI, p. 610, sec. 5481.

**A special agent of the General Land Office**, whether appointed by the Secretary of the Interior or by the Commissioner of the General Land Office, is not an officer of the United States within the meaning of R. S. sec. 5481, providing for the punishment of

"every officer of the United States who is guilty of extortion under color of his office," and is not subject to indictment and prosecution under said section. *U. S. v. Schlierholz*, (1904) 133 Fed. 333; *U. S. v. Schlierholz*, (1905) 137 Fed. 616.

## Vol. VI, p. 611, sec. 5498.

**Minister to foreign country.**—Under this section a person who has entered into a contract with another to assist him in prosecuting the claims of a city against the gov-

ernment, but who shortly afterwards accepts the post of minister to a foreign country, and holds such post during the prosecution of the claim, cannot recover any fee for

the prosecution of the claim. He can, however, upon payment of the claims, recover from his associate any attorney fees and costs advanced for his benefit, though he

cannot recover any fee for services. *Fox v. Willis*, (1903) 114 Ky. 940, 72 S. W. 330, 73 S. W. 743.

### Vol. VI, p. 614. [*Suits against public officers, etc.*]

The successor in office of a judge of a territorial court may be substituted in the place of his predecessor on appeal from a final judgment denying mandamus to compel the latter to take jurisdiction of an action attempted to be brought in his court, since the case may properly be considered one in which there is a necessity for such

action in order to obtain a settlement of the question involved, within the meaning of this act, authorizing substitution in actions brought by or against federal public officers in their official capacity, or in relation to the discharge of their official duties. *Caledonian Coal Co. v. Baker*, (1905) 196 U. S. 432, 25 S. Ct. 375, 49 U. S. (L. ed.) 540.

## PUBLIC PRINTING.

### Vol. VI, p. 644, sec. 4.

Contracts for purchase of paper for postal cards.—The Public Printer cannot lawfully enter into a contract for the purchase of all

the paper required in the printing of postal cards for a period of four years. (1909) 27 Op. Atty.-Gen. 584.

### Vol. VI, p. 658, sec. 89.

Special reports of department chiefs.—This section authorizes the printing of 2,500 copies of special as well as annual reports

of department bureau chiefs, when such printing is directed by the head of a department. (1905) 25 Op. Atty.-Gen. 377.

### 1909 Supp., p. 572. [*Public printing and binding, etc.*]

The phrase "document or reports," as used in this resolution, prescribing the appropriation or allotment out of which the cost of printing and binding of documents or reports emanating from the executive departments, bureaus, and independent offices of the government shall be paid, is restricted to "executive documents and reports," and does not embrace the printed laws authorized by section 56 of the Act of Jan. 12, 1895, 6 Fed. Stat. Annot. 159. (1908) 26 Op. Atty.-Gen. 514.

The Official Register of the United States, being a public document emanating from the Census Office, all expense incurred in its ac-

tual preparation for printing, apart from the creation of the manuscript, is chargeable under this joint resolution to the appropriation or allotment of appropriation for printing and binding for the Census Office; and the balance of the cost thereof, which include the cost of binding and any charge which may be incurred in the creation of the manuscript, should be charged to the Congressional allotment and the appropriate executive allotment in proportion to the number of copies delivered to Congress and to each department. (1908) 26 Op. Atty.-Gen. 552.

### 1909 Supp., p. 574, sec. 2, par. 7.

Statutes, resolutions, or treaties.—The language of this paragraph prescribing the appropriation or allotment out of which the cost of printing any document or report thereafter printed by order of Congress shall

be paid, when read in connection with section 56 of the Act of Jan. 12, 1895, 6 Fed. Stat. Annot. 158, does not refer to statutes, resolutions, or treaties. (1908) 26 Op. Atty.-Gen. 514.

# PUBLIC PROPERTY, BUILDINGS, AND GROUNDS.

## Vol. VI, p. 700, sec. 1. [*Condemnation for building sites, etc.*]

**Authorization of officer necessary.**—This act providing for proceedings for the condemnation of land for public use by the United States confers no general authority to acquire land, but only authority to institute proceedings for condemnation where its acquirement is otherwise authorized. *U. S. v. Certain Lands in Narragansett*, (1906) 145 Fed. 654.

**Nature of proceeding.**—A proceeding by the United States for the condemnation of land for public use, and for the assessment and payment of damages therefor, is not a proceeding to collect an account or claim against the United States, but an adversary proceeding instituted by the United States against landowners for the taking thereof. *U. S. v. Sargent*, (C. C. A. 1908) 162 Fed. 81.

## Vol. VI, p. 705, sec. 2.

**Interest.**—This act authorizes condemnation of land for public use by the United States, and declares that the practice, pleadings, forms, and modes of proceeding shall conform to the practice, pleadings, forms, and proceedings existing in courts of record in like cases in the state. *Rev. Laws Minn. 1905*, sec. 2534, declares that on payment of damages, with costs and interest, if any, in condemnation proceedings, the petitioner may take possession, etc., and section 2535 declares that all such damages, whether as-

sessed by commissioners or on appeal, shall bear interest from the time of filing the commissioners' report. It was held that an order in proceedings in the United States District Court for the District of Minnesota, confirming a report of commissioners in condemnation proceedings by the United States, properly awarded interest on the damages assessed for the land taken from the date of the commissioners' report. *U. S. v. Sargent*, (C. C. A. 1908) 162 Fed. 81.

## Vol. VI, p. 711, sec. 3748.

**Title to military clothing.**—Under this section prohibiting the purchase, sale, pledge, loan or gift by a soldier of any of his clothing, arms, military outfit, and accouterments, the government in supplying the soldier or recruit with equipments suitable and necessary for the discharge of his military duties retains title to the same; it being regarded as public property, whether remaining in a public depot or in the possession of the individual soldier, and this notwithstanding

the soldier is allowed to retain such articles of clothing as he has then in use on the expiration of his term of service. *U. S. v. Hart*, 146 Fed. 202; *Lobosco v. U. S.*, (C. C. A. 1911) 183 Fed. 742.

This section as amended and enlarged is now contained in section 35 of the Penal Code, 1909 Supp. Fed. Stat. Annot. 414.

**Other related sections.**—See also under *R. S.* secs. 1242 and 5438, 7 Fed. Stat. Annot. 1017, and 2 Fed. Stat. Annot. 31.

## Vol. VI, p. 714, sec. 3753.

**Nature of stipulation.**—A stipulation executed by the United States district attorney on behalf of the government, conformably to *R. S.* secs. 3753, 3754, with a view to obtaining possession of vessels building for the United States, which were in the hands of a receiver appointed in proceedings under a state supply lien law, was held not to deprive the United States of any right which it had to assert claims to priority under the building contracts or rights existing by reason of the sovereignty of the United States, since the evident purpose of these sections is that neither the United States nor the claimants to the property shall lose any rights

because of the release under the stipulation, but the rights of the parties shall continue to be such as they were before the change of possession. *U. S. v. Ansonia Brass, etc., Co.*, (1910) 218 U. S. 452, 31 S. Ct. 49, 54 U. S. (L. ed.) 1107.

**Interest on claims.**—Under this and the following section a stipulation declaring that its object was to secure to all the claimants the fullest possible protection and security did not entitle the claimants to receive interest upon the proceeds of the property in the hands of the United States. *William R. Trigg Co. v. Bucyrus Co.*, (1905) 104 Va. 79, 51 S. E. 174.

# RAILROADS.

## Vol. VI, p. 728, sec. 9, note.

**Rights against pre-emption claimants.** — The Union Pacific Railroad Company, Eastern Division, had a right to extend its road west of the 100th meridian *via* Denver to a connection with the main line of the Union Pacific Railroad under this section, and a right of way 400 feet in width through the public lands for the road as so extended was given the company by that provision. It has

been held that this right of way was effective as against a complainant, who initiated a pre-emption claim to certain land on June 16, 1866, by settling thereon from the date of the grant, July 2, 1864; the land being then a part of the public domain. *Stuart v. Union Pac. R. Co.*, (C. C. A. 1910) 178 Fed. 753.

## Vol. VI, p. 733, sec. 5258.

**Attachment of railway cars.** — Cars owned by a foreign railway company, which have temporarily come into the state in the course of interstate transportation, through the agency of other carriers, are subject to attachment under the state laws, despite the provisions of the Interstate Commerce Act and of this section, securing continuity of transportation. *Davis v. Cleveland, etc., R. Co.*, (1910) 217 U. S. 157, 30 S. Ct. 463, 54 U. S. (L. ed.) 708. See also *Southern Flour, etc., Co. v. Northern Pac. R. Co.*, (1906) 127 Ga. 626, 56 S. E. 742; *De Rochemont v. New*

*York Cent., etc., R. Co.*, (1909) 75 N. H. 158, 71 Atl. 868.

**Garnishment of freight of nonresident carrier.** — Sums due to a foreign railway carrier from other carriers as the former's share of freight on interstate shipments may be garnished under the state laws, despite the provisions of the Interstate Commerce Act and of this section, securing continuity of transportation. *Davis v. Cleveland, etc., R. Co.*, (1910) 217 U. S. 157, 30 S. Ct. 463, 54 U. S. (L. ed.) 708.

## Vol. VI, p. 752, sec. 1. [Act of March 2, 1903.]

**Amendment.** — This section was amended by Act of March 2, 1903, ch. 976, 32 Stat. L. 943, 10 Fed. Stat. Annot. 375.

**Constitutional.** — The Federal Safety Appliance Act governing railways is constitutional. *Chicago, etc., R. Co. v. Brown*, (C. C. A. 1911) 185 Fed. 80.

**Construction.** — The Safety Appliance Act is remedial in its character, enacted for the better protection of railroad employees and travelers by rail, and it should be construed by the courts, as far as its terms will admit, so as to carry out fully the intention of Congress. *U. S. v. Central of Georgia R. Co.*, (1907) 157 Fed. 893; *U. S. v. Southern R. Co.*, (1909) 170 Fed. 1014; *U. S. v. Chicago, etc., R. Co.*, (1908) 173 Fed. 684; *Southern R. Co. v. Snyder*, (C. C. A. 1911) 187 Fed. 492.

The doctrine that statutes in derogation of the common law are to be construed strictly does not demand that the act compelling interstate carriers to adopt automatic couplers, in which there is an undoubted intention to make some change in the existing law, should be so construed as to defeat the obvious object of Congress. *Johnson v. Southern Pac. Co.*, (1904) 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363, (1902) 117 Fed. 462, 54 C. C. A. 508. Compare *U. S. v. Illinois Cent. R. Co.*, (1907) 156 Fed. 182, in which it was held that this Act is a crim-

inal statute creating public offenses, and is to be construed in accordance with the rules governing the construction of such statutes, and that trials thereunder are governed by the rules of criminal procedure and evidence.

The undoubted purpose of Congress in enacting the safety appliance laws was humanitarian, and such statute should not be frittered away by judicial construction. *U. S. v. Chicago, etc., R. Co.*, (1906) 149 Fed. 486; *Wabash R. Co. v. U. S.*, (1909) 168 Fed. 1, 93 C. C. A. 393.

**Intent.** — The purposes of the Safety Appliance Acts fall within the rule applicable to statutes to prevent fraud upon the revenue and for the collection of customs, where intent does inhere in their violation. *U. S. v. Great Northern R. Co.*, (1906) 150 Fed. 220.

**Duty absolute.** — A carrier using, in moving interstate traffic, cars whose condition does not satisfy the requirements of the Safety Appliance Acts cannot escape the penalty therein prescribed by showing that it exercised reasonable care in equipping its cars with the required safety appliances, and used due diligence to keep them in repair by the usual inspection, but the statutes impose an absolute duty upon the carrier which is not discharged by the exercise of reasonable care or diligence. *Chicago, etc., R. Co. v. U. S.*, (1911) 220 U. S. 559, 31 S. Ct. 612, 55 U. S. (L. ed.) 582, affirming (1909) 170 Fed.

556, 95 C. C. A. 642; *Delk v. St. Louis, etc., R. Co.*, (1911) 220 U. S. 580, 31 S. Ct. 617, 55 U. S. (L. ed.) 590, *reversing* (1908) 158 Fed. 931, 14 Ann. Cas. 233, 86 C. C. A. 95; *U. S. v. Southern R. Co.*, (1905) 135 Fed. 122; *U. S. v. Chicago, etc., R. Co.*, (1907) 156 Fed. 180; *U. S. v. Philadelphia, etc., R. Co.*, (1908) 160 Fed. 696; *U. S. v. Philadelphia, etc., R. Co.*, (1908) 162 Fed. 403; *U. S. v. Philadelphia, etc., R. Co.*, (1908) 162 Fed. 405; *U. S. v. Lehigh Valley R. Co.*, (1908) 162 Fed. 410; *U. S. v. Chicago G. W. R. Co.*, (1908) 162 Fed. 775; *U. S. v. Atchison, etc., R. Co.*, (C. C. A. 1908) 163 Fed. 517; *Chicago, etc., R. Co. v. U. S.*, (1908) 165 Fed. 423, 91 C. C. A. 373; *U. S. v. Wheeling, etc., R. Co.*, (1908) 167 Fed. 198; *Atlantic Coast Line R. Co. v. U. S.*, (1909) 168 Fed. 175, 94 C. C. A. 35; *U. S. v. Southern Pac. Co.*, (C. C. A. 1909) 169 Fed. 407; *U. S. v. Baltimore, etc., R. Co.*, (1909) 170 Fed. 456; *U. S. v. Southern R. Co.*, (1909) 170 Fed. 1014; *Atchison, etc., R. Co. v. U. S.*, (C. C. A. 1909) 172 Fed. 1021; *Norfolk, etc., R. Co. v. U. S.*, (C. C. A. 1910) 177 Fed. 623; *Johnson v. Great Northern R. Co.*, (C. C. A. 1910) 178 Fed. 643; *Brinkmeier v. Missouri Pac. R. Co.*, (1909) 81 Kan. 101, 105 Pac. 221, *overruling* first paragraph of the syllabus of *Missouri Pac. R. Co. v. Brinkmeier*, (1908) 77 Kan. 14, 93 Pac. 621.

In *St. Louis, etc., R. Co. v. Taylor*, (1908) 210 U. S. 281, 28 S. Ct. 616, 52 U. S. (L. ed.) 1061, the leading case on this question, which arose under section 5 of this Act, Mr. Justice Moody, in the course of the opinion, said: "We need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery, and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wis-

dom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the attention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe drawbar there must be hardship. Such an injury must be an irreparable misfortune to someone. If it must be borne entirely by him who suffers it, that is a hardship to him. If its burden is transferred, as far as it is capable of transfer, to the employer, it is a hardship to him. It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are, in the main, helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words."

**Intrastate railroads.**—A railroad company which hauls over its line within a state a car of another company employed in moving interstate traffic consigned to a point in another state, which car is not equipped with the appliances required by Safety Appliance Act, is liable for the penalty imposed by said Act. *U. S. v. Chicago, etc., R. Co.*, (1906) 143 Fed. 353.

**"Equipped."**—This Act while in terms it requires only that engines and cars shall be "equipped" with the required appliances, must be construed to mean equipment which, if there, is capable of being operated, and that it shall be kept in good order and repair; but it cannot be construed to require that the equipment shall in fact be efficiently operated by those in charge of the train. *U. S. v. Illinois Cent. R. Co.*, (1907) 156 Fed. 182.

A train, within the Safety Appliance Act, is one aggregation of cars drawn by the same engine, but if the engine is changed then there is a different train. *U. S. v. Boston, etc., R. Co.*, (1909) 168 Fed. 148.

**Stockyards company conducting part of transportation by railroad for carriers.**—A stockyards company which owns and maintains at a large shipping point an extensive stockyard which is in effect the live stock depot of all the railroad companies doing busi-

ness at that point, and which owns and maintains several miles of railroad tracks extending over its own premises from its stockyards to a transfer track (also on its own premises) connecting with the several tracks of the railroad companies, and which by means of its own locomotives and servants transports for hire over its tracks all shipments of live stock accepted by the railroad companies for carriage to and from such stockyards, including such shipments as are interstate, is a common carrier engaged in interstate commerce by railroad within the meaning of the safety appliance law, although the cars in which it transports such shipments are in every instance the cars of the railroad company from which the shipment is received or to which it is delivered at the transfer track, and although the stockyards company does not collect the compensation for its service directly from the shippers or consignees, but only from the railroad companies delivering the loaded cars to it, or receiving them from it, and the transfer track, and although its service is performed and its compensation is paid in accordance with a contract between it and the railroad companies. *Union Stockyards Co. v. U. S.*, (C. C. A. 1909) 169 Fed. 404.

**Terminal company.**—A terminal company which received cars of coal coming from another state, and delivered them within its yards to the engines of a railroad company, was engaged in moving interstate commerce, within this Act. *U. S. v. Northern Pac. Terminal Co.*, (1906) 144 Fed. 861.

In *Belt R. Co. v. U. S.*, (C. C. A. 1909) 168 Fed. 543, it appeared that the defendant owned a railroad located wholly in Cook county, Ill. Its road constituted a belt which intersected the trunk lines leading into Chicago and forming, by means of V's, direct physical connection with such trunk lines. The defendant's business consisted entirely of transporting cars between industries located along its line and trunk lines and between such trunk lines, for which it received an arbitrary charge per car, which was collected monthly from the railroad companies, defendant having no dealings with shippers. The defendant paid no attention to the class

of traffic, but acted as an agent of the trunk lines in transferring cars. The defendant on the occasion in question moved a train of freight cars, containing one consigned from a point in Illinois and destined to Wisconsin, from the tracks of the Chicago & Eastern Illinois railroad to those of the Chicago & Northwestern railroad. It was held that such transfer constituted in effect a continuous carriage over both such roads, so that the defendant with respect thereto was engaged in interstate commerce, and was within the Safety Appliance Acts in relation to power brakes.

**Modification by court.**—Even admitting that the requirements of the Safety Appliance Act are unduly severe and unreasonable, that fact would not justify a modification of the statute by judicial decision. The courts do not possess the power to read an exception into a statute so as to modify or change the nature of the same and thus defeat the purpose for which the law was intended. *Atlantic Coast Line R. Co. v. U. S.*, (1909) 168 Fed. 175, 94 C. C. A. 35.

**Negligence per se.**—The fact that an automatic coupler would not couple automatically with one of its kind, and therefore did not comply with the Safety Appliance Act, did not render the use of such a coupler negligence *per se*, in the absence of proof that it was not reasonably safe for the uses to which it was put. *Shohoney v. Quincy, etc., R. Co.*, (1909) 223 Mo. 649, 122 S. W. 1025.

**Defect discovered by proper inspection.**—A railroad company negligently fails to furnish an automatic coupler for the safety of its servants in coupling and uncoupling cars, as required by Act, where the coupler furnished is broken so that it will not work, and the defect was discoverable by proper inspection, and the company did not use ordinary and reasonable care by proper inspection to discover the defect, or to repair it after discovery. *St. Louis, etc., R. Co. v. York*, (1909) 92 Ark. 554, 123 S. W. 376.

**Relation to Interstate Commerce Act.**—See under this title, vol. 10, p. 375, sec. 1.

For other notes, see under this title, vol. 10, p. 375, sec. 1 *et seq.*

## Vol. VI, p. 753, sec. 2.

**What cars included.**—If a railroad company hauls a car which is defective as to coupling appliances or grabirons or handholds, although the defective car does not contain any interstate traffic, yet if it is hauled in a train which contains another car that is loaded with interstate traffic, then the statute is violated. *U. S. v. Baltimore, etc., R. Co.*, (1909) 170 Fed. 456.

**Intrastate transportation.**—A car loaded with coal, to be delivered to a consignee in another state, is "used in moving interstate traffic," within the meaning of section 2, by the railroad company which takes it from the place of loading, although such company only undertakes to deliver it to a connecting carrier within the same state. *U. S. v. Southern R. Co.*, (1905) 135 Fed. 122.

**Cars on side track.**—A freight car loaded with interstate freight, and placed on a side track in the railway yard at destination, to await simple repairs to the automatic coupler, is used in moving interstate commerce within the meaning of the Safety Appliance Act, when a coupling with another car is thereafter attempted by the carrier's order, during the course of switching operations. *Delk v. St. Louis, etc., R. Co.*, (1911) 220 U. S. 580, 31 S. Ct. 617, 55 U. S. (L. ed.) 590, *reversing* (1908) 158 Fed. 931, 14 Ann. Cas. 233, 86 C. C. A. 95.

A foreign freight car, moved by one railroad company from one state into another, loaded, and there delivered to the defendant company, and by the defendant to the consignee, and after being unloaded placed by



the defendant on a switch track, from which it was afterwards redelivered to the original company, again loaded by it, and returned into the state whence it came, was, when on defendant's switch track awaiting redelivery, a car in use in interstate commerce, and subject to the requirement of the Safety Appliance Act, as to equipment with automatic coupling devices in such condition as to be operative, and its movement on such track by defendant, when so defective that it would not couple by impact, was a violation of such Act. *Johnson v. Great Northern R. Co.*, (C. C. A. 1910) 178 Fed. 643.

**Coupling and uncoupling included.**—To the same effect as the original note, *Johnson v. Southern Pac. Co.*, (1904) 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363, *reversing* (1902) 117 Fed. 462, 54 C. C. A. 508; *U. S. v. Chicago, etc., R. Co.*, (1906) 149 Fed. 486; *U. S. v. Louisville, etc., R. Co.*, (1908) 162 Fed. 185, *affirmed* (C. C. A. 1909) 174 Fed. 1021; *Southern R. Co. v. Simmons*, (1906) 105 Va. 651, 55 S. E. 459.

**Automatic coupling by impact necessary.**—Of similar effect to the original note, *U. S. v. Southern R. Co.*, (1905) 135 Fed. 122; *U. S. v. Great Northern R. Co.*, (1906) 150 Fed. 229; *U. S. v. Atchison, etc., R. Co.*, (1908) 167 Fed. 696; *Norfolk, etc., R. Co. v. U. S.*, (C. C. A. 1910) 177 Fed. 623.

**Duty to keep in repair.**—Where an interstate carrier has equipped its cars, engines, etc., engaged in interstate commerce with automatic couplers, so that they can be coupled and uncoupled without men going between the ends of the cars, the carrier is then only required to use the utmost diligence in discovering and correcting defects in such equipment which may thereafter develop in the use thereof, and is not liable for violation of the Act because of the mere transportation of a car containing a defective coupler, under the maxim that the law does not require an impossibility. *U. S. v. Illinois Cent. R. Co.*, (1909) 170 Fed. 542, 95 C. C. A. 628.

**Car becoming defective in transit.**—A railroad company is not guilty of a violation of the provisions of Safety Appliance Act by using on its line in moving interstate traffic an engine or car not equipped as therein required, if it was properly so equipped at the beginning of its interstate journey, but became defective during such journey, unless such company failed to supply the deficiency at the first opportunity after it was actually discovered, or should have been discovered by the use of the utmost care that a highly prudent man would use under the circumstances of the case. *U. S. v. Illinois Cent. R. Co.*, (1907) 156 Fed. 182; *U. S. v. Illinois Cent. R. Co.*, (1909) 170 Fed. 542, 95 C. C. A. 628.

Carriers are required immediately to repair defects in cars caused during the time they are being hauled, if they can do so with the means and appliances at hand at the time and place, or when such condition should have been discovered by the exercise of reasonable care. If requisite means are not at hand, carriers have the right without incurring the penalty of the law, to haul the defective car to the nearest repair point on

their line. But, if they haul such car from a repair point, they are liable for the statutory penalty. *U. S. v. Atchison, etc., R. Co.*, (1908) 167 Fed. 696.

**Duty to maintain repair points.**—It is the duty of the carrier to establish reasonable repair points along its line for the making of repairs of the kind necessary to comply with the law. At such repair points there should be the material and facilities to make all such repairs. *U. S. v. Atchison, etc., R. Co.*, (1908) 167 Fed. 696.

**Appliance out of repair.**—A common carrier cannot excuse itself from compliance with the statutory requirements by showing that a particular equipment is out of repair; for to permit it to do so would enable it to require brakemen to enter between cars for the purpose of coupling and uncoupling them, thereby defeating the purpose of the law altogether. Employees can only be protected from danger by the safety appliances being kept in repair. *U. S. v. Great Northern R. Co.*, (1906) 150 Fed. 229.

**Movement of car for repair.**—The necessary movement of a defective car alone for the purpose of repair does not subject the carrier to the penalties of the Act. *Chicago, etc., R. Co. v. U. S.*, (1909) 168 Fed. 236, 93 C. C. A. 450; *U. S. v. Rio Grande Western R. Co.*, (1909) 174 Fed. 399, 98 C. C. A. 293.

While a railroad may move empty cars by themselves to repair shops for the purpose of having them placed in condition to comply with the Safety Appliance Acts without being guilty of a violation of those Acts, yet in so moving them for the purpose of repair, in order not to be subject to the Acts, they must be wholly excluded from commercial use themselves, and from connection with other vehicles which are commercially employed. *Southern R. Co. v. Snyder*, (C. C. A. 1911) 187 Fed. 492. See also *U. S. v. Southern Pac. Co.*, (C. C. A. 1909) 169 Fed. 407.

But where an interstate carrier hauls cars considerably damaged by derailment, so that the coupling devices are gone, 379 miles, past three or more places where repairing is done, in order to make the repairs at larger and better equipped shops, it violates the safety appliance law. *U. S. v. Chicago, etc., R. Co.*, (1906) 149 Fed. 486.

Where a car having a broken coupler could reasonably have been repaired where it stood on a switch track, the mere fact that it could be repaired more conveniently at another place was held not to justify its being moved in its defective condition. *Chicago Junction R. Co. v. King*, (1909) 169 Fed. 372, 94 C. C. A. 652.

**Moving car for unloading preparatory to sending to repair shop.**—In *U. S. v. Louisville, etc., R. Co.*, (1907) 156 Fed. 194, *affirmed* (C. C. A. 1909) 167 Fed. 306, a car of defendant railroad company was found in its yards in Louisville loaded with pig iron which had been shipped from another state and with the chain forming a part of the coupler on one end broken, rendering the device inoperative. The defect was discovered by defendant, but could not be repaired where the car was without blocking the entire busi-

ness of the yards, and the place of business of the consignee of the iron was only four blocks distant and nearer than the repair track, and defendant therefore took the car to the consignee, where it was unloaded and from there to the repair track, where it was repaired. It did not appear what company had brought the car to the yards. It was held that defendant took the most practicable course after discovering the defect and was not guilty of a violation of Safety Appliance Act.

**Empty cars.**—An empty car hauled in a train with others cars carrying interstate commerce must be equipped with appliances required by law, and such appliances kept in repair to the same extent as those of a loaded car. *U. S. v. St. Louis, etc., R. Co.*, (1906) 154 Fed. 516; *U. S. v. Louisville, etc., R. Co.*, (1908) 162 Fed. 185, *affirmed* (C. C. A. 1909) 174 Fed. 1021; *U. S. v. Wheeling, etc., R. Co.*, (1908) 167 Fed. 198; *U. S. v. Southern R. Co.*, (1909) 170 Fed. 1014. *Compare U. S. v. Illinois Cent. R. Co.*, (1907) 156 Fed. 182.

A car with a defective coupler which, although empty, was brought into a station in an interstate train, left in the switch yards over night, and the next day taken out in another interstate train, was being used in interstate commerce within the meaning of the Safety Appliance Act, not only while being moved in the trains, but also while in the yards. *Erie R. Co. v. Russell*, (C. C. A. 1910) 183 Fed. 722.

A car which had been actually engaged in moving interstate traffic, and which was held in the railroad yards to be sent on an interstate trip whenever required, and had not been segregated from the class of cars used in such traffic, was, though unloaded, being so used when a servant was injured, within the meaning of this Act. *Felt v. Denver, etc., R. Co.*, (1910) 48 Colo. 249, 110 Pac. 216.

**Train being made up.**—This Act applies not only in cases where the cars are, at the very moment of the injury, being actually used in moving interstate traffic, but to cases where the injury occurs in the making up of the train for the purpose of moving interstate traffic. *Mobile, etc., R. Co. v. Bromberg*, (1904) 141 Ala. 258, 37 So. 395.

**Necessity for getting in dangerous position to prepare coupler or to uncouple.**—If the coupling and uncoupling apparatus on a car is so constructed that in order to open the knuckle when preparing the coupler for use, or in uncoupling the car, it is reasonably necessary for a man to place part of his body, his arm, or his leg in a hazardous or dangerous position, such car is not equipped as required by this section. *U. S. v. Nevada County Narrow Gauge R. Co.*, (1908) 167 Fed. 695.

**"Hauling"** a defective car is not necessary to complete the offense against this Act, as both "hauling" and "using" are forbidden, and it seems that such a car may be "used," within the statutory meaning, otherwise than by being "hauling." *U. S. v. St. Louis Southwestern R. Co.*, (1910) 184 Fed. 23, 106 C. C. A. 230.

Locomotives are embraced by the words "any car" in this section, prohibiting common carriers from using any car in moving interstate commerce not equipped with automatic couplers, although locomotives are elsewhere in the statute in terms required to be equipped with power driving wheel brakes. *Johnson v. Southern Pac. Co.*, (1904) 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363, *reversing* (1902) 117 Fed. 462, 54 C. C. A. 508.

**A dining car in constant use** is, while waiting for the train to be made up for its next interstate trip, "used in moving interstate traffic" within the meaning of this section. *Johnson v. Southern Pac. Co.*, (1904) 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363, *reversing* (1902) 117 Fed. 462, 54 C. C. A. 508.

The mere fact that a railroad has frequently hauled interstate traffic is not sufficient in a personal injury action to hold the road amenable to the federal Safety Appliance Act, requiring cars employed in interstate traffic to be equipped with automatic couplers. *Felt v. Denver, etc., R. Co.*, (1910) 48 Colo. 249, 110 Pac. 213.

**Uncoupling levers.**—The use by a railroad company of a switch engine having no "uncoupling levers" does not subject it to the penalty imposed by this Act for using a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars," in the absence of proof that such levers are necessary to enable such engine to couple to cars by impact, and especially where it is shown that it can be uncoupled without the necessity of going between it and the car to which it is coupled. *U. S. v. Montpelier, etc., R. Co.*, (1910) 175 Fed. 874.

**Both ends of cars.**—The Safety Appliance Act requires that each car taken separately shall be completely equipped, and that the couplers at both ends shall be in good order and in operative condition. *U. S. v. Central of Georgia R. Co.*, (1907) 157 Fed. 893; *U. S. v. Philadelphia, etc., R. Co.*, (1908) 160 Fed. 696; *U. S. v. Atchison, etc., R. Co.*, (1908) 167 Fed. 696; *U. S. v. Baltimore, etc., R. Co.*, (1909) 170 Fed. 456.

**Car loaded in manner to prevent use of coupling lever.**—A car duly equipped with automatic coupling and uncoupling apparatus, but which apparatus is rendered wholly inoperative because the car is loaded with lumber projecting over the coupling lever, so as to prevent its operation in the movement of interstate traffic, cannot be held to be a car equipped in compliance with the Safety Appliance Act. *U. S. v. Illinois Cent. R. Co.*, (C. C. A. 1910) 177 Fed. 801.

**Each coupler operative by own mechanism.**—The federal Safety Appliance Act requires that each coupler must be operative of its own mechanism, irrespective of the condition of the appliances on other adjacent cars. *U. S. v. Southern R. Co.*, (1909) 170 Fed. 1014.

**Delegation of duty by company.**—The duty of seeing that no cars used in interstate commerce are hauled by a railroad company unless equipped with the required safety appliances is imposed by the statute on the com-

pany, and cannot be evaded by delegating the same to the conductor of a train or other employee whose action in that respect is that of the company. *Chicago Junction R. Co. v. King*, (1909) 169 Fed. 372, 94 C. C. A. 652.

**Bad-order card on car.**—A railroad company which moved, in the carriage of interstate commerce, a car the automatic coupler on which was so out of repair that it would not work, is not relieved from liability for violation of this Act by the fact that it placed a bad-order card on such car, indicating the defect. *U. S. v. Southern R. Co.*, (1905) 135 Fed. 122; *U. S. v. Chicago, etc., R. Co.*, (1908) 173 Fed. 684.

The word "used," in this Act requiring common carriers to equip any car used in moving interstate traffic with automatic couplers, applies to all cars and trains operated by a railroad carrier of interstate commerce over an interstate highway, irrespective of whether they are operated between points situated in the same state, or whether they are empty, or whether the traffic carried is interstate traffic. *Wabash R. Co. v. U. S.*, (1909) 168 Fed. 1, 93 C. C. A. 393.

**Duty to keep car equipped.**—The duty imposed on interstate carriers by Act prohib-

iting any such carrier to haul or permit to be hauled or used on its line in interstate traffic any car not equipped with automatic couplers, requires the carrier, not only once to equip a car used in interstate traffic with such coupler, but to keep it so equipped. *U. S. v. Erie R. Co.*, (1909) 166 Fed. 352.

**Couplers of different makes.**—The equipment of a locomotive and a dining car with automatic couplers, but of such different type as not to couple with each other automatically, does not satisfy the provision of this section prohibiting common carriers from using any car in moving interstate commerce not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. *Johnson v. Southern Pac. Co.*, (1904) 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363, *reversing* (1902) 117 Fed. 462, 54 C. C. A. 508.

A shovel car is a "car" within the meaning of this Act. *Schlemmer v. Buffalo, etc., R. Co.*, (1907) 205 U. S. 1, 27 S. Ct. 407, 51 U. S. (L. ed.) 681.

**Duty absolute.**—See under this title, vol. 6, p. 752, sec. 1.

## Vol. VI, p. 755, sec. 4.

**Passenger cars.**—The requirement of this section, as amended by Act March 2, 1903, ch. 976, sec. 1, 32 Stat. L. 943, 10 Fed. Stat. Annot. 375, that it shall be unlawful for any railroad company to use "any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car, for greater security to men in coupling and uncoupling cars," applies to passenger cars, and a failure to comply therewith is not excused by the fact that cars are equipped with air hose, steam hose, or other appliances affording some measure of protection to employees. *U. S. v. Norfolk, etc., R. Co.*, (1910) 184 Fed. 99. See also *Norfolk, etc., R. Co. v. U. S.*, (C. C. A. 1910) 177 Fed. 623.

**Car being moved from one railroad yard to another.**—A car employed in moving interstate traffic and not equipped with a grabiron required by this section was received from another company by the defendant railroad company and hauled from one of its yards to another for the purpose of being put in a train and forwarded to its destination in another state. It was held that in such movement the car was being used in interstate commerce within the meaning of this Act, and that the defendant was liable for the penalty imposed thereby for its violation. *U. S. v. Pittsburgh, etc., R. Co.*, (1905) 143 Fed. 360.

**Handholds on rear of yard engine.**—While this section is indefinite as to the number of handholds and as to the intended location

thereof on the ends and sides of cars, it is not indefinite so far as it requires handholds to be provided both in the ends and sides of cars, and a yard engine used in interstate commerce is not equipped as required where no handholds are provided in the sides near the rear end of the tender though the tender is equipped with a running board and an uncoupling lever bar which runs nearly across the entire back of the tender, and is so located and of such a character that it might serve as a handhold; it not appearing that the presence of a handhold as required would not tend to greater security. *U. S. v. Baltimore, etc., R. Co.*, (1910) 184 Fed. 94. *Compare U. S. v. Boston, etc., R. Co.*, (1909) 168 Fed. 148.

**Burden of proof.**—Unless the government satisfies a jury by a preponderance of the evidence that there was no grabiron or handhold on the car where there should have been one, the jury should find for the railroad company. *U. S. v. Boston, etc., R. Co.*, (1909) 168 Fed. 148.

**Coupling and uncoupling cars.**—A man in connecting or disconnecting the air hose between the cars is engaged in coupling or uncoupling cars within the meaning of this section, if it is necessary for him to connect or disconnect that hose in order to connect or disconnect the cars. *U. S. v. Boston, etc., R. Co.*, (1909) 168 Fed. 148.

**Duty absolute.**—See under this title, vol. 6, p. 752, sec. 1.

## Vol. VI, p. 755, sec. 5.

**Delegation of legislative power.**—Legislative power is not unconstitutionally delegated to the American Railway Association and the

Interstate Commerce Commission by the provisions of this section that, after a date named, only cars with drawbars of uniform

height shall be used in interstate commerce, and that the standard shall be fixed by the association and declared by the commission. *St. Louis, etc., R. Co. v. Taylor*, (1908) 210 U. S. 281, 28 S. Ct. 616, 52 U. S. (L. ed.) 1061.

**Drawbars of uniform height.**—Drawbars of unloaded freight cars are required, by this section, to be of uniform and standard height; but those of loaded cars need not be of uniform height, provided that they do not vary more than the three inches prescribed as the maximum permitted variation from the standard. *St. Louis, etc., R. Co. v. Taylor*, (1908) 210 U. S. 281, 28 S. Ct. 616, 52 U. S. (L. ed.) 1061.

**Necessary showing by plaintiff.**—Failure of the plaintiff to show that the centre of the draft line of the drawheads of the two cars was not even was immaterial, the rule not requiring that the draft lines should be even, but that the centres of the drawbars should be of a certain standard height. It was not necessary for plaintiff to show knowledge on the part of defendant that it had not complied with the rule. *Neal v. St. Louis, etc., R. Co.*, (1903) 71 Ark. 445, 78 S. W. 220.

## Vol. VI, p. 756, sec. 6.

**Separate offenses.**—The unit of the offense under either section 2 or 4 is the hauling or use of a defective car, and each such car so hauled or used, whether at different times or at the same time and in the same train, constitutes a separate offense, which may be charged in different counts of the same petition under section 6. *U. S. v. St. Louis Southwestern R. Co.*, (1910) 184 Fed. 28, 106 C. C. A. 230.

**Number of penalties recoverable.**—Where several cars each without the requisite appliances required by Safety Appliance Act are hauled by a carrier in interstate commerce at one and the same time, there are as many distinct violations of the Act as there are cars hauled not properly equipped, for every one of which the statutory penalty is recoverable. *St. Louis Southwestern R. Co. v. U. S.*, (C. C. A. 1911) 183 Fed. 770; *U. S. v. St. Louis Southwestern R. Co.*, (1910) 184 Fed. 28, 106 C. C. A. 230.

**Nature of action.**—An action by the United States to recover from a carrier the penalty prescribed for violations of the Safety Appliance Acts is a civil, and not a criminal, action. *Chicago, etc., R. Co. v. U. S.*, (1911) 220 U. S. 559, 31 S. Ct. 612, 55 U. S. (L. ed.) 582, *affirming* (1909) 170 Fed. 556, 95 C. C. A. 642; *U. S. v. Louisville, etc., R. Co.*, (1908) 162 Fed. 185, *affirmed* (C. C. A. 1909) 174 Fed. 1021; *U. S. v. Chicago G. W. R. Co.*, (1908) 162 Fed. 775; *Atlantic Coast Line R. Co. v. U. S.*, (1909) 168 Fed. 175, 94 C. C. A. 35; *U. S. v. Baltimore, etc., R. Co.*, (1909) 170 Fed. 456; *U. S. v. Illinois Cent. R. Co.*, (1909) 170 Fed. 542, 95 C. C. A. 628; *Chicago, etc., R. Co. v. U. S.*, (C. C. A. 1909) 170 Fed. 557; *U. S. v. Southern R. Co.*, (1909) 170 Fed. 1014; *U. S. v. Atlantic Coast Line R. Co.*, (1910) 182 Fed. 284; *U. S. v. St.*

**Liability for death of servants.**—Failure of the railroad to comply with the rule of this section does not authorize a recovery for the death of a servant unless such failure was the proximate cause of the death. *Neal v. St. Louis, etc., R. Co.*, (1903) 71 Ark. 445, 78 S. W. 220.

**Question for jury.**—In an action for a death alleged to have been caused by failure to comply with the rules adopted under this Act it was held to be a question for the jury whether the railroad companies had failed to comply with the rules. *Neal v. St. Louis, etc., R. Co.*, (1903) 71 Ark. 445, 78 S. W. 220.

**Separate violations.**—Where a car is not properly provided with grabirons on a given day, and the train stops for a certain time and then goes on again, there are not two violations of the law, but only one, because the car is all the time being moved in the same train. It makes no difference that it is being so moved on two different days. *U. S. v. Boston, etc., R. Co.*, (1909) 168 Fed. 148.

**Duty absolute.**—See under this title, vol. 6, p. 752, sec. 1.

*Louis Southwestern R. Co.*, (1910) 184 Fed. 28, 106 C. C. A. 230.

**Complaint.**—A complaint under the Federal Safety Appliance Act alleging that the violation occurred "on or about" a particular date, is not vague and indefinite. *Atlantic Coast Line R. Co. v. U. S.*, (1909) 168 Fed. 175, 94 C. C. A. 35.

In an action against a railway company for penalties for violating the Safety Appliance Acts, the government need not allege that the company acted knowingly and negligently; it being sufficient that the dereliction is set forth in the language of the statute, with specification of the time and place, the particular part of the car where the defects existed, and the nature of the defect. *U. S. v. Oregon Short Line R. Co.*, (1908) 180 Fed. 483.

A complaint under the safety appliance law of Congress to recover a penalty for hauling a car in moving interstate traffic in violation of this Act, as amended by Act March 2, 1903, ch. 976, 32 Stat. L. 943, 10 Fed. Stat. Annot. 375, relating to automatic couplers, is not demurrable (a) because it fails to negative the matter of the exception created by the proviso to section 6, or (b) because it only shows that one of the couplers was out of repair and inoperative, and that it was so because the uncoupling chain was "kinked;" or (c) because it fails to negative the exercise of reasonable care on the part of the railway company in maintaining the coupler in operative condition; or (d) because, although showing an actual and substantial hauling of the car in moving interstate traffic, it fails to specify how far the hauling was continued, or is silent in respect of any actual use of the defective coupler. *U. S. v. Denver, etc., R. Co.*, (1908) 163 Fed.

519, 90 C. C. A. 329. See also *Louisville, etc., R. Co. v. U. S.*, (C. C. A. 1911) 186 Fed. 280.

**Evidence—Competency.**—Evidence of the condition of alleged defective cars when last inspected, thirty-seven miles distant, before they arrived at the station where the defects were discovered, and the material slips of the workmen who repaired them, were held to be competent evidence upon the issues in an action to recover penalties under this Act. *U. S. v. Rio Grande Western R. Co.*, (1909) 174 Fed. 399, 98 C. C. A. 293.

**Evidence.**—In an action by the United States against a railroad company to recover penalties for violation of the Safety Appliance Acts, a record kept by a station agent of the defendant in his office in the regular course of his duty showing the contents of a car loaded at his station, and its origin and destination, was held to be admissible on behalf of the government to prove that the car was being used in interstate commerce, as an admission of fact by defendant. *Louisville, etc., R. Co. v. U. S.*, (C. C. A. 1911) 166 Fed. 280.

**Weight and sufficiency.**—Positive testimony is to be preferred to negative testimony, other things being equal; but where it was the duty of an inspector on the part of the railroad company to inspect cars, and he said that he did inspect the cars that came in and did not see certain defective appliances, that is not such negative testimony that it should not receive the same consideration, other things being equal between the witnesses, as positive testimony. *U. S. v. Baltimore, etc., R. Co.*, (1909) 170 Fed. 456. See also *Norfolk, etc., R. Co. v. U. S.*, (C. C. A. 1910) 177 Fed. 623.

**Measure of proof.**—In an action by the government against an interstate railroad to recover penalties for violation of the Safety Appliance Acts, the government is only required to prove its case by preponderance of the evidence and not beyond reasonable doubt. *U. S. v. Central of Georgia R. Co.*, (1907) 157 Fed. 893; *U. S. v. Philadelphia, etc., R. Co.*, (1908) 160 Fed. 696; *U. S. v. Louisville, etc., R. Co.*, (1908) 162 Fed. 185, *affirmed* (C. C. A. 1909) 174 Fed. 1021; *U. S. v. Chicago G. W. R. Co.*, (1908) 162 Fed. 775; *U. S. v. Nevada County Narrow Gauge R. Co.*, (1908) 167 Fed. 695; *U. S. v. Baltimore, etc., R. Co.*, (1909) 170 Fed. 456; *U. S. v. Illinois Cent. R. Co.*, (1909) 170 Fed. 542, 95 C. C. A. 628; *U. S. v. Southern R. Co.*, (1909) 170 Fed. 1014; *U. S. v. Chicago, etc., R. Co.*, (1908) 173 Fed. 684; *U. S. v. Montpelier, etc., R. Co.*, (1910) 175 Fed. 874; *St. Louis Southwestern R. Co. v. U. S.*, (C. C. A. 1911) 183 Fed. 770. *Contra*, *U. S. v. Illinois Cent. R. Co.*, (1907) 156 Fed. 182.

**Burden of proof.**—The burden of proof is

cast upon the government. Every material fact must be proved by a fair balance of evidence to entitle the plaintiff to recover the penalty prescribed by law. *U. S. v. Philadelphia, etc., R. Co.*, (1908) 160 Fed. 696; *U. S. v. Montpelier, etc., R. Co.*, (1910) 175 Fed. 874.

Where, in an action against an interstate railroad for violating this Act, the government proves that a car laden for interstate traffic and with defective couplings has been hauled on defendant's tracks, the burden is then shifted to defendant to prove exculpatory facts. *U. S. v. Illinois Cent. R. Co.*, (1909) 170 Fed. 542, 95 C. C. A. 628.

The burden of proof is upon a carrier to bring itself within the exception in favor of four-wheeled cars which is made by the proviso in this section. *Schlemmer v. Buffalo, etc., R. Co.*, (1907) 205 U. S. 1, 27 S. Ct. 407, 51 U. S. (L. ed.) 681; *U. S. v. Atlantic Coast Line R. Co.*, (1907) 153 Fed. 918, *affirmed* (C. C. A. 1909) 168 Fed. 175.

**Directed verdict.**—An action by the government against a railroad company to recover penalties for violations of the Safety Appliance Act, is a civil action, so that, the government having produced evidence to sustain each of the counts in its declaration, and the defendant having introduced no testimony, the government is entitled to a directed verdict. *U. S. v. Atlantic Coast Line R. Co.*, (1910) 182 Fed. 284. *Contra*, *Atchison, etc., R. Co. v. U. S.*, (C. C. A. 1909) 172 Fed. 194.

**Review.**—An action by the United States against a railroad company to recover the penalty for violation of the Safety Appliance Act is a civil action, and the judgment therein is reviewable at the instance of the United States on writ of error. *U. S. v. Louisville, etc., R. Co.*, (1909) 167 Fed. 306, 93 C. C. A. 58; *U. S. v. Illinois Cent. R. Co.*, (1909) 170 Fed. 542, 95 C. C. A. 628.

**Former jeopardy.**—The constitutional prohibition against subjecting a person to be twice put in jeopardy for the same offense does not apply to actions by the United States against an interstate railroad to recover penalties for violation of this Act, so as to prevent a review by the government of an adverse decision on a writ of error. *U. S. v. Illinois Cent. R. Co.*, (1909) 170 Fed. 542, 95 C. C. A. 628.

**Joint action to recover penalty.**—In a joint action against two or more railroad companies to recover the penalty for violation of this Act, there may be a recovery against all or any of the defendants as the proofs warrant. *U. S. v. Chicago, etc., R. Co.*, (1906) 143 Fed. 353.

**The only exceptions to the safety appliance acts** are those found in the proviso of section 6. *U. S. v. Central of Georgia R. Co.*, (1907) 157 Fed. 893.

## Vol. VI, p. 756, sec. 8.

**Judicial notice of Act.**—In an action against a railroad company for the death of a servant caused by defendant's failure to

comply with this Act, the court will take judicial notice of what the Act provides, and its introduction in evidence is immaterial.

Mobile, etc., R. Co. v. Bromberg, (1904) 141 Ala. 258, 37 So. 395.

**Prima facie case by plaintiff.**—In an action against a railroad company for the death of a brakeman alleged to have been caused by defendant's failure to equip its cars with automatic couplers, as required by this Act, proof that plaintiff's intestate was engaged in coupling cars at the time he was killed, that the cars were not provided with automatic couplers, and that the intestate's death was caused by the old-fashioned couplers slipping by one another, made a *prima facie* case. Mobile, etc., R. Co. v. Bromberg, (1904) 141 Ala. 258, 37 So. 395.

**Negligence of fellow servants.**—Where a switchman who was, while employed in Arizona, injured in switching cars not equipped with sufficient automatic couplers as required by the federal Safety Appliance Act, which provides that any employee injured by any car in use contrary to the provisions of the Act shall not be deemed to have assumed the risk, the injuries, though caused by the negligence of a fellow servant, were from a risk which, as a matter of law, he did not assume, though the common-law doctrine of fellow servants, grafted on the principle of assumed risk, obtains in Arizona, except as modified by R. S. Ariz. 1901, par. 2767, making an employer liable for injuries to an employee in consequence of the incompetency of another employee, provided the employer had previous notice of such incompetency. Southern Pac. Co. v. Allen, (1907) 48 Tex. Civ. App. 66, 106 S. W. 441.

**Effect of Act on common law.**—This Act abolishes the defense of assumed risk and any other defense based on identically the same facts which would establish the defense, if available. Southern Pac. Co. v. Allen, (1907) 48 Tex. Civ. App. 66, 106 S. W. 441.

**Jurisdiction of state courts.**—In Southern Pac. Co. v. Allen, (1907) 48 Tex. Civ. App. 66, 106 S. W. 441, it was held that the courts of Texas have jurisdiction of an action for injuries to a switchman received in Arizona through the failure of a foreign railroad company to furnish proper automatic couplers, whether based on negligence or on a violation of the federal Safety Appliance Act, the laws of Texas and Arizona concurring in holding that such a negligent act is subject to legal redress, and the federal statute being in force throughout the United States.

**Removal to federal court.**—Where, after pleas of assumed risk and contributory negligence in an action for injuries to a brakeman while uncoupling cars, plaintiff amended his petition so as to allege a violation of the federal Safety Appliance Act, prohibiting interstate carriers from using cars not equipped with automatic couplers, and providing that a servant injured while using cars not equipped should not be held to have assumed the risk, the cause thereupon became one arising under the laws of the United States, and was removable to the federal court, though the petition, before the amendment, stated a cause of action independent of such

statute. Nichols v. Chesapeake, etc., R. Co., (1907) 127 Ky. 310, 105 S. W. 481.

**Employees entitled to benefit of Act.**—The protection given to railroad employees by the Safety Appliance Act is not limited to employees injured while coupling or uncoupling cars, but extends to a switchman who was injured as a direct result of the movement of a train containing a car with a broken coupler while, acting within the scope of his duty, he was between the cars engaged in replacing the broken part, and he cannot be charged with contributory negligence because of his so going between the cars with knowledge of the defect. Chicago Junction R. Co. v. King, (1909) 169 Fed. 372, 94 C. C. A. 652.

**A plea of assumption of risk in an action against a carrier for injuries to an employee resulting from a failure to comply with this Act is frivolous.** Mobile, etc., R. Co. v. Bromberg, (1904) 141 Ala. 258, 37 So. 395.

**Necessary showing by plaintiff.**—It is unnecessary for the complaint in an action for the death of a servant, caused by failure to comply with this Act, to allege in what manner the failure to comply with the Act caused the injury. Mobile, etc., R. Co. v. Bromberg, (1904) 141 Ala. 258, 37 So. 395.

In an action by an employee against a railroad company to recover for an injury alleged to have been caused by the use by defendant in interstate commerce of cars not equipped with automatic couplers, as required by this Act, evidence of the use of such cars with couplers so defective that they could not be coupled without going between them, and that in doing so plaintiff was injured, was sufficient to make a *prima facie* case, although it did not show the precise nature of the defect. Norfolk, etc., R. Co. v. Hazelrigg, (C. C. A. 1911) 184 Fed. 828.

**Question for jury.**—In Erie R. Co. v. Russell, (C. C. A. 1910) 183 Fed. 722, it appeared that the plaintiff's intestate, who was a switchman employed by the defendant railroad company in its yards, while engaged in repairing a defective coupler on a car standing on a switchtrack, was caught between such car and others which moved against it, and killed. It was held, in an action to recover for his death, that the question whether the defective coupler was a proximate cause of his injury, so as to bring the case within the Safety Appliance Act, was properly submitted to the jury, as was also the question of the contributory negligence of deceased under the evidence.

In Donegan v. Baltimore, etc., R. Co., (C. C. A. 1908) 165 Fed. 869, it appeared that the plaintiff was a brakeman on a freight train of defendant's railroad being moved in interstate business, and was directed to cut off the two rear cars while the train was moving slowly and before it reached a certain switch. The automatic coupler on one of the cars was broken, and plaintiff went between the cars and attempted to pull the pin by hand, but, not succeeding, started out, when his foot caught in an unblocked switch frog and he was injured. It was held, in

an action to recover for the injury, that the question whether the failure of defendant to have the car properly equipped was the proximate cause of the injury, so as to render it liable therefor under the Safety Appliance Act was, under the evidence, one of fact for the jury, and that it was error for the court to direct a verdict for defendant.

**Contributory negligence.**—Of similar effect to the original note. *Toledo, etc., R. Co. v. Gordon*, (1910) 177 Fed. 152, 100 C. C. A. 572.

The benefit of the provisions of this section, excluding the defense of assumption of risk, was not refused by holding that, as a matter of law, an experienced railway brakeman who persisted in attempting to couple in a dangerous way a car having an automatic coupler to another car not so equipped when a safer method was called to his attention, and who was killed because he raised his head while making the coupling, in spite of repeated cautions, was guilty of contributory negligence, defeating any recovery. *Schlemmer v. Buffalo, etc., R. Co.*, (1911) 220 U. S. 590, 31 S. Ct. 561, 55 U. S. (L. ed.) 596.

The possibility that a railway employee, while attempting to make a coupling with a car not equipped with an automatic coupler, as required by this Act, might miscalculate the height to which he might safely raise his head, is so inevitable and clearly attached to the risk which, under section 8, he does not assume, as to prevent a court from holding, as a matter of law, that he is guilty of contributory negligence which would defeat any recovery in lifting his head a little too high after being warned of the danger. *Schlemmer v. Buffalo, etc., R. Co.*, (1907) 205 U. S. 1, 27 S. Ct. 407, 51 U. S. (L. ed.) 681.

## Vol. VI, p. 757, sec. 1.

**State laws.**—This Act does not show an intention of Congress to enter the field of legislation relating to the number of employees to be carried on trains operated within a state though engaged in interstate com-

merce. The mere fact that a plaintiff, while employed as a brakeman by defendant railroad company, was injured in coupling cars with a link and pin coupling, used by defendant in violation of this Act, creates no presumption that he was negligent, and unless his contributory negligence is conclusively shown by the evidence it is a question for the jury. *Denver, etc., R. Co. v. Arrighi*, (C. C. A. 1905) 141 Fed. 67.

In an action by a brakeman against a railroad company to recover for an injury received while uncoupling cars used on interstate commerce, one of which was being moved with a defective coupler in violation of this Act, it was error for the court to give a general instruction as to the effect of contributory negligence where the cars could have been uncoupled from the other side of the train without the necessity of going between them as plaintiff did. *Norfolk, etc., R. Co. v. Hazelrigg*, (C. C. A. 1909) 170 Fed. 551.

Whether a switchman injured while uncoupling cars equipped with defective automatic couplers in violation of the federal Safety Appliance Act, was guilty of contributory negligence in failing to use safer means, and in violation of his employer's rules, was held, under the evidence for the jury. *Southern Pac. Co. v. Allen*, (1907) 48 Tex. Civ. App. 66, 106 S. W. 441.

**Availability of defense of contributory negligence.**—Contributory negligence on the part of an employee is a defense to an action founded on this Act, although by section 8 the defense of assumption of risk is expressly excluded. *Schlemmer v. Buffalo, etc., R. Co.*, (1911) 220 U. S. 590, 31 S. Ct. 561, 55 U. S. (L. ed.) 596.

merce, and hence did not prevent the passage of a state Act regulating such crews. *Pittsburgh, etc., R. Co. v. State*, (1909) 172 Ind. 147, 87 N. E. 1034.

## Vol. X, p. 375, sec. 1.

**Constitutionality.**—Congress had the power, under the commerce clause of the Federal Constitution, to require, as it did in the Safety Appliance Act of March 2, 1893, 6 Fed. Stat. Annot. 752, as amended by this Act, that all locomotives, cars, and similar vehicles used on any railway engaged in interstate commerce, shall be equipped with certain designated safety appliances, regardless of whether such vehicles are used in moving intrastate or interstate traffic. *Southern R. Co. v. U. S.*, (1911) 222 U. S. 20, 32 S. Ct. 2, *affirming* (1908) 164 Fed. 347; *U. S. v. Atlantic Coast Line R. Co.*, (1907) 153 Fed. 918, *affirmed* (C. C. A. 1909) 168 Fed. 175; *Wabash R. Co. v. U. S.*, (1909) 168 Fed. 1, 93 C. C. A. 393; *Southern R. Co. v. Snyder*, (C. C. A. 1911) 187 Fed. 492.

**Construction.**—The provision of this Act amendatory of the Safety Appliance Acts of March 2, 1893, ch. 196, 27 Stat. L. 532, and April 1, 1896, ch. 87, 29 Stat. L. 85, 6 Fed. Stat. Annot. 752, that the requirements of such Acts relating to train brakes, automatic couplers, etc., shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used in interstate commerce, "and all other locomotives, tenders, cars, and similar vehicles used in connection therewith," does not require that the connection between a car not equipped as therein required and one used in interstate commerce shall be immediate to bring it within the statute, but it is sufficient if they are in the same train. *Louisville, etc., R. Co. v. U. S.*, (C. C. A. 1911) 186 Fed. 280.

**Purpose of amendment.**—Two of the pur-

poses for which the Safety Appliance Act of 1893, Act March 2, 1893, ch. 196, 27 Stat. L. 531, 6 Fed. Stat. Annot. 752, was amended by the act of 1902, were: (1) To include certain vehicles omitted by the former statute; and (2) to include cars "used" by an interstate carrier on any part of its line. The original statute was broadened, and not restricted, by substitution of the word "use" for the words "haul and use." *U. S. v. Chicago, etc., R. Co.*, (1906) 149 Fed. 486.

Cars used in moving intrastate traffic on a railway which is a highway of interstate commerce are comprehended by the provisions of the Safety Appliance Act of March 2, 1893, 27 Stat. L. 531, ch. 196, 6 Fed. Stat. Annot. 752, as amended by this Act, declaring, *inter alia*, that its provisions and requirements shall "apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles, used in connection therewith." *Southern R. Co. v. U. S.*, (1911) 222 U. S. 20, 32 S. Ct. 2, *affirming* (1908) 164 Fed. 347; *U. S. v. Great Northern R. Co.*, (1906) 145 Fed. 438; *U. S. v. Erie R. Co.*, (1909) 166 Fed. 352; *Wabash R. Co. v. U. S.*, (1909) 168 Fed. 1, 93 C. C. A. 393; *Norfolk, etc., R. Co. v. U. S.*, (C. C. A. 1910) 177 Fed. 623.

The following cases must be considered as overruled on this point by the U. S. Supreme Court case cited *supra*, this note: *U. S. v. Erie R. Co.*, (1909) 166 Fed. 352; *Louisville, etc., R. Co. v. U. S.*, (C. C. A. 1911) 186 Fed. 280; *Southern R. Co. v. Snyder*, (C. C. A. 1911) 187 Fed. 492.

Car being hauled between two points in same state.—Under this amended Act a carrier of interstate commerce over an interstate railway is liable for penalty as to all cars and trains operated on such railway, though the defective car is being hauled from one point to another in the same state, provided that it is part of a train engaged in interstate traffic. *U. S. v. International, etc., R. Co.*, (C. C. A. 1909) 174 Fed. 638.

Independent intrastate railroad company.—A common carrier which operates a railroad entirely within a single state, and transports thereon articles of commerce shipped in continuous passages from places without the state to stations on its road, or from stations on its road to points without the state, is subject to the provision of the Safety Appliance Act, although it carries the property free from a common control, management or arrangement with another carrier for continuous carriage or shipments of the articles. *U. S. v. Colorado, etc., R. Co.*, (1907) 157 Fed. 321, 13 Ann. Cas. 893, 85 C. C. A. 27; *U. S. v. Colorado, etc., R. Co.*, (1907) 157 Fed. 342, 85 C. C. A. 48; *Pacific Coast R. Co. v. U. S.*, (C. C. A. 1909) 173 Fed. 448.

Cars on side track ready for repair shop.—Where a yard employee was injured in coupling cars on a transfer track, from one of which the drawhead was gone, the fact that such car had been left to be taken to a repair shop, and was not then in commercial

use, nor actually connected with any car in such use, and could have been taken from the track without such connection, was not conclusive that it was not subject to the Safety Appliance Acts, if it would naturally be so connected in the usual course of switching. *Southern R. Co. v. Snyder*, (C. C. A. 1911) 187 Fed. 492. *Compare Siegel v. New York Cent., etc., R. Co.*, (1910) 178 Fed. 873.

Empty cars going to repair shop.—The hauling by a railroad company from one state to another of a car not equipped with the required safety appliances, upon its own trucks, as a part of a train of other cars moving in interstate commerce, is a use of the defective car in violation of the Safety Appliance Act, as amended, though it is empty and is being transported to a repair shop in the state of its destination. *Chicago, etc., R. Co. v. U. S.*, (1908) 165 Fed. 423, 91 C. C. A. 373; *Chicago, etc., R. Co. v. U. S.*, (1909) 168 Fed. 236, 93 C. C. A. 460. See also under this title, vol. 6, p. 753, sec. 2.

Relation to Interstate Commerce Act.—The construction of the language of the Safety Appliance Acts is not controlled by the language or by the interpretation of the terms of the Interstate Commerce Act (Act Feb. 4, 1887, ch. 104, 24 Stat. L. 379, 3 Fed. Stat. Annot. 808). *U. S. v. Colorado, etc., R. Co.*, (1907) 157 Fed. 321, 13 Ann. Cas. 893, 85 C. C. A. 27; *Pacific Coast R. Co. v. U. S.*, (C. C. A. 1909) 173 Fed. 448. *Compare U. S. v. Geddes*, (1903) 180 Fed. 480.

Cars becoming defective while in transit.—If a railroad train used in moving interstate traffic when started is properly equipped with air brakes, as required by Safety Appliance Act, or if cars so used are properly equipped with automatic couplers as therein required when started or when received by the company for transportation over its line, but from any cause either train or cars become defective so as not to comply with the law while being so moved, the company is required to immediately repair such defects as soon as discovered, or as soon as they could have been discovered by the exercise of reasonable care, if the means of repair are at hand; but, if not, the company may haul the same to the nearest repair point without being subject to the penalty for violation of the Act. *U. S. v. Chicago G. W. R. Co.*, (1908) 162 Fed. 775.

Construction train.—A carrier operating its own construction train, which hauls its own rails and products from a point in one state to a point in another state, is engaged in interstate commerce. *U. S. v. Chicago, etc., R. Co.*, (1906) 149 Fed. 486.

What cars included.—This amended Act requiring railroads to use automatic couplers on interstate equipment, requires all cars regularly used on any railroad engaged in interstate commerce and all other cars used in connection therewith to couple automatically by impact, and to be coupled and uncoupled without the necessity of men going between them, whether they be loaded or empty, and though they be not actually engaged in such commerce at the time. *Hohenleitner v. Southern Pac. Co.*, (1910) 177 Fed. 796.



If an interstate carrier receives and hauls a defectively equipped foreign car, which it cannot be required to do, it violates the federal Safety Appliance Acts. *U. S. v. Chicago, etc., R. Co.*, (1906) 149 Fed. 486.

Under this amended Act it is unlawful for a railroad company to use any car in interstate commerce, or car or similar vehicle used in connection therewith, that is not provided with secure grabirons or handholds at the ends and sides of such car for safety of men in coupling and uncoupling. *U. S. v. Illinois Cent. R. Co.*, (1908) 166 Fed. 997.

**Test of interstate commerce.**—The importation into one state from another is the test of interstate commerce. Every part of every transportation of articles of commerce in a continuous passage from a commencement in one state to a prescribed destination in another is a transaction of interstate commerce. Every carrier who transports such goods through any part of such continuous passage is engaged in interstate commerce, whether the goods are carried upon through bills of lading or are rebilled by the several carriers. *U. S. v. Colorado, etc., R. Co.*, (1907) 157 Fed. 321, 13 Ann. Cas. 893, 85 C. C. A. 27.

**Used in connection therewith.**—This amended Act requires cars used in interstate commerce or cars used in "connection" therewith to be equipped with secure grabirons at the ends and sides of each car for the greater safety of men in coupling and uncoupling. It has been held that a car used in intrastate commerce only, not so equipped, though moved in a train containing a car bearing interstate traffic was not used in "connection" therewith where they were in different parts of the train and not in position to be coupled or uncoupled. *U. S. v. Illinois Cent. R. Co.*, (1908) 166 Fed. 997.

**Reasons for failure to couple immaterial.**—The Act is violated when cars are hauled or used by carriers engaged in such commerce which will not so couple, whether the failure to do so results from the character of the car, the kind of equipment used, or the fact that the tracks are so laid on a curve that the couplers will not meet without men going between the cars to adjust them. *Hohenleitner v. Southern Pac. Co.*, (1910) 177 Fed. 796.

**Termination of journey.**—Where a freight car loaded with lumber brought from another state was delivered to defendant railroad company on an exchange track a few blocks from its final destination and after being moved from such track by defendant without

inspection was found to have a broken coupler so that it could not be coupled without going between the cars, it was being used by defendant in interstate commerce in violation of this Act. *Chicago, etc., R. Co. v. U. S.*, (1908) 165 Fed. 423, 91 C. C. A. 373.

A declaration against a railroad company for violating this Act as amended, alleging that on a specified date defendant hauled a certain car with a defective coupler, so that it could not be coupled by impact, "in and around Atlanta, in the state of Georgia," was not demurrable as showing that the interstate shipment had already reached its destination, under the rule that whenever a car is loaded in one state with a commodity which is destined for another state, and begins to move, interstate commerce is begun, and does not cease until the car has arrived at its point of final destination. *U. S. v. Western, etc., R. Co.*, (1910) 184 Fed. 336.

**Defective car on side track in ordinary use.**

—A car with a defective coupler, billed for the repair shop, but which was not sent there, but was left on a track in ordinary use in a switch yard, to be repaired by the switchman and then coupled to other cars, was being "used" within the meaning of the statute. *Erie R. Co. v. Russell*, (C. C. A. 1910) 183 Fed. 722.

**"In connection therewith."**—Where a car not properly equipped is moved in a train containing cars carrying interstate commerce, there is a violation of the Act, notwithstanding the defective car is not immediately connected with that carrying the interstate shipment. *U. S. v. Western, etc., R. Co.*, (1910) 184 Fed. 336.

**Transportation of articles for independent express company.**—The transportation by a common carrier by railroad of articles of interstate commerce for an independent express company is "engaging in interstate commerce by railroad" within the meaning of the Safety Appliance Acts. *U. S. v. Colorado, etc., R. Co.*, (1907) 157 Fed. 342, 85 C. C. A. 48.

**Separate penalty for each car.**—*U. S. v. Chicago G. W. R. Co.*, (1908) 162 Fed. 775.

**Nature of action.**—See under this title, vol. 6, p. 756, sec. 6.

**Empty cars.**—See under this title, vol. 6, p. 753, sec. 2.

**Duty absolute.**—See under this title, vol. 6, p. 752, sec. 1.

**For other notes,** see under this title, vol. 6, p. 752, sec. 1 *et seq.*

## Vol. X, p. 375, sec. 2.

**"Single train."**—A freight train scheduled to run regularly between points in different states is a single train throughout such run and at all times subject to the provisions of the Safety Appliance Act, although some of the cars composing it may have been left and others taken on at different stations, and although after entering the second state the engine, caboose, and train crew may have been changed. In such case, if at any one or more

points in the run a sufficient number of the cars composing the train are not equipped with air brakes to meet the requirement of the Act, the railroad company is liable to the penalty imposed for its violation, but to one penalty only. *U. S. v. Chicago G. W. R. Co.*, (1908) 162 Fed. 776.

**Use of hand brakes.**—The provision of the Safety Appliance Act March 2, 1893, ch. 196, sec. 1, 27 Stat. L. 531, 6 Fed. Stat. Annot.

752, requiring all railroad trains used in interstate traffic to have a sufficient number of cars equipped with power or train brakes so that the engineer can control their speed without requiring brakemen to use the hand brake for that purpose, as amended by this section, fixing fifty per cent. of the cars in each train as the minimum number which must be so equipped, which number was increased to seventy-five per cent, by order of the Interstate Commerce Commission, cannot be construed to prohibit the use of hand brakes, and evidence that under a general order of a railroad company brakemen were required to set hand brakes on trains while going down a certain grade, as a precaution against accidents, is not sufficient to establish a violation of the statute, there being no claim or evidence that the required percentage of cars were not equipped with power brakes. *U. S.*

*v. Baltimore, etc., R. Co.*, (1910) 176 Fed. 114, *affirmed* (1911) 185 Fed. 486, 107 C. C. A. 586.

**Cars with power brakes not in use.**—This section, providing that at least fifty per cent. of the cars in every train shall have their brakes used and operated by the engineer, and that "all power braked cars in such train which are associated together, with said fifty per centum, shall have their brakes so used and operated," is not violated where the required percentage of cars in a train are equipped with power brakes which are used because the train also contains other cars so equipped, but the brakes of which are out of repair and cannot be operated, and are therefore cut out. *U. S. v. Baltimore, etc., R. Co.*, (1910) 176 Fed. 114, *affirmed* (1911) 185 Fed. 486, 107 C. C. A. 586.

## 1909 Supp., p. 582, sec. 2.

**Constitutionality.**—Congress, in the exercise of its power over commerce, could enact the provisions of this Act restricting the hours of labor of railway employees who are connected with the movement of trains in interstate or foreign commerce. Such restrictions are not unconstitutional because many of such employees are, by virtue of practical necessity, also employed in intrastate transportation. *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1911) 221 U. S. 612, 31 S. Ct. 621, 55 U. S. (L. ed.) 878.

**Uncertainty.**—The words "except in case of emergency," in the proviso in this section, making it unlawful for railway carriers engaged in transportation in the District of Columbia or the territories, or in interstate or foreign commerce, to require or permit employees engaged in such transportation to be or remain on duty for a longer period than that prescribed, do not make the application of the Act so uncertain as to destroy its validity, even though the proviso in section 3, limiting the effect of the entire Act, can be said to include everything which may be embraced within the term "emergency." *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1911) 221 U. S. 612, 31 S. Ct. 621, 55 U. S. (L. ed.) 878.

**Nine hours not consecutive.**—Requiring a railway telegraph operator to work five and one-half hours, and then, after an interval, three and one-half more hours in the same twenty-four, is not made unlawful by the provisions of sections 2, 3, of this Act, forbidding common carriers to permit such employees to be on duty for a longer period than nine hours in any twenty-four-hour period in a place continuously operated night and day. *U. S. v. Atchison, etc., R. Co.*, (1911) 220 U. S. 37, 31 S. Ct. 362, 55 U. S. (L. ed.) 361.

**Excuses for violation.**—This Act prohibiting any interstate carrier from permitting its employees to remain on duty more than sixteen consecutive hours, is not violated where a crew is permitted to remain on duty more than sixteen hours because of casualty, unavoidable accident, or act of God, or where

the delay in the operation of the train was the result of a cause not known to the carrier when the employees left a terminal, and which could not have been foreseen; but the Act does not excuse a carrier failing to operate its train a specified distance within the sixteen-hour period because of its negligence. *Black v. Charleston, etc., R. Co.*, (1910) 87 S. C. 241, 69 S. E. 230.

**State laws.**—This Act was only intended to prescribe a general rule applicable to conditions throughout the country in the movement of interstate commerce, and hence did not so cover the subject as to preclude the state from passing a law making it unlawful for any corporation or receiver operating a railroad in the state to permit any telegraph or telephone operator spacing trains by telegraph or telephone under the block system to remain on duty for more than eight hours in a twenty-four-hour period. *People v. Erie R. Co.*, (1910) 198 N. Y. 369, 91 N. E. 849. Compare the cases set out in 1909 Supp. Fed. Stat. Annot., p. 583.

The fact that Congress, on March 4, 1907, adopted this statute regulating the hours of labor of trainmen, to become operative on March 4, 1908, does not impair state legislation, unless the federal Act is in operation, and is prohibitive in its terms, or affects the very question which the state legislation undertakes to control. *Lloyd v. North Carolina R. Co.*, (1909) 151 N. C. 536, 66 S. E. 604.

**Intrastate railroads and employees wholly engaged in local business** were not affected by the provisions of this section, making it "unlawful for any common carrier, its officers or agents, subject to this Act, to require or permit any employee subject to this Act to be or remain on duty" for a longer period than that prescribed, since such carriers and employees are defined in section 1 as those who are engaged in the transportation of passengers or property by railroad in the District of Columbia or the territories, or in interstate or foreign commerce, although that section further defines "railroad" as including all bridges and ferries used or operated in

connection with any railroad, and also all the road in use by any carrier operating a railroad by contract, agreement, or lease; and "employees" as meaning persons actually engaged in, or connected with, the movement of any train. *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1911) 221 U. S. 612, 31 S. Ct. 621, 55 U. S. (L. ed.) 878.

**Period of duty.**—Where an interstate carrier had a rule requiring engineers to report thirty minutes before leaving time, during which they were required to overlook their engines in preparation for the trip, to see that they were properly oiled and the brakes O. K., and to connect the engines with their trains, the time so occupied constituted a

part of their term of duty and this though it was the custom of the carrier not to strictly enforce the rule. *U. S. v. Illinois Cent. R. Co.*, (1910) 180 Fed. 630.

**Train dispatchers**, being "employees," are within the protection of the main part of this section giving to all employees "at least eight consecutive hours off duty" in each day, counting from some point in the next day, so that it would be impossible for carriers to require of them short-service periods spread over the entire twenty-four hours, giving no opportunity for real recuperation. *Atchison, etc., R. Co. v. U. S.*, (C. C. A. 1910) 177 Fed. 114, *affirmed* (1911) 220 U. S. 37, 31 S. Ct. 362, 55 U. S. (L. ed.) 361.

## 1909 Supp., p. 584, sec. 4.

**Reports from carriers.**—Authority to require the secretary or similar officer of the carriers subject to the Act to make monthly reports under oath, showing the instances where employees subject to the Act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect in lieu of the form to be used in detailing excess service, was conferred upon the Interstate Commerce Commission by the provision of this section empowering it to call to its aid in the enforcement of the Act "all powers granted to it," when read in connection with the Act of June 18, 1910, 36 Stat. L. 556, ch. 309, sec. 14, *ante*, this Supplement, p. 125, authorizing the commission to require the carriers to file periodical or special reports under oath concerning any matter about which it is by law authorized or required to keep itself informed, or which it is required to enforce. *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1911) 221 U. S. 612, 31 S. Ct. 622, 55 U. S. (L. ed.) 878.

**The constitutional protection against unreasonable searches and seizures** is not denied by an order of the Interstate Commerce Commission requiring the secretary or other similar officer of the carriers subject to this Act, regulating the hours of labor of employees, to make monthly reports under oath, showing the instances where employees sub-

ject to the Act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect, in lieu of the form to be used in detailing excess service. *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1911) 221 U. S. 612, 31 S. Ct. 621, 55 U. S. (L. ed.) 878.

**Self-crimination.**—Carriers subject to the Act cannot claim privilege against self-crimination to justify the refusal to comply with an order of the Interstate Commerce Commission, requiring the secretary or similar officer to make monthly reports under oath, showing the instances where employees subject to the Act have rendered excess service, and giving the cause and explanatory facts, if any, or, where there has been no excess service, to make a separate oath to that effect, in lieu of the form to be used in detailing excess service. *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1911) 221 U. S. 612, 31 S. Ct. 621, 55 U. S. (L. ed.) 878.

Neither can the secretary or similar officer of a carrier subject to this Act claim a personal privilege against self-crimination to justify a refusal to comply with an order of the Interstate Commerce Commission, requiring such official to make such monthly reports under oath. *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, (1911) 221 U. S. 612, 31 S. Ct. 621, 55 U. S. (L. ed.) 878.

## 1909 Supp., p. 584, sec. 1.

**Constitutionality.**—This Act is a valid exercise of the powers granted by Congress by the commerce clause of the Constitution, as it is confined to common carriers by rail engaged in interstate commerce and employees while thus actually engaged. *Mondou v. New York, etc., R. Co.*, 223 U. S. 1, 32 S. Ct. 169; *Watson v. St. Louis, etc., R. Co.*, (1909) 169 Fed. 942; *Walsh v. New York, etc., R. Co.*, (1909) 173 Fed. 494; *Zikos v. Oregon R., etc., Co.*, (1910) 179 Fed. 893; *St. Louis, etc., R. Co. v. Conley*, (C. C. A. 1911) 187 Fed. 949; *Owens v. Chicago G. W. R. Co.*, (1910) 113 Minn. 49, 128 N. W. 1011.

**Due process of law.**—This Act is not unconstitutional as depriving railroad companies

of their property or liberty to contract without due process of law, in violation of the Fifth Amendment to the U. S. Constitution. *Mondou v. New York, etc., R. Co.*, 223 U. S. 1, 32 S. Ct. 169; *St. Louis, etc., R. Co. v. Conley*, (C. C. A. 1911) 187 Fed. 949.

**Equal protection of law.**—This Act is not unconstitutional as denying the equal protection of the laws to the carriers affected thereby. *Mondou v. New York, etc., R. Co.*, 223 U. S. 1, 32 S. Ct. 169; *Zikos v. Oregon R., etc., Co.*, (1910) 179 Fed. 893.

**Delegation of judicial power.**—This Act does not attempt to delegate judicial power of the United States to state courts, in violation of article 3 of the Constitution, but creates

substantive rights not solely cognizable in the federal courts, but which may be availed of in any court of competent jurisdiction, state or federal. *Zikos v. Oregon R., etc., Co.*, (1910) 179 Fed. 893.

**State laws.**—This Act making railroads engaged in interstate commerce liable for injuring or killing employees while similarly engaged, is plenary, and supersedes all laws of the states relating thereto. *Mondou v. New York, etc., R. Co.*, 223 U. S. 1, 32 S. Ct. 169; *Dewberry v. Southern R. Co.*, (1910) 175 Fed. 307; *Taylor v. Southern R. Co.*, (1910) 178 Fed. 380; *Bottoms v. St. Louis, etc., R. Co.*, (1910) 179 Fed. 318.

The federal Employer's Liability Act does not conflict with, so as to supersede, a state statute providing that a cause of action for personal injuries shall survive in favor of the personal representative of the injured party, the recovery inuring to the exclusive benefit of the widow or next kin, it not creating a right of action, but only preserving one which would have otherwise abated on the injured person's death. *St. Louis, etc., R. Co. v. Hesterly*, (Ark. 1911) 135 S. W. 875.

Since Congress has not required railroads engaged in interstate commerce to fill or block switches, frogs, and guard rails on their roads, a state law requiring railroads so to do does not conflict with this Act, whereby Congress assumed jurisdiction over injuries to employees engaged in interstate commerce. *St. Louis, etc., R. Co. v. McNamare*, (1909) 91 Ark. 515, 122 S. W. 103.

**Jurisdiction.**—This Act is remedial in character, and should be so construed as to prevent the mischief and advance the remedy, and an action based thereon may be maintained either in the state or federal courts. *St. Louis, etc., R. Co. v. Conley*, (C. C. A. 1911) 187 Fed. 949; *Bradbury v. Chicago, etc., R. Co.*, (1910) 149 Ia. 51, 128 N. W. 2.

"The suggestion that the Act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that Act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the Act had emanated from its own legislature, and should be respected accordingly in the courts of the state. . . . We are not disposed to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, it affords no reason for declining a jurisdiction conferred by law." *Van Devanter, J.*, in *Mondou v. New York, etc., R. Co.*, 223 U. S. 1, 32 S. Ct. 169.

Where a suit brought under this Act involved a determination of the meaning of the phrase "person employed by such carrier in interstate commerce," it was held that federal jurisdiction existed, even though the complaint should be dismissed because plaintiff was not a person so employed. *Colasurdo v.*

*New Jersey Cent. R. Co.*, (1910) 180 Fed. 832.

**District of trial.**—Act Cong. March 3, 1887, ch. 373, sec. 1, 24 Stat. L. 552, as corrected by Act Aug. 13, 1888, ch. 866, sec. 1, 25 Stat. L. 433, 4 Fed. Stat. Annot. 265, provides that no civil suit shall be brought before either the Circuit or District Courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states suits shall be brought only in the district of the residence of either plaintiff or defendant. It has been held that where an action for injuries to a servant was brought under the federal Employer's Liability Act federal jurisdiction did not depend solely on diverse citizenship but was also sustainable as depending on the construction of such Act, and hence the suit could not be maintained over defendant's objection in a district other than that in which defendant was an inhabitant. *Smith v. Detroit, etc., R. Co.*, (1909) 175 Fed. 506.

**Removal to federal court.**—An action against a railroad company for an injury to an employee, brought under and in reliance upon this act, where the declaration contains no statement or suggestion that the result of the suit will depend upon the construction of the act, is not removable on the ground that it is one arising under a law of the United States. *Nelson v. Southern R. Co.*, (1909) 172 Fed. 478.

**Pleading.**—In order to rely on a federal statute as the basis of a cause of action or defense, the pleadings must allege facts bringing the case within the statute, and an action against a railroad company for damages for an injury resulting in the death of an employee was not based upon the Federal Employer's Liability Act, where the complaint alleged that the defendant "was a railroad corporation operating a line of railroad in the state of Oklahoma, and was . . . common carrier of freight and passengers for hire," in that state, but did not allege that it was engaged in interstate commerce, or that decedent was injured while employed by it in connection with such commerce. *St. Louis, etc., R. Co. v. Hesterly*, (Ark. 1911) 135 S. W. 875. See also *Walton v. Southern R. Co.*, (1910) 179 Fed. 175.

In a railroad servant's action for injuries, where the petition does not disclose that the suit is based on the federal statute, it will be held that plaintiff is not seeking recovery for an injury received while engaged in interstate commerce, and the sufficiency of the petition must be tested by the state law. *Missouri, etc., R. Co. v. Hawley*, (Tex. 1909) 123 S. W. 726; *Missouri, etc., R. Co. v. Neaves*, (Tex. 1910) 127 S. W. 1091.

An employee of a railroad who seeks to avail himself of the act making railroads, while engaging in interstate or foreign commerce, liable for injuries to employees, has the burden of showing that his duties while an employee directly pertained to interstate or foreign commerce, and an employee of a rail-

road engaging in interstate commerce, who shows that he was injured while loading rails on a flat car, in consequence of the negligence of fellow servants, but who does not show whether the rails were old or new, where they came from, where they were to be taken, or where the car was to go when loaded, is not entitled to the benefit of the act. *Tamura v. Great Northern R. Co.*, (1910) 58 Wash. 216, 108 Pac. 774.

**Necessity for pleading statute.** — Where the petition of an employee in an action against a railroad company to recover for a personal injury alleges facts which bring the case within the Federal Employer's Liability Act, it is governed by such act, whether specifically declared on or not. *Smith v. Detroit, etc., R. Co.*, (1909) 175 Fed. 506; *Whittaker v. Illinois Cent. R. Co.*, (1910) 176 Fed. 130; *Southern R. Co. v. Ansley*, (1910) 8 Ga. App. 325, 68 S. E. 1087.

**Contributory negligence.** — In an action under this act, for injuries to a trackman in a railroad yard, by being struck by certain passenger cars, kicked along the track, it was held that contributory negligence was no defense. *Colasurdo v. New Jersey Cent. R. Co.*, (1910) 180 Fed. 832.

**Negligence of fellow servant.** — Under this act a railroad company engaged in interstate commerce is liable to the extent therein provided to an employee injured while assisting in carrying on such commerce, when the injury results from the negligence of a fellow servant, if such fellow servant is also engaged in interstate commerce. *Zikos v. Oregon R., etc., Co.*, (1910) 179 Fed. 893.

Where the plaintiff, a track walker, was injured while assisting certain fellow employees in repairing a switch in a railroad yard, by being struck by certain cars, kicked toward him, and from the relative position of plaintiff and his fellow employee the jury could have found that plaintiff was relying on them to look out for trains approaching from that direction, their failure to warn him constituted negligence of fellow servants which, as provided by Federal Employer's Liability Act, was an actionable negligence of the railroad company. *Colasurdo v. New Jersey Cent. R. Co.*, (1910) 180 Fed. 832.

**Violation of Safety Appliance Act.** — Under the Employer's Liability Act where a railroad company moved a car being used in interstate commerce having a coupler so defective that it would not couple automatically by impact, as required by Act March 2, 1893, ch. 196, sec. 2, 27 Stat. L. 531, 6 Fed. Stat. Annot. 753, and an employee, while attempting to remedy the defect in the performance of his duty, was caught between the cars and injured, the violation of the statute by the company was a contributing cause of the injury, which rendered it liable therefor; the questions of assumption of risk and contributory negligence being immaterial, under sections 3 and 4 of this act. *Johnson v. Great Northern R. Co.*, (C. C. A. 1910) 178 Fed. 643.

**Must be engaged in interstate commerce.** — In order to establish a cause of action under this act, the offending carrier at the time of

the injury must be engaged in interstate commerce and the injury must be suffered by the employee while employed by such carrier in such commerce. *Pedersen v. Delaware, etc., R. Co.*, (1911) 184 Fed. 737; *St. Louis, etc., R. Co. v. Hesterly*, (Ark. 1911) 135 S. W. 875.

**Trains carrying construction material.** — In *Pedersen v. Delaware, etc., R. Co.*, (1911) 184 Fed. 737, it appeared that the defendant railroad company engaged in interstate and intrastate business at the time of plaintiff's injury was building an additional track near Hoboken, N. J., part of which was laid on a bridge. The plaintiff, an employee engaged in the bridge construction, was injured while carrying material from one part of the work to another, by a local train running between two points in New Jersey. It was held that the injury was inflicted by the carrier as the result of the operation of a train engaged wholly in intrastate business, and plaintiff could not recover under this act.

**Operation.** — The Employer's Liability Act is not retroactive, and does not authorize an action for the wrongful death by the administrator of an employee engaged in interstate commerce against his master occurring prior to the time the act took effect. *Winfree v. Northern Pac. R. Co.*, (C. C. A. 1909) 173 Fed. 65.

**Survival of cause of action.** — The cause of action for an injury to an employee of an interstate carrier by railroad, given by this section, does not survive the death of the person injured, and damages for his conscious suffering are not recoverable in an action for his death. *Walsh v. New York, etc., R. Co.*, (1909) 173 Fed. 494.

**Damages.** — In an action for the death of a railroad brakeman under this act, providing that the recovery shall inure to the benefit of deceased's family, an instruction permitting a recovery for the loss sustained by decedent's children, consisting of their loss of care, attention, instruction, and training, from their father's death, was not erroneous. *Duke v. St. Louis, etc., R. Co.*, (1909) 172 Fed. 684.

**Res judicata.** — Judgment, in a suit under a state statute brought by plaintiff in behalf of herself and her minor children for negligent death of her husband, bars a subsequent suit by her as administratrix, under this act, difference in the capacity in which she sued not affecting the identity of the parties to the suit. *Troxell v. Delaware, etc., R. Co.*, (1911) 185 Fed. 540.

**Servant employed in interstate commerce.** — An employee of a railroad company, charged with the duty of seeing to the coupling of cars and of the air brake pipes upon cars standing upon a switch track to be transferred to another company, some of which cars were being used in interstate commerce, was being employed in interstate commerce, and was within the provisions of the Employer's Liability Act. *Johnson v. Great Northern R. Co.*, (C. C. A. 1910) 178 Fed. 654.

**Trackman.** — This Act includes within its scope all persons who could be included within the constitutional power of Congress, and

hence includes a trackman engaged in the repair of a switch connected with a track used for both interstate and intrastate commerce. *Colasurdo v. New Jersey Cent. R. Co.*, (1910) 180 Fed. 832.

A section hand working on the track of a railroad over which both interstate and intrastate traffic is moved is employed in "interstate commerce" within the meaning of this act and within its protection. *Zikos v. Oregon R., etc., Co.*, (1910) 179 Fed. 893.

## 1909 Supp., p. 584, sec. 2.

**Jurisdiction of federal courts.**—This section which makes common carriers by railroad within the territories of the United States liable for injuries to employees as therein stated, supersedes the common law in the territories with respect to such liability, and any cause of action within its terms is necessarily one arising under a law of the United States and on that ground within the jurisdiction of a federal Circuit Court, where the requisite amount is involved. *Cound v. Atchison, etc., R. Co.*, (1909) 173 Fed. 527.

Where an action for injuries to a servant arose solely on the Federal Employer's Liability Act, the federal Circuit Court had original jurisdiction without reference to the citizenship of the parties. *Clark v. Southern Pac. Co.*, (1909) 175 Fed. 122.

**District of suit.**—An action in a federal court on a cause of action arising under a law of the United States, although the parties are citizens of different states, is not one in which "jurisdiction is founded only" on diversity of citizenship, within the meaning of the Federal Judiciary Act of 1875 (Act March 3, 1875, 137, sec. 1, 18 Stat. L. 470), as amended in 1887 (Act March 3, 1887, ch.

A member of a railroad bridge gang injured, while engaged and within the scope of his employment in repairing bridges, by an alleged defective scaffold, though his duties required work in the repair of bridges for the railroad company in different states, was held not to be "employed in interstate commerce," within the Employer's Liability Act. *Taylor v. Southern R. Co.*, (1910) 178 Fed. 381.

373, 24 Stat. L. 552) and 1888 (Act Aug. 13, 1888, ch. 866, 25 Stat. L. 433, 4 Fed. Stat. Annot. 265), and, unless the objection is waived, can only be brought in the district of which defendant is an inhabitant. *Cound v. Atchison, etc., R. Co.*, (1909) 173 Fed. 527.

**Petition.**—Where a petition in an action against an interstate carrier for injuries to a brakeman in one of the territories of the United States alleged injury to the plaintiff by the negligence of a carrier while the plaintiff was in the performance of his duty, it sufficiently showed that the action was based on the Federal Employer's Liability Act, though it did not so allege in terms. *Clark v. Southern Pac. Co.*, (1909) 175 Fed. 122.

**Temporary separation of husband and wife.**—That a wife was temporarily separated from her husband at the time he was killed while in the defendant's employ did not affect her right to recover damages under the Employer's Liability Act, for his wrongful death. *Dunbar v. Charleston, etc., R. Co.*, (1911) 186 Fed. 175.

## 1909 Supp., p. 585, sec. 3.

**Failure to apply rule of comparative negligence.**—In an action for personal injuries received by a railroad employee, the defendant cannot complain that the rule of comparative negligence under this section was not applied where the jury were instructed

to find for the plaintiff only in event of the defendant's negligence and plaintiff's freedom from contributory negligence, and the latter rule being more favorable to defendant. *Galveston, etc., R. Co. v. Averill*, (Tex. 1911) 136 S. W. 98.

# RECEIVING STOLEN GOODS.

## Vol. VI, p. 761, sec. 5357.

**Sufficiency of indictment.**—Under this section it is not essential to allege in the indictment that the property was received without the consent of the owner or with intent to deprive him of its use and benefit, the criminal intent and evil purpose of the receiver being sufficiently alleged where his act is characterized as unlawful and felonious. *Bise v. U. S.*, (C. C. A. 1906) 144 Fed. 374, 7 Ann. Cas. 165.

An indictment charging that defendants

on a certain date, within a certain district of the Indian Territory, unlawfully, feloniously, and knowing the same to have been previously stolen, did receive certain described property which had been previously feloniously stolen, taken, and carried away from the owner, was held to sufficiently charge the offense of receiving stolen goods within this section. *Bise v. U. S.*, (1904) 5 Ind. Ter. 602, 82 S. W. 921.

## Vol. VI, p. 761, sec. 2.

**Evidence of similar offenses.**—In a prosecution under this act, for knowingly receiving property stolen from a navy yard of the United States, on the question of knowledge, it was held that evidence was admissible to

show that the defendant had received and purchased articles of the same general character stolen from such navy yard at other times. *Sapir v. U. S.*, (C. C. A. 1909) 174 Fed. 219.

## RECORDS.

## Vol. VI, p. 764, sec. 5403.

**Definition.**—In this section which makes it a criminal offense to steal or destroy "any record, paper, or proceeding of a court of justice," or "any paper or document or record filed or deposited in any public office or with any judicial or public officer," the words "record" and "document" are not limited in their meaning to the technical common-law records of courts as enrolled, or to technical documents, but mean any paper filed and which becomes a part of the records of the court or office, broadly speaking, and is treated as a record of what it contains. *McInerney v. U. S.*, (1906) 143 Fed. 729, 74 C. C. A. 655.

**Imperfect or incorrectly kept records.**—It is not a defense to a prosecution under this section for stealing or destroying a

record of a court that such record was technically imperfect or incorrectly kept. *McInerney v. U. S.*, (1906) 143 Fed. 729, 74 C. C. A. 655.

**Papers in naturalization proceedings.**—The original application of an alien for naturalization filed in a court of the United States, together with the affidavits, certificates, and record of proceedings thereon, preserved in the office of the clerk, bound in one of a series of books kept for the purpose, and which are evidence of the rights of the applicant as a citizen, constitute a record of the court within the meaning of this section, and the stealing or destruction of any part thereof is a criminal offense thereunder. *McInerney v. U. S.*, (1906) 143 Fed. 729, 74 C. C. A. 655.

## Vol. VI, p. 764, sec. 5408.

**"Custody"** means keeping, and implies responsibility for the protection and preservation of the person or thing in custody. A document in a public office in the general custody of a commissioner and in the particular custody of a chief clerk, under whom five or six subordinate clerks are employed who have access to it in order to discharge their duties, is not in the custody of one of the latter. *Martin v. U. S.*, (1909) 168 Fed. 198, 93 C. C. A. 484, *reversing* (1907) 7 Ind. Ter. 451, 104 S. W. 678.

The words "take away or withdraw" in this section, must be read with the word "destroys," and they mean a taking away or withdrawal whereby some injury is intended, attempted, or inflicted upon the record or document, or upon some one who has an interest in it and is entitled to use it. *Martin v. U. S.*, (1909) 168 Fed. 198, 93 C. C. A. 484, *reversing* (1907) 7 Ind. Ter. 451, 104 S. W. 678.

**One of the clerks of the commissioner to the Five Civilized Tribes**, employed at a salary of \$1,200 a year, under authority granted by Congress to the Secretary of the Interior, to employ all assistance necessary to perform the duties of the commissioners to those tribes, was not an officer of the United States, and was not punishable under this section. *Martin v. U. S.*, (1909) 168 Fed. 198, 93 C. C. A. 484, *reversing* (1907) 7 Ind. Ter. 451, 104 S. W. 678.

**Indictment.**—An allegation that an act, innocent in itself, but criminal if done "fraudulently," was performed fraudulently, or with an intent to defraud, without the averment of any acts or facts tending to show fraud, is a legal conclusion and futile. It is insufficient to charge the offense of fraudulently taking away or removing a record or document under this section. *Martin v. U. S.*, (1909) 168 Fed. 198, 93 C. C. A. 484, *reversing* (1907) 7 Ind. Ter. 451, 104 S. W. 678.

## REPORTS (LAW).

Vol. VI, p. 768, sec. 1.

Copyright by official reporter. — Conceding the right of the official reporter of the Supreme Court of the United States to secure a copyright in his work in the volumes of published reports, the mere arrangement of reported cases in sequence, and their paging

and distribution into volumes, are not features of such importance as to entitle him to copyright protection of such details. *Banks Law Pub. Co. v. Lawyers' Co-Operative Pub. Co.*, (1909) 169 Fed. 386, 17 Ann. Cas. 957, 94 C. C. A. 642.

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## REVENUE MARINE—REVENUE CUTTER SERVICE.

1909 Supp., p. 597, sec. 5.

Service in the Revenue-Cutter Service. — Officers of the Revenue-Cutter Service who during the civil war served upon vessels of that service which were armed, manned, and equipped as were naval vessels, and were engaged in conjunction with the navy in hostile operations against the enemy, "served in the naval forces of the United States" within the meaning of this section, and upon retirement, are entitled to have the rank and to receive three-fourths of the duty pay and increase of the next higher grade to that held by them at the time of retirement. The mere fact that an officer of the Revenue-Cutter Service was in that service during the civil war would not be sufficient to establish

that he had "served during the civil war in the land or naval forces" if the location and character of his services were such that he did and could have done nothing more during the time of the civil war than he would have done in time of peace. If, however, the location of his vessel and the consequent range of his duties were such that he necessarily filled a place which must or would probably have been otherwise assigned to some other public armed force, then the fact that he did not take part in any engagement or actual conflict with the enemy will not deprive him of the benefits of this act. (1908) 27 Op. Atty-Gen. 8.

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## RIVERS, HARBORS, AND CANALS.

Vol. VI, p. 787, sec. 2476.

Construction. — Under this section the waters of navigable rivers within the territory specified are declared to be public highways; but the section does not reserve the bed of the stream, but does declare that when the opposite banks of any stream, not navigable, belong to different persons, the stream and the bed thereof shall become common to both. This Act of Congress means that navigable streams, within the territory to be disposed of, shall be deemed to be and remain public highways, subject to the public easement; that the public should enjoy its free and uninterrupted navigation, unobstructed by dams, bridges, or other struc-

tures which might impede its commerce; the intention of Congress being to reserve the use of the rivers for the public without interference with the riparian owner, and the latter to have his right to the bed of the stream without interference with *jus publicum*. *Johnson v. Johnson*, (1908) 14 Idaho 561, 95 Pac. 499.

Navigable streams in Alaska are public highways, and no portion of the bed or land lying between high and low water mark is subject to entry or sale under the public land laws. *U. S. v. Roth*, (1904) 2 Alaska 257.



**Vol. VI, p. 792, sec. 4.**

**Constitutionality.**—This section which makes it the duty of the Secretary of War "to prescribe such rules and regulations for the use, administration, and navigation of any or all canals and similar works of navigation that now are or hereafter may be, owned, operated, or maintained by the United States as in his judgment the public necessity may require," and makes a wilful violation of such rules and regulations a criminal offense punishable as therein provided, impliedly forbids the use of canals owned by the United States, under penalty of criminal prosecution, except in compliance with such rules and regulations, and the delegation of power to make the same to an administrative department is constitutional. *U. S. v. Moody*, (1908) 164 Fed. 269.

Rule 8 of the regulations promulgated by

the Secretary of War for the government of St. Mary's Falls Canal, owned by the United States, which provides that "the movements of all vessels, boats, or other floating things, in the canal shall be under the direction of the superintendent and his assistants, whose orders and instructions must be obeyed," is within the authority conferred on him by this act, to make regulations for the operation of all canals owned, operated, or maintained by the United States, and valid; and an order given by the superintendent or an assistant, for the movement of a vessel, is but the carrying into effect of such rule, and not the making of a special rule, and the disobedience of such an order is a violation of the rule, made punishable as a criminal offense under the statute. *U. S. v. Moody*, (1908) 164 Fed. 269.

**Vol. VI, p. 793, sec. 5.**

**Necessity for publication of regulations.**—Regulations made pursuant to this section, providing for the opening of drawbridges across navigable streams, and that the Secretary of War shall make such rules and regulations as public necessity requires, which regulations, when made and published, shall have the force of law, have no force until

duly published, so that a steamboat owner would not be negligent in not observing rules not published. *Fugina v. Chicago, etc., R. Co.*, (1910) 142 Wis. 144, 125 N. W. 981.

**Publication a jury question.**—*Fugina v. Chicago, etc., R. Co.*, (1910) 142 Wis. 144, 125 N. W. 981.

**Vol. VI, p. 796, sec. 1.**

**Jurisdiction.**—Under this Act which makes it a criminal offense to dump refuse in the tidal waters of New York Harbor within prescribed limits, or to deviate from the dumping grounds specified in a permit granted thereunder, an offense is not committed until

refuse is dumped in some prohibited place, and such place fixes the locus of the crime and the venue for its prosecution. *U. S. v. Newark Meadows Imp. Co.*, (1909) 173 Fed. 426.

**Vol. VI, p. 801, sec. 4.**

**Refund of penalty.**—Prior to the taking effect of the Act of Feb. 14, 1903, 32 Stat. L. 825, 10 Fed. Stat. Annot. 58, creating the Department of Commerce and Labor, the Secretary of the Treasury had no authority to remit a fine or penalty imposed for a violation of this act, nor to discontinue a suit instituted by the government to recover a penalty thereunder, and therefore the Secretary of Commerce and Labor has no authority

to direct the discontinuance of such a suit. (1904) 25 Op. Atty-Gen. 220.

The word "vessels" as used in this Act does not relate to vessels in the sense contemplated by sections 5292-5294, Revised Statutes, 2 Fed. Stat. Annot. 101-104, authorizing the remission of fines, penalties, and forfeitures by the Secretary of the Treasury. (1904) 25 Op. Atty-Gen. 220.

**Vol. VI, p. 805, sec. 9.**

**Change of authorized bridge.**—A railroad bridge over a navigable stream, built under authority of an Act of Congress, which contained no reserve as to repeal, modification, or alteration, can only be required to be moved or replaced by a new bridge constructed, in accordance with this act, by an Act of Congress authorizing the same and providing for just compensation. *U. S. v. Parkersburg Branch R. Co.*, (C. C. A. 1906) 143 Fed. 224.

**Rebuilding bridge.**—Neither the provision of this section 9 that "it shall not be lawful

to construct or commence the construction of any bridge . . . until the consent of Congress to the building of such structures shall have been obtained," not of section 10, prohibiting "the creation of any obstruction not affirmatively authorized by Congress," applies to the rebuilding of a bridge which was lawfully in existence when the act was passed. *Rogers Sand Co. v. Pittsburgh, etc., R. Co.*, (C. C. A. 1905) 139 Fed. 7. Compare *Gulf, etc., R. Co. v. Meadows*, (Tex. 1909) 120 S. W. 521, in which it was held that where a railroad company tore down a wood

bridge, and erected in its place a new steel structure, it was a "construction" of a bridge within the federal statute.

**Navigable waters entirely within the limits of a state.**—No one may build a bridge over a navigable river within the limits of one state without the concurrent permission of the state and national governments. *Gulf, etc., R. Co. v. Meadows*, (Tex. 1909) 120 S. W. 521.

## Vol. VI, p. 813, sec. 10.

**State and federal assent both necessary.**—This act requiring the consent of the Secretary of War on the approval of the chief of engineers to the construction of public works in any navigable waterway within the United States, does not transfer exclusive control over navigable waters entirely within the limits of a state to the federal authorities, but the right of private persons to erect structures in such waters is dependent upon the concurrent or joint consent of both the state and federal governments. *Cobb v. Lincoln Park*, (1903) 202 Ill. 427, 87 N. E. 5; *Minnesota Canal, etc., Co. v. Pratt*, (1907)

In (1906) 25 Op. Atty.-Gen. 601, it was held that the Hudson Highland Bridge and Railway Company, a corporation created by the legislature of the state of New York, with authority to construct a bridge across the Hudson River between two points in the state of New York, could not lawfully build such bridge without first obtaining the consent of Congress as required by this section.

101 Minn. 197, 112 N. W. 395; *Wilson v. Hudson County Water Co.*, (1910) 76 N. J. Eq. 543, 76 Atl. 560.

**Water pipes across river.**—Under this section a water pipe across a river if built according to plans recommended by the chief of engineers and authorized by the Secretary of War, is deemed to be affirmatively authorized by Congress, and is a lawful structure without any further action by Congress, although the affirmative authority arises by implication. *Maine Water Co. v. Knickerbocker Steam Towage Co.*, (1905) 99 Me. 473, 59 Atl. 953.

## Vol. VI, p. 815, sec. 12.

**Acquittal under this section as bar to civil suit.**—The acquittal of a defendant indicted under this section for creating an obstruction in a navigable stream, in violation of section 10, is not a bar to a subsequent suit in equity brought by the United States

under the same section against the same defendant to compel the removal of such obstruction; the issues and measures of proof required in the two proceedings not being the same. *U. S. v. Donaldson-Shultz Co.*, (C. C. A. 1906) 148 Fed. 581.

## Vol. VI, p. 816, sec. 13.

**Liability of vessel.**—This section and section 16 of this act prohibiting the deposit of refuse matter in any navigable water of the United States, and making any vessel used in such illegal act liable for the pecuniary penalties imposed therefrom, are within the

constitutional powers of Congress, and to render a vessel subject to such penalties it is not essential that some person or corporation should have previously been convicted thereunder. *The Scow No. 9*, (1907) 152 Fed. 548.

## Vol. VI, p. 817, sec. 15.

**Scope of section.**—While this section providing that it shall not be lawful to tie up or anchor vessels or other craft in navigable channels "in such manner as to prevent or obstruct the passage of other vessels or craft," was not intended to absolutely prohibit the anchoring in navigable channels, it makes it unlawful whenever the result is to obstruct other vessels in passing to such extent as to make such passing a dangerous manœuvre; and the fact that other vessels have succeeded in passing one so anchored in safety is not proof that her anchorage was not in violation of the statute, or that she was not in fault for a collision with another vessel which was attempting to pass. *The Cald.* (1907) 153 Fed. 837, 83 C. C. A. 19.

**Abandonment.**—Under this section and section 19 of this act which provide that whenever any vessel or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the

owner to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and maintain such marks until it is removed or abandoned, and to at once commence the removal of the same, and that if not removed within thirty days, or if sooner abandoned, it may be broken up or removed by the Secretary of War, the neglect to mark a sunken craft as required is not a *prima facie* abandonment, nor is the failure to remove it an abandonment until the expiration of thirty days, and during all such time it is the duty of the owner to keep the place marked, and if he does not he is liable for injuries caused to others thereby unless there has been an actual abandonment. *People's Coal Co. v. Second Pool Coal Co.*, (1910) 181 Fed. 609.

**Dredge anchored in narrow channel.**—In *The City of Birmingham*, (1905) 138 Fed. 555, 71 C. C. A. 115, it appeared that a dredge, anchored at night within 200 feet of

the centre of the narrow channel of the Savannah river, at a point not far above a sharp bend, and where a seven-foot tide ebbed and flowed, was struck and sunk by an ascending steamer. The dredge was of light draft, and could have anchored in a place of safety entirely outside the channel; the only reason given for not doing so being the inconvenience of moving from the place where she was working. It was held that such anchorage obstructed the passage of other vessels, in violation of this section, and that the dredge was chargeable with contributory fault for the collision.

**Vessel anchored in wide channel.**—A vessel anchored at night in calm weather, as the result of a previous collision, in Hampton Roads in the middle of the channel, which was there a mile or more wide for seagoing vessels, was not chargeable with violation of this section, prohibiting vessels from anchoring in navigable channels in such manner as to prevent or obstruct the passage of other vessels: and where she carried proper lights and kept an anchor watch who gave due warning by signals to an approaching schooner, the latter was solely in fault for a collision between them. *The Job H. Jackson*, (1906) 144 Fed. 897, *affirmed* (C. C. A. 1907) 152 Fed. 1021.

**Aiding of vessel grounded or in difficulty.**—This section which makes it unlawful to anchor or tie up any vessel in a navigable channel in such manner as to prevent or obstruct the passage of other vessels, was not intended to prevent the aiding of a vessel grounded or in difficulty, even if it involves the temporary obstruction of a channel. *The Waverley*, (1907) 155 Fed. 436.

**Reasonable time for marking sunken vessel.**—The owner of a canal boat which was sunk in the channel of the Hudson river, who failed for two days without good excuse to mark the place, as required by this section, did not act within a reasonable time, and was liable for damages done to another vessel by collision with the wreck. *The Macy*, (C. C. A. 1909) 170 Fed. 930.

## Vol. VI, p. 817, sec. 16.

**Liability of vessel.**—This section and section 13 of this Act prohibiting the deposit of refuse matter in any of the navigable waters of the United States, and making any vessel used in such illegal act liable for the pecuniary penalties imposed therefor, were enacted in the exercise, for the public good, of the police powers inherent in the government, and a vessel so used is subject to such penalties, although the act was without the knowledge or intent of her owner and contrary to his general instructions. *Scow No. 36*, (C. C. A. 1906) 144 Fed. 932.

Where the owner of a dumping scow placed a man in sole charge with power to dump her

Amount of precaution necessary. — This section, providing that it shall be unlawful to tie up or anchor vessels or other craft in navigable channels in such manner as to prevent or obstruct the passage of other vessels, was held not to condemn a lighter which, compelled to anchor in the Hudson river, because of a dense fog, made her way to the side on which were the anchorage grounds, as far as was considered safe, and anchored after taking soundings which indicated that she was within the grounds; the exercise of precautions commensurate with the danger being all that was required. *The Newburgh*, (1904) 130 Fed. 321, 64 C. C. A. 567.

**Liability of owner for failure to mark wreck.**—This section which provides that, whenever a vessel is wrecked and sunk in a navigable channel, "it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night," places such duty upon the owner, and no one else, and he cannot shift the responsibility for an injury to another vessel, resulting from his failure to perform it, upon tugs which caused the wreck by their fault, when he had notice of the situation in ample time to have performed the duty before damages resulted. *The Anna M. Fahy*, (C. C. A. 1907) 153 Fed. 866.

**"Owner."**—In *People's Coal Co. v. Second Pool Coal Co.*, (1910) 181 Fed. 609, it appeared that the respondent, a coal company, having in its possession as bailee a coal flat partly loaded with coal, moored to its float in the Allegheny river in Pittsburgh, cast it loose during a flood, and it sank some distance below. The place was not marked, and some three weeks later the libellant's vessel ran into it and was injured. It was held that the respondent was the "owner," within the meaning of this section, and removed to mark the place until the flat was removed or abandoned, and it appearing that there had been no abandonment, that the respondent was liable to the libellant for the injury to its vessel.

load, and he, becoming unnecessarily alarmed at the roughness of the sea while being towed to the dumping grounds, dumped a part of her load into the waters of a harbor, in violation of section 13, it was held that the scow was subject to the penalty imposed by section 16, although the action of the scowman was contrary to the orders of the owner; but that the towing tug, although the property of the same owner, where the master had no reason to anticipate the violation of the statute, could not be said to have been "used or employed" in such violation, and was not subject to the penalty thereof. *The Scow No. 9*, (1907) 152 Fed. 548.

## Vol. VI, p. 818, sec. 18.

**Constitutionality — Taking private property for public use without past compensation.**—The making of the alterations or

changes in a bridge erected under the sanction of a state over an interstate waterway, which the Secretary of War, acting under the au-

thority of this section, requires to secure navigation against an unreasonable obstruction, is not a taking of private property for public use for which the Federal Constitution requires compensation to be made, but is merely incidental to the exercise by the government of its power to regulate commerce among the states. *Union Bridge Co. v. U. S.*, (1907) 204 U. S. 364, 27 S. Ct. 367, 51 U. S. (L. ed.) 523, *affirming* (1906) 143 Fed. 377; *Monongahela Bridge Co. v. U. S.*, (1910) 216 U. S. 177, 30 S. Ct. 356, 54 U. S. (L. ed.) 435.

*Delegation of power.*—Legislative and judicial powers are not unconstitutionally delegated to the Secretary of War by the provision of this section, empowering that official, when satisfied, after a hearing of the parties interested, that a bridge over a navigable waterway of the United States is an unreasonable obstruction to navigation, to require such changes or alterations as will render navigation reasonably safe, easy, and unobstructed. *Union Bridge Co. v. U. S.*, (1907) 204 U. S. 364, 27 S. Ct. 367, 51 U. S. (L. ed.) 523, *affirming* (1906) 143 Fed. 377; *Monongahela Bridge Co. v. U. S.*, (1910) 216 U. S. 177, 30 S. Ct. 356, 54 U. S. (L. ed.) 435, *affirming* (1908) 160 Fed. 712; (1904) 25 Op. Atty-Gen. 195.

*Power of Secretary of War.*—The Secretary of War is not invested with arbitrary power in the premises by the provision of this section empowering him, when satisfied that a bridge over an interstate waterway is an unreasonable obstruction to navigation, to require such changes or alterations as will render navigation reasonably free, easy, and unobstructive, since he is bound, before making any decision or taking final action, to notify the parties interested of any proposed investigation by him to give them an opportunity to be heard, and to allow reasonable time to make such alterations as he finds to be necessary to free navigation. *Monongahela Bridge Co. v. U. S.*, (1910) 216 U. S. 177, 30 S. Ct. 356, 54 U. S. (L. ed.) 435.

*Notice signed by Assistant Secretary of War.*—A notice to a bridge company to make certain alterations in a bridge over an interstate waterway, conformably to this section, is not insufficient in case of noncompliance because it bears the signature of the Assistant Secretary of War, instead of the Secretary himself, who is the official named in the statute as the one to give such notice, where the communication shows upon its face that it was from the War Department, and from the Secretary of War, and that the latter, without abrogating his authority under the statute, only used the hand of the Assist-

ant Secretary in order to give the owners of the bridge notice of what was required of them. *Hannibal Bridge Co. v. U. S.*, (1911) 221 U. S. 194, 31 S. Ct. 603, 55 U. S. (L. ed.) 699.

*Applicable to bridges authorized by Congress.*—The authority conferred upon the Secretary of War by this section to require any bridge constructed over any navigable water of the United States which is an unreasonable obstruction to navigation to be so altered as to render navigation under it reasonably free, easy, and unobstructed, applies to bridges constructed under the authority of Acts of Congress, provision having been made in the previous sections for the case of structures of that nature unauthorized by Congress. (1904) 25 Op. Atty-Gen. 195.

*Rights in unused navigable stream.*—Where a private canal constructed and used as a cut-off to take the place commercially of the tortuous channel of a navigable stream had been abandoned, and its uses for such purposes entirely destroyed by the owner of the rights therein, it was held that the rights of the public reverted to the original channel of the stream, and that the United States might maintain a suit to enjoin the obstruction of such channel by a bridge. *U. S. v. Jamaica, etc., Turnpike Road*, (1910) 183 Fed. 598.

*Hearing.*—A bridge company convicted for failure to make the alterations in a bridge over an interstate waterway which the Secretary of War, acting under the authority of this section, requires, was afforded the reasonable opportunity to be heard, upon the question whether the bridge was, in fact, an unreasonable obstruction to navigation, where the company had full notice of the action of the officer of engineers, who, under the order of the Secretary, made a tentative examination of the facts, and appeared at the regular final hearing before that officer with liberty to contest the facts, and introduce any evidence pertinent to the case, and the decision of the Secretary of War was based on the engineer officer's report of all the facts adduced before him, and which constituted the basis of his conclusion that the bridge was an unreasonable obstruction to navigation. *Monongahela Bridge Co. v. U. S.*, (1910) 216 U. S. 177, 30 S. Ct. 356, 54 U. S. (L. ed.) 435.

*"Material obstructions."*—The obstructions to navigation which the Secretary of War by this section is authorized to prevent or to remove at the expense of the owner, without compensation, are "material" obstructions. (1904) 25 Op. Atty-Gen. 195.

## Vol. VI, p. 820, sec. 19.

*Authority of Secretary of War.*—This section, relating to rivers and harbors, and authorizing the Secretary of War at his discretion to remove obstructions from the navigable waters of the United States, did not invest the Secretary of War with exclusive jurisdiction of the removal of obstructions, but was intended to clothe him with dis-

cretionary power, which he might exert or leave to the enforcement of the local authorities, and if he fails or declines to act, the local authorities may protect their domestic commerce by keeping navigable waters in their jurisdiction unobstructed. *Hagan v. Richmond*, (1905) 104 Va. 723, 52 S. E. 385.

*Personal liability of owner.*—This section

relating to the removal of obstructions from navigable waters, and limiting the liability of the owners of vessels without personal negligence, is paramount, and a state Act and city ordinance declaring that the board of harbor commissioners shall remove any wreck

injurious to the harbor at the owner's expense are invalid, unless the obstruction occurs with the privity or knowledge of the owner. *Hagan v. Richmond*, (1905) 104 Va. 723, 52 S. E. 385.

### Vol. VI, p. 821, sec. 20, par. third.

**Act of 1890.**—The provision of Act Cong. Sept. 19, 1890, ch. 907, 26 Stat. L. 454, 6 Fed. Stat. Annot. 805 note, prohibiting the maintenance of obstructions to navigation in navigable streams, is not inconsistent with this

Act, prohibiting the erection of such obstructions. *U. S. v. Wishkah Boom Co.*, (1905) 136 Fed. 42, 68 C. C. A. 592, (1906) 202 U. S. 613, 26 S. Ct. 765, 50 U. S. (L. ed.) 1171.

### Vol. VI, p. 825, sec. 1.

**Construction of statute.**—This Act providing for governing the movements and anchorage of vessels and rafts in St. Mary's river, from Point Iroquois on Lake Superior to Point Detour on Lake Huron, does not take all the waters on the American side of the boundary line out of the provision of the treaty by which they were found to be a part

of Lake Huron, nor change the character of the water from a lake into a river, the term "St. Mary's river" being used for convenience in designating the waters between the two points mentioned for the purposes of navigation. *Ainsworth v. Munoskong Hunting, etc., Club*, (1909) 159 Mich. 61, 123 N. W. 803.

### Vol. VI, p. 827. [*Condemnation, purchase, etc.*]

**Authority of Secretary of War.**—By this Act the Secretary of War is directly given the right to institute proceedings for "condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision has

been made by law," and under such Act he is intrusted with the power and duty of determining specifically what land, right of way, or material is needed for such works as are authorized by law. *U. S. v. Certain Lands in Narragansett*, (1906) 145 Fed. 654.

### Vol. VI, p. 836, sec. 2.

**Subsequent ratification by Congress** is a sufficient answer to the contention that the title of the United States to the Isthmian or Panama canal zone was not acquired as

provided in this Act, by treaty with the Republic of Columbia. *Wilson v. Shaw*, (1907) 204 U. S. 24, 27 S. Ct. 233, 51 U. S. (L. ed.) 351.

## SEAMEN.

### Vol. VI, p. 848, sec. 4504.

**Master as shipping commissioner.**—The master of a vessel making a coastwise voyage between Atlantic ports of the United States may act as shipping commissioner for the

purpose of signing his own crew, and the contract so signed is valid and binding. *The William H. Clifford*, (1908) 165 Fed. 59.

### Vol. VI, p. 853, sec. 4511.

**Filling in blanks.**—It is not competent for the master to fill up blank spaces in the shipping articles, so as to bind the seaman, as such articles constitute a contract for wages. *The Bark Shetland v. Johnson*, (1903) 21 App. Cas. (D. C.) 416.

**Wages.**—A provision in shipping articles that "the crew shall make no claim for wages or provisions while the vessel is detained by

ice, prior to departure," is not in violation of this section, and is reasonable and valid. *The Joseph B. Thomas*, (1905) 136 Fed. 693. See also *The Lillian*, (1904) 131 Fed. 375.

**Parol evidence.**—A shipowner, when sued by members of the crew for damages resulting from a deviation from the voyage specified in the articles, cannot be permitted to show by parol evidence that the members of the crew

were informed that the nature of the intended voyage was materially different from that stated, and that they assented to the deviation at the time of their engagement.

### Vol. VI, p. 859, sec. 4520.

**Necessity of shipping articles.**—Where the mate of a vessel of more than fifty tons burden, engaged in the coasting trade, had general authority to hire seamen, and engaged libelants to serve as members of the crew on a certain voyage, without making any agreement with them with respect to their wages, and they were received on board by the mate as members of the crew, and treated as such while at an intermediate port, without having ever assented to any contract to

*Turtle v. Northwestern Steamship Co.*, (1907) 154 Fed. 146, *affirmed* (C. C. A. 1908) 162 Fed. 256.

work for their passage without other compensation, it was the duty of the master to require libelants to sign shipping articles for the voyage before carrying them to sea, as required by this section; and hence such libelants were entitled to recover the highest rate of wages paid at the port of departure for the time of their actual service, as provided by R. S. secs. 4521, 4523. *The Elihu Thompson*, (1905) 139 Fed. 89.

### Vol. VI, p. 862, sec. 4523.

A contract for service on a British ship made in an American port, by which the seaman was paid wages in advance, in violation of Act Dec. 21, 1898 (30 Stat. L. 755, 763, ch. 28), is void, and the seaman may leave the service at any time, and recover full wages for the time served, without deduction on account of the advance. *Kenney v. Blake*, (C. C. A. 1903) 125 Fed. 672, *affirming* (1902) 117 Fed. 557.

The advance payment of wages to a seaman, in violation of Act Dec. 21, 1898, ch. 28, sec. 24, 30 Stat. L. 763, does not render the contract for service made by the shipping articles void, under this section, where it is not shown that the unlawful payment entered into the contract as one of the things agreed on by the parties. *The Bound Brook*, (1906) 146 Fed. 160. See also *The Alnwick*, (1904) 132 Fed. 117.

### Vol. VI, p. 864, sec. 4527.

**Pay on wrongful discharge.**—By analogy to this section a court of admiralty may, when equitable, award a seaman wrongfully discharged an additional month's wages, although he served more than a month, and is not therefore within the terms of the statute. *Caffyn v. Peabody*, (1906) 149 Fed. 294.

Libelants signed as seamen for a voyage on a vessel then ready to sail from the port of Philadelphia, but detained by ice; the shipping articles containing a provision that they should make no claim for wages or provisions while the vessel was so detained. They went on board, and were furnished light work, and given their provisions for a few days, and were then sent on shore by the

master, but were told to be in readiness to come back whenever the vessel should be able to get away. When that time came, a week later, they either could not be found or refused to go. It was held that they were not discharged, and were not entitled to wages for the time they were on board, nor to extra pay, under this section, as upon a wrongful discharge. *The Joseph B. Thomas*, (C. C. A. 1906) 148 Fed. 762, *affirming* (1905) 136 Fed. 693.

**Seamen in coastwise trade.**—This section does not apply to seamen in the coastwise trade not signed before a shipping commissioner. *The George B. Ferguson*, (1905) 140 Fed. 455.

### Vol. VI, p. 866, sec. 4529.

**Purpose of section.**—This section must be considered as intended to secure justice, and not to penalize vessels for mere errors of judgment on the part of their masters, and should not be applied in a case where seamen left their ship on account of a matter as to which there was reasonable ground for controversy, which constituted sufficient cause for litigating their right to recover wages. *The Amazon*, (1906) 144 Fed. 153.

**"Without sufficient cause."**—Where there was fair ground for claiming the right to reduce the wages of a mate because of neglect of duty, the refusal to pay him the agreed wages in full on his discharge was not "without sufficient cause," so as to subject

the master or owner to the penalty imposed by this section. *The Sadie C. Sumner*, (1905) 142 Fed. 611.

**Leaving service without consent.**—Libelants were hired as deck hands on a steamer making daily trips between New York and another port, at thirty dollars per month, and after working six days left the service without the consent of the master. It was held that the refusal of the owner to pay them wages for the time they worked did not subject him to the penalty imposed by this section, for refusing and neglecting to pay seamen's wages when due without sufficient cause, there being reasonable ground, at least, for the owner's claim that libelants'

contract was one from month to month, and that they had no right to abandon the service before the end of the month. The Express, (1904) 129 Fed. 655.

**Effect of fine.** — Where a sailor was fined a portion of his wages for disobedience of orders, as authorized by this section, but the master of the ship did not make an entry of the offense in the ship's log-book on the day the offense was committed, as required by

section 4597, such fine was no defense to an action by the sailor against the ship to recover the same as wages. The St. Paul (1904) 133 Fed. 1002.

**Discharge.** — Where seamen were discharged, and payment of wages refused, it was held that they were entitled to libel the vessel at once therefor, without instituting proceedings under sections 4546, 4547. The Elihu Thompson, (1905) 139 Fed. 89.

## Vol. VI, p. 871, sec. 10.

**Advance payment.** — Evidence considered, and held to show that the voyage for which a libellant signed as a seaman was to terminate in a foreign port, and that he was therefore rightfully discharged in such port, but that he was entitled to recover a sum deducted from his wages on account of an advance payment made by the master when libellant signed in an American port, in violation of this act. The August Belmont, (1907) 153 Fed. 639.

Libellant, a citizen of the United States, signed as a seaman on a German vessel before the German consul at the port of New York for a voyage to Japan, and was paid a month's wages in advance, in violation of this act. When the vessel reached a Pacific port of the United States, he left it without the consent of the master, and brought suit in a court of admiralty to recover his wages for the time served. It was held that the court had jurisdiction, since, having been signed in violation of the statute, the contract was void, and he never became legally a member of the crew; that for the same reason he had the right to leave the vessel at any time, and was entitled, under such statute, to recover wages for the full time

served, without deduction on account of the advance payment. The Neck, (1905) 138 Fed. 144.

This section is applicable to a case of the shipment of seamen on a British vessel in an American port; and by virtue of R. S. sec. 4523, such seamen, to whom an advance was made on signing the articles, may leave the service at any time, and recover wages for the time served, and their right is not affected by their waiver of any claim to recover the sums advanced. The Alnwick, (1904) 132 Fed. 117.

**Paying seamen's debt.** — The fact that the master of a vessel took possession of notes given by seamen to a boarding house keeper after the signing of shipping articles, and held the same with the intention of paying them on the discharge of the seamen, if on inquiry it was found to be legal, does not constitute a violation of this section, nor render the shipment void so as to entitle the seamen to quit the service before the expiration of the term of service under R. S. sec. 4523, where the amount was not charged to the seamen nor any agreement made to pay the notes. The Albani, (1909) 169 Fed. 220.

## Vol. VI, p. 874, sec. 4536.

This section is applicable as well to seamen operating on coastwise vessels as on merchant vessels generally, and hence it is no answer to a libel in admiralty, against a tug engaged in the coasting trade for a seaman's wages earned thereon, that the wages have been attached by garnishment. The Amelia, (1910) 183 Fed. 899.

**Seamen's wages are protected from seizure** after judgment by attachment or proceedings in aid of execution by the provisions of this section. Wilder v. Inter-Island Steam Nav. Co., (1908) 211 U. S. 239, 29 S. Ct. 58, 53 U. S. (L. ed.) 164.

## Vol. VI, p. 890, sec. 4561.

The purpose of this section is to protect seamen; and a seaman will not be held to have assumed the risk from unseaworthy vessels so as to preclude a recovery from the vessel or owner for an injury resulting there-

from, but the vessel by going to sea in violation of the statute assumes all risks which may result therefrom. The Fullerton, (C. C. A. 1908) 167 Fed. 1.

## Vol. VI, p. 898, sec. 4573.

**Compliance with statute presumed.** — Where in a proceeding by seamen against a vessel for wages, the men claim their wages from a date prior to the sailing date, on the ground that they were told to be on board by such

date, while on behalf of the vessel it is testified they were told to be in readiness to go on board when notified, and their wages would begin on the day of sailing, and it is conceded that the vessel cleared at the cus-

tom house, but failed to sail for some time, owing to ice in port, it will be assumed that the master furnished the collector of customs with a list of the crew before his vessel cleared, as required by this section; and, as the vessel could not clear unless a crew had been secured, this fact will be held to cor-

roborate the seamen that they were due to go on board about the date of clearance, and it will not be presumed that they were thereafter to be kept waiting indefinitely to suit the convenience of the master. *The Bark Shetland v. Johnson*, (1903) 21 App. Cas. (D. C.) 416.

## Vol. VI, p. 910, sec. 4596.

**Punishment.**—Where a seaman was guilty of misconduct in leaving a vessel without permission and in refusing to work the cargo as he agreed in his shipping articles, and such offenses and fines therefor were duly entered in the logbook against him as required by this section, such fines might be properly deducted from his pay. *The Charles K. Schull*, (1909) 166 Fed. 374.

Libelants signed as seamen for a whaling voyage; the articles providing that they should do their duty and obey the lawful commands of the officers while cruising or in port, and that they should not go out of the vessel without leave from the captain or commanding officer. While in the port of Hakodate, Japan, they were given shore leave by watches, but required to return at a stated time, and each was also given a small sum of money. On one occasion, five of them having failed to return, at the direction of the consular agent further leave was denied until the missing men should be arrested and returned, whereupon the entire crew quit work and refused to do their duty, in which refusal the most of them persisted for seven days. On the fourth day, by direction of the

consular agent, they were ironed, and on the sixth, having made threats against the master and the vessel being then at sea, they were handcuffed, placed in the between-decks on chains run between the arms of each man with the ends made fast to the sides of the vessel about four and one-half feet above the deck. At night the chain was lowered, so they could lie on the deck. On the next day they agreed to return to work and were at once released. They were requested to go to work each day, and knew that as soon as they agreed to do so they would be freed. It was held that such action of the master was not in excess of the punishment authorized by this section, but was justified under the circumstances, and that the vessel was not liable in damages therefor. *The John and Winthrop*, (C. C. A. 1910) 182 Fed. 380.

This section does not deprive the master of authority in his discretion to impose a milder punishment than that prescribed. *The Thrasher*, (C. C. A. 1909) 173 Fed. 258.

The word "punishable" does not mean "must be punished," but "may be punished" as therein provided. *The Thrasher*, (C. C. A. 1909) 173 Fed. 258.

## Vol. VI, p. 914, sec. 4597.

**Applies to coasting vessels.**—The provisions of this section, which authorize a court to refuse to receive evidence of offenses by seamen not entered in the official log as therein required, are applicable to vessels in the coasting trade. *The Amazon*, (1906) 144 Fed. 153.

Where a fine had been imposed on a seaman for disobedience, but the same was unavailable as a defense to an action for wages for failure of the ship's master to enter the offense in the ship's logbook on the day it occurred, it was held that the ship was justi-

fied in contesting its liability, and was therefore not liable to a fine for unreasonable delay in payment of the seaman's wages. *The St. Paul*, (1904) 133 Fed. 1002.

**Hearing other evidence.**—A deduction from the wages of a mate on a small schooner for time lost by reason of drunkenness was held to be justified, although no entries of the occurrence were made in the log, as required by this section, the court exercising the discretion given it by said section to receive other evidence. *The Marjory Brown*, (1905) 134 Fed. 999.

## Vol. VI, p. 930, sec. 4612.

**Horsemen**, signed for service on a vessel in caring for horses during a voyage, are "seamen," for the purpose of determining

the application to them of the Immigration Acts. *U. S. v. Atlantic Transport Co.*, (C. C. A. 1911) 188 Fed. 42.



# SHIPPING AND NAVIGATION.

## Vol. VII, p. 16, sec. 4141.

**"Home port."**—The meaning of the word "port" in this section was changed by Act Cong. June 26, 1884, ch. 121, 32 Stat. L. 58, 7 Fed. Stat. Annot. 36, which provides that the word "port" as used in sections 4178 and 4334, in reference to painting the name and port of registered vessels on their sterns, shall be construed to mean either the port where the vessel is registered or the place in the same district where the vessel was built or where one or more of the owners reside. *Com. v. Ayer, etc., Tie Co.*, (1903) 117 Ky. 171, 79 S. W. 290.

## Vol. VII, p. 21, sec. 4153.

**Computation of tonnage.**—The superstructure of an inclosed cabin on a gasoline boat, which cabin extends from the bottom of the boat above the deck, having windows in the superstructure, but which adds nothing to the carrying capacity of the boat in either passengers or cargo, is not "a closed-in space . . . available for cargo or stores, or for the berthing or accommodation of passengers or

**State taxation.**—Vessels which, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a state, are subject to taxation in that state, although they may have been registered or enrolled under R. S. secs. 4141, 4311, at a port outside the limits of the state. *Old Dominion Steamship Co. v. Virginia*, (1905) 198 U. S. 299, 25 S. Ct. 686, 49 U. S. (L. ed.) 1059. See also *Olson v. San Francisco*, (1905) 148 Cal. 80, 82 Pac. 850.

crew," which under this section is to be added to the space below deck in computing the vessel's tonnage, and where without it the boat is not over fifteen tons burden she is not subject to inspection, etc., under the provisions of R. S. sec. 4426, 7 Fed. Stat. Annot. 173. *The Messenger*, (C. C. A. 1909) 168 Fed. 908.

## Vol. VII, p. 36, sec. 21.

**Situs of vessel for taxation.**—The settled rule that the domicile of the owner or the actual situs of the vessel, and not the place of enrolment of a vessel plying between the ports of different states, engaged in the coast-wise trade, and the consequent marking of the stern of the vessel with the name of the place of enrolment, as provided for in R. S. secs. 4178, 4334, 7 Fed. Stat. Annot. 36, 64, was the criterion by which to determine the situs of the vessel for taxation, was not

changed by the declaration of this section that the word "port," as used in those sections, shall be construed to mean either the port where the vessel is enrolled or the place where it was built or where one of the owners resides, which simply enables the owner to select a place other than the port of enrolment to be marked upon the vessel. *Ayer, etc., Tie Co. v. Kentucky*, (1906) 202 U. S. 409, 26 S. Ct. 679, 50 U. S. (L. ed.) 1082.

## Vol. VII, p. 42, sec. 4192.

**Distribution of proceeds of vessel.**—While R. S. secs. 4192, 4193, providing for the recording of mortgages, etc., on vessels, do not make such recorded mortgages maritime liens enforceable in a court of admiralty, yet where such court has in its registry for distribution a fund arising from the sale of a vessel, and the maritime liens have been paid, the holder of a recorded mortgage may prove his claim against the fund, and is entitled to payment therefrom in the order of his priority. *The Gordon Campbell*, (1904) 131 Fed. 963.

**Effect of unrecorded bill of sale on statutory lien.**—Under this section it was held that a bill of sale of a vessel of New Jersey

to a resident of New York not so recorded was invalid to defeat a lien for supplies furnished the vessel in New Jersey, by one having no actual knowledge of the sale, under the New Jersey statute giving a lien on domestic vessels. *Hitchings v. Olsen*, (C. C. A. 1911) 184 Fed. 305.

**Effect of state laws.**—The recording of a mortgage on a vessel of the United States, under this section, in the office of the collector of customs where such vessel is registered renders the mortgage valid, regardless of the fact that it is not recorded as required by the state law. *Fleming v. Philadelphia F. Assoc.*, (1907) 147 Mich. 404, 110 N. W. 933.

## Vol. VII, p. 56, sec. 4311.

State taxation. — See under this title, vol. 7, p. 16, sec. 4141.

## Vol. VII, p. 88, sec. 5361.

"Haven." — Waters inclosed in whole or in part by a breakwater or other artificial structure to afford a protected anchorage, as well as those so inclosed by natural land, constitute a "haven" within this section, making certain acts offenses against the United States when committed "upon the high seas,

or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state." *Ex p. O'Hare*, (1910) 179 Fed. 662, 103 C. C. A. 220, *reversing* (1909) 171 Fed. 290.

## STATES.

## Vol. VII, p. 120, sec. 4.

Taxation of right of possession of mining claim. — Lands of the United States are not taxed in violation of this section by the imposition, under the authority of a Colorado statute (Laws 1887, pp. 340, 341), of a tax upon the right of possession, for mining pur-

poses, of a lode mining claim, and the enforcement of the collection of such tax by a sale of such right of possession. *Elder v. Wood*, (1908) 208 U. S. 226, 28 S. Ct. 263, 52 U. S. (L. ed.) 464.

Vol. VII, p. 121. [*North Dakota, South Dakota, Montana, and Washington.*]

Cases under this act, see *Montana v. Rice*, (1907) 204 U. S. 291, 27 S. Ct. 281, 51 U. S. (L. ed.) 490; *Winters v. U. S.*, (1908) 207 U. S. 564, 28 S. Ct. 207, 52 U. S. (L. ed.) 340; *U. S. v. Sutton*, (1909) 215 U. S. 291, 30 S. Ct. 116, 54 U. S. (L. ed.) 200; *U. S. v. Tully*, (1905) 140 Fed. 899; *State v. Tully*, (1904) 31 Mont. 365, 78 Pac. 760; *State v. Rice*,

(1906) 33 Mont. 365, 83 Pac. 874; *State v. District Ct.*, (1910) 42 Mont. 105, 112 Pac. 706; *State v. Budge*, (1905) 14 N. D. 532, 105 N. W. 725; *State v. Maynard*, (1903) 31 Wash. 132, 71 Pac. 775; *State v. Callvert*, (1904) 34 Wash. 58, 74 Pac. 1018; *O'Brien v. Wilson*, (1908) 51 Wash. 52, 97 Pac. 1115.

Vol. VII, p. 122. [*Idaho.*]

Cases under this act, see *Hollister v. State*, (1903) 9 Idaho 8, 71 Pac. 541; *Roach v. Gooding*, (1905) 11 Idaho 244, 81 Pac. 642;

*Balderston v. Brady*, (1910) 17 Idaho 567, 107 Pac. 493.

Vol. VII, p. 124. [*Utah.*]

For cases under this act, see *Montello Salt Co. v. Utah*, (1911) 221 U. S. 452, 31 S. Ct. 706, 55 U. S. (L. ed.) 810; *Brigham City v.*

*Rich*, (1908) 34 Utah 130, 97 Pac. 220; *State v. Candland*, (1909) 36 Utah 406, 104 Pac. 285.

## 1909 Supp., p. 632, sec. 1.

Binding force of limitations in enabling act. — Since Congress has no power to admit a state into the Union except on an equal footing with the original states in accordance with the rights, powers, and duties defined by the Constitution, the admission of Oklahoma fixed her status and that of her people as that acquired by the other states of the federal Union, under the Constitution, anything in the enabling act to the contrary notwithstanding, and conferred on such state the exclusive power to enact its own laws, regulating intrastate commerce, and in the exer-

cise of its police power regulating the introduction and sale of intoxicating liquors. *U. S. v. U. S. Express Co.*, (1910) 180 Fed. 1006.

A condition in the enabling act for the admission of Oklahoma into the Union on an equal footing with the original states, that the capital of the state should temporarily be at the city of Guthrie, and should not be changed therefrom previous to 1913, although accepted by an irrevocable ordinance, ceased to be a valid limitation upon the power of the state after its admission and cannot override any subsequent repugnant state legisla-

tion. *Coyle v. Smith*, (1911) 221 U. S. 559, 31 S. Ct. 688, 55 U. S. (L. ed.) 853, *affirming* 28 Okla. 121, 113 Pac. 944.

For an exhaustive examination of the authorities on the question as to whether the

provisions of an enabling act are binding on a state after admission to the Union, see *Coyle v. Smith*, (1911) 28 Okla. 121, 113 Pac. 945; *Smith v. State*, (1911) 28 Okla. 235, 113 Pac. 932.

### 1909 Supp., p. 634, sec. 3.

**Construction.**—The authority conferred by the Act enabling the people of Oklahoma and Indian Territory to form a constitution, which provides that the delegates to the constitutional convention shall adopt the Federal Constitution, and shall form a state constitution which shall be republican in form, and which shall make no distinction in civil and political rights on account of race or color, and which shall not be repugnant to the Federal Constitution, is a working rule, addressed to the delegates forming a constitutional convention, and where a constitution formed by the convention has been declared by the President of the United States as authorized by the enabling act, the obligations of the character indicated imposed by the enabling act cease, and individuals may not invoke the act as a prohibition against state legislation, though the enabling act also requires that the constitutional convention shall accept its terms and adopt an ordinance to that effect. *McCabe v. Atchison, etc., R. Co.*, (C. C. A. 1911) 186 Fed. 968.

**Qualification of voters.**—An amendment to the constitution of Oklahoma provides: "No person shall be registered as an elector of this state, or be allowed to vote in any election

herein, unless he be able to read and write any section of the constitution of the state of Oklahoma; but no person who was on Jan. 1, 1866, or at any time prior thereto entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers when electors apply for ballot to vote." It has been held that this provision is not invalid on account of the provision in the enabling Act that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of independence. *Atwater v. Hassett*, (1910) 27 Okla. 292, 111 Pac. 802.

### 1909 Supp., p. 636, sec. 4.

**Effect of admission on congressional legislation.**—Upon the admission of Oklahoma into the Union under this Act "on an equal footing with the original states," the congressional requirement that the Kansas rates should be the test of the rates which the Southern Kansas Railway Company might charge the inhabitants of the Indian Territory, made by the Act of Congress of July 4, 1884, 23 Stat. L. 73, ch. 179, reserving to Congress the right to regulate rates until a state

government should exist, when that government should possess the right of regulation, ceased to be of any force, and the whole subject of domestic rates passed under the control of the state. *Oklahoma v. Atchison, etc., R. Co.*, (1911) 220 U. S. 277, 31 S. Ct. 434, 55 U. S. (L. ed.) 465.

For another case under this section, see *Farrar v. St. Louis, etc., R. Co.*, (1910) 149 Mo. App. 188, 130 S. W. 373.

### 1909 Supp., p. 637, sec. 7.

**Expenses of loaning and investing school funds.**—Under the provisions of the enabling act, the state of Oklahoma is not prohibited from using any of the interest derived from the \$5,000,000 donated to the state for the use and benefit of the common schools in lieu of sections 16 and 36 and other lands of the

Indian Territory, or the income from the permanent school fund as constituted by section 2 of article 11 of the constitution, to pay the expenses of the loaning and investing of the same. *Betts v. Land Office Com'rs*, (1910) 27 Okla. 64, 110 Pac. 766.

### 1909 Supp., p. 638, sec. 8.

**Paying expenses of sale and leasing.**—Under this section the state of Oklahoma is not prohibited from using a part of the proceeds of the sale of the lands granted by the federal government to the state of Oklahoma for the State University Preparatory School, Normal School, the Agricultural and Mechan-

ical School, and the Colored Agricultural and Normal University, penal institutions, and public buildings, and for the support of the common schools, or rentals therefrom to pay the expenses of the sale or leasing thereof. *Betts v. Land Office Com'rs*, (1910) 27 Okla. 64, 110 Pac. 766.

## 1909 Supp., p. 639, sec. 10.

**Employees.** — The commissioners of the Land Office, under rules and regulations continued in force in the state of Oklahoma by virtue of this section of the enabling act, until the legislature of the state prescribes rules and regulations, are authorized to determine the number of employees necessary for the leasing of the public lands, fix their salaries, and pay them or cause them to be paid out of the rentals derived therefrom, together with the expenses incident to such leasing, without an appropriation made as required by section 55 of article 5 of the constitution of Oklahoma. *Betts v. Land Office Com'rs*, (1910) 27 Okla. 64, 110 Pac. 766.

**Service of process on foreign corporations.** — A section of an Oklahoma statute (section 1227, *Wilson Rev. & Ann. Stat.* 1903), providing that any action to which a foreign corporation may be the party defendant may be brought in the county where its designated agent resides or in any county in which the business, or any part of it out of which the action arose, is transacted, service upon such agent shall be taken and held as due service upon such corporation, not being in conflict with this section requiring that all actions shall be instituted in the county which the defendants or either of them reside or may be found, is valid. *Nelson v. Deming Invest. Co.*, (1908) 21 Okla. 610, 96 Pac. 742.

## 1909 Supp., p. 641, sec. 13.

**Conditional sales.** — *Wilson's Rev. & Ann. Stat. Okla.* 1903, sec. 4179, declared that conditional sale contracts should be invalid against innocent purchasers or creditors of the buyer unless registered in the county where the property was kept. The enabling act provides that the laws of Oklahoma territory shall apply to the state of Oklahoma until changed by the legislature, but that no existing rights or contracts shall be af-

fectured by the change, but shall continue as if no change in the form of government had taken place. It has been held that a contract of conditional sale of property in the territory prior to statehood being valid without registration, the seller, on the territory becoming a state, was not required to register it in order to enforce it in subsequent bankruptcy proceedings against the buyer. *In re Gray*, (1908) 170 Fed. 638.

## 1909 Supp., p. 641, sec. 14.

**Construction.** — Crimes and offenses committed before and after the admission of Oklahoma into the Union, and not those committed before and after the passage of the enabling act, must be deemed meant by the provision of this section for the transfer of jurisdiction in respect of all crimes against the United States to the federal court therein provided, since otherwise there would be an indefinite period between the date of the enabling act and the admission of the state, during which such crimes might go unpunished. *Pickett v. U. S.*, (1910) 216 U. S. 456, 30 S. Ct. 265, 54 U. S. (L. ed.) 566.

**District of trial.** — The fact that the organic act of the territory of Oklahoma required criminal offenses to be tried in the county where committed does not render the provision of the enabling act of the state transferring jurisdiction of offenses against the United States to the District Court for

the appropriate district invalid as an *ex post facto* law with respect to offenses previously committed, and such District Court has jurisdiction to indict and try a person for such an offense, although not held in the county where it was committed. *Hallock v. U. S.*, (C. C. A. 1911) 185 Fed. 417.

**Prosecution for murder.** — The murder of one negro by another within the limits of the Osage Indian reservation subsequent to the Oklahoma enabling act, but prior to the admission of that state into the Union, was justifiable, after such admission, in the District Court of the United States for the western district of Oklahoma, under this section of that act, providing for the transfer of jurisdiction in respect of all crimes against the United States to the federal courts therein provided. *Pickett v. U. S.*, (1910) 216 U. S. 456, 30 S. Ct. 265, 54 U. S. (L. ed.) 566.

## 1909 Supp., p. 643, sec. 16.

**District of trial.** — The United States Constitution, art. 3, sec. 2, provides that, when crimes are not committed within any state, the trial shall be at such place or places as the Congress may by law have directed, and the Oklahoma amended enabling act provides that pending prosecutions for offenses theretofore committed in territorial times shall be transferred and thereafter conducted in the Circuit or District Court for the district in which they were committed. It has

been held that the creation of judicial districts by the new state on its admission into the Union was intended to supersede the old territorial subdivisions, and to supersede for jurisdictional purposes the new districts for the old territorial counties and enlarge the area of jurisdiction accordingly, so that an offender, having been indicted for an offense committed within the western district of Oklahoma, was only entitled to a trial within that district, and not within the county in

which the offense was committed. *Billingsley v. U. S.*, (C. C. A. 1910) 178 Fed. 653.

**Procedure in Circuit Court after admission of state.**—Where an appeal was taken from a judgment of dismissal to the Supreme Court of the territory of Oklahoma, and the appeal, being undetermined on the admission of the state, was thereafter transferred to a

federal Circuit Court, which by this section was vested with the powers of such Supreme Court, it was held that the judgment should be affirmed by the Circuit Court, if it should have been affirmed by the Supreme Court under the territorial Code of Procedure. *Young v. U. S.*, (1910) 176 Fed. 612.

## 1909 Supp., p. 644, sec. 19.

**Provisions self-executing.**—This section and the following section in connection with section 497 of the Oklahoma constitution, are self-executing, and together transferred all cases pending in all courts of original jurisdiction in Oklahoma Territory and in Indian Territory to similar courts of original jurisdiction of the state. *Reeves v. Territory*, (1909) 2 Okla. Crim. 351, 101 Pac. 1039.

**Guardianship proceedings.**—A guardianship proceeding pending in one of the United States courts of the Indian Territory at the time of admission of the state was, by this section of the enabling act and section 23 of the schedule of the constitution of Oklahoma, transferred to the County Court of the county

in which was located the court in which the case was pending. *Eaves v. Mullen*, (1910) 25 Okla. 679, 107 Pac. 433.

**Petition for allotment of dower.**—A proceeding pending on petition for the allotment of dower in personalty belonging to an estate in course of administration in one of the United States courts in Indian Territory, sitting in probate at the time of admission of the state into the Union, was, by this section of the enabling act, and section 23 of the schedule of the constitution of Oklahoma, transferred to the County Court of the county in which was located the court in which said case was pending. *Burdett v. Burdett*, (1910) 26 Okla. 416, 109 Pac. 922.

## 1909 Supp., p. 645, sec. 20.

**Number of challenges.**—In the Indian Territory a defendant charged with a felony was allowed to challenge twenty jurors peremptorily; and under section 28 of the schedule of the Oklahoma constitution, accepting the terms of an amendment to the enabling act, section 20, providing that all criminal cases pending in the Indian Territory not transferred to the federal courts should be proceeded with in the state courts under the laws then in force in the Indian Territory, it was held that a defendant tried in the state court for a felony committed in the Indian Territory before statehood was entitled to twenty peremptory challenges, and that it was error for the court to restrict him to five. *Harris v. U. S.*, (1910) 4 Okla. Crim. 317, 111 Pac. 982.

**Pending in United States court.**—A homicide cause, the venue of which had been changed conformably to the Act of June 28, 1898, 30 Stat. L. 511, ch. 517, sec. 29, 3 Fed. Stat. Annot. 460, because of the Indian citizenship of the accused, from the United States court in the Indian Territory to the federal District Court at Paris, Texas, was not pending in the United States in the Indian Territory, within the meaning of the provisions of this section of the Oklahoma enabling act as amended for the transfer to the Oklahoma courts of all cases pending in the United States courts of Oklahoma and Indian Territories, not transferred to the United States Circuit or District Courts in the state of Oklahoma. *Hendrix v. U. S.*, (1911) 219 U. S. 79, 31 S. Ct. 193, 55 U. S. (L. ed.) 102.

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# STATUTES.

## Vol. VII, p. 134, sec. 3.

**Coal barges.**—Under this section providing that the word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water, barges used for the transportation of coal on an inland river were held to be "vessels," within

R. S. secs. 4141, 4192, 7 Fed. Stat. Annot. 16, 42, providing for the registration thereof, and requiring bills of sale and mortgages thereon to be recorded in the office of the surveyor at the home port. *Arnold v. Eastin*, (1903) 116 Ky. 686, 76 S. W. 855.

## Vol. VII, p. 136, sec. 13.

**Construction.**—This section which provides that “the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability,” was not an attempt to limit the power of succeeding Congresses; but it merely prescribes a rule of construction, binding upon the courts, as a substitute for the common-law rule with respect to the effect of a repealing statute as a release from penalties and prosecutions for offenses committed under the statute repealed, and under it the repeal of a penal statute extinguishes no penalties previously incurred thereunder, in the absence of an express extinguishing clause in the repealing act. *U. S. v. Standard Oil Co.*, (1907) 148 Fed. 719; *U. S. v. Chicago, etc., R. Co.*, (1907) 151 Fed. 84; *Great Northern R. Co. v. U. S.*, (1907) 155 Fed. 945, 84 C. C. A. 93, *affirmed* (1908) 208 U. S. 452, 28 S. Ct. 313, 52 U. S. (L. ed.) 567.

**Effect on prior offenses.**—The exception from the operation of the provision repealing

conflicting laws, which is made by the Hepburn Act of June 29, 1906, 34 Stat. L. 584, ch. 3591, sec. 10, 1909 Supp. Fed. Stat. Annot. 275, in favor of causes pending in the federal courts, which “shall be prosecuted to conclusion in the manner heretofore provided by law,” was addressed solely to the procedure to be followed in pending cases, and such section, therefore, did not supersede the general provision of R. S. sec. 13, saving existing forfeitures, penalties, or liabilities from repeal, so as to prevent future criminal prosecutions for offenses against the Elkins Act of Feb. 19, 1903, 32 Stat. L. 847, ch. 708, 10 Fed. Stat. Annot. 170, committed prior to the adoption of the latter statute. *Great Northern R. Co. v. U. S.*, (1908) 208 U. S. 452, 28 S. Ct. 313, 52 U. S. (L. ed.) 567, *affirmed* (1907) 155 Fed. 945, 84 C. C. A. 93.

**Applied.**—This section was applied in *Hertz v. Woodman*, (1910) 218 U. S. 205, 30 S. Ct. 621, 54 U. S. (L. ed.) 1001; *U. S. v. Standard Oil Co.*, (1907) 148 Fed. 719; *U. S. v. Chicago, etc., R. Co.*, (1907) 151 Fed. 84, *affirmed* (C. C. A. 1908) 162 Fed. 835; *U. S. v. Delaware, etc., R. Co.*, (1907) 152 Fed. 269; *Burton v. Frank A. Seifert Plastic Relief Co.*, (1908) 108 Va. 338, 61 S. E. 933.

## Vol. VII, p. 142, sec. 5596.

**Reference to acts not included.**—To the same effect as the original note, see *People's U. S. Bank v. Goodwin*, (1908) 162 Fed. 937.

## STEAM VESSELS.

## Vol. VII, p. 161, sec. 4400.

**Vessels on waters entirely within a state.**—All vessels carrying passengers within the jurisdiction of the United States are subject

to regulations prescribed by Congress, even if the waters navigated are entirely within a state. *The Scow No. 1*, (1909) 169 Fed. 717.

## Vol. VII, p. 162, sec. 4401.

Under this section, see *The Queen*, (C. C. A. 1910) 186 Fed. 725.

## Vol. VII, p. 164, sec. 4405.

**Regulations.**—Regulations to guard against collision established by the board of supervising inspectors under authority of this section, have the force of laws; but they are only valid and obligatory in so far as they are not inconsistent with statutory regulations. *The Aurelia*, (1910) 183 Fed. 341.

**Fire drills.**—Inspectors' rule 5, sec. 15, requiring masters of steam vessels to keep the fire apparatus thereon in complete working order, and to post station bills and exercise

the crew in their duties in connection therewith, is within the power conferred on the board by this section and valid. It does not purport to create offenses, but merely to prescribe duties, but a breach of it, resulting from a master's misconduct, negligence, or inattention, causing death, is manslaughter because so provided by Congress in R. S. sec. 5344, 3 Fed. Stat. Annot. 235. *U. S. v. Van Schaick*, (1904) 134 Fed. 592.

**Vol. VII, p. 174. [Regulations as to motor boats.]**

**Steam vessels employed in inland navigation.**—The provisions of this Act apply to vessels propelled by gas, fluid, naphtha, or electric motors, and do not relate to steam vessels employed in inland navigation. *Beck v. Johnson*, (1909) 169 Fed. 154.

**Forfeiture.**—This Act which makes all vessels of above fifteen tons burden carrying freight or passengers for hire, propelled by gas, fluid, naphtha, or electric motors, subject to the provisions of certain enumerated sections of the Revised Statutes relating to river navigation and to inspection and employment of engineers and pilots by steam vessels, does not have the effect of extending to such vessels the provisions of section 4499, 7 Fed. Stat. Annot. 197, imposing penalties upon "any vessel propelled in whole or in part by steam," which shall be navigated without complying with the terms of such

title, and such a vessel is not subject to seizure and forfeiture thereunder. *The Ben R.*, (1904) 134 Fed. 784, 67 C. C. A. 290.

**Computation of tonnage.**—The superstructure of an inclosed cabin on a gasoline boat, which cabin extends from the bottom of the boat above the deck, having windows in the superstructure, but which adds nothing to the carrying capacity of the boat in either passengers or cargo, is not a "closed-in space . . . available for cargo or stores or for the berthing or accommodation of passengers or crew," which under R. S. sec. 4153, 7 Fed. Stat. Annot. 21, is to be added to the space below deck in computing the vessel's tonnage, and where without it the boat is not over fifteen tons burden she is not subject to inspection, etc., under the provisions of this Act. *The Messenger*, (C. C. A. 1909) 168 Fed. 908.

**Vol. VII, p. 181, sec. 4463.**

**Competency.**—To the same effect as the original note. *Northern Commercial Co. v. Lindblom*, (1908) 162 Fed. 250, 89 C. C. A. 230.

**Vol. VII, p. 184, sec. 4465.**

**Discretion of court.**—A court of admiralty may, in exercise of a judicial discretion, refuse to impose on the owner of a steamship the penalty prescribed by this section for carrying more passengers than the number allowed by the vessel's inspection certificate, where, because of extraordinary conditions existing, such imposition would be equitable. Thus in *The Charles Nelson*, (1906) 149 Fed. 848, it was held that a steamship which left San Francisco for Seattle a few days after the destruction of the former city by earthquake and fire was not subject to the penalty prescribed by this section for carry-

ing more steerage passengers than the number allowed by her inspection certificate, nor liable to such passengers in damages for the inconvenience and privation resulting to them from the overcrowding and from a shortage of water, where the excess of passengers was due to the confusion caused by the destruction of the city and company's office, and occurred notwithstanding its efforts to prevent it, and the shortage was due to the company's inability to procure water or sufficient coal for its condenser in San Francisco, and to bad weather which prolonged the voyage.

**Vol. VII, p. 187, sec. 4471.**

**Duty of master.**—This section provides for the maintenance of a steam fire pump and two hand pumps with pipes, one on each side of the vessel, to convey water to the upper decks to which suitable hose shall be attached and kept in good order at all times and ready for immediate use. United States inspectors' rule 5, sec. 15, provides for a fire drill at

least once a week. It has been held that it is the statutory duty of the captain to maintain an efficient fire drill, and to see that the proper apparatus for extinguishing fire is provided and maintained in proper order. *Van Schaick v. U. S.*, (C. C. A. 1908) 159 Fed. 847, 14 Ann. Cas. 456.

**Vol. VII, p. 187, sec. 4472.**

**Automobiles.**—This section originally prohibited passenger steamers from carrying as freight certain articles, including petroleum products or other like explosive fluids, except in certain cases and under certain restrictions. By Act Feb. 20, 1901, ch. 386, 31 Stat. L. 799, the section was amended by adding the following provision: "Nothing in the foregoing or following sections of this Act shall prohibit the transportation by steam vessels of gasoline or any of the products of petroleum when carried by motor vehicles

(commonly known as automobiles) using the same as a source of motive power: Provided, however, that all fire, if any, in such vehicles or automobiles be extinguished before entering the said vessel, and that the same be not relighted until after said vehicle shall have left the same . . ." It was held that gasoline contained in the tank of an automobile being transported on a steam vessel was carried as freight within the meaning of the statute; that an automobile in which the motive power was generated by passing

an electric spark through a compressed mixture of gasoline and air in the cylinder, causing intermittent explosions, carried a fire while the vehicle was under motion from its own motive power; and that the carrying by a steam ferryboat of such a vehicle, which was run on and off the boat under its own power, was a violation of the statute. The Texas, (1905) 134 Fed. 909.

A subsequent amendment to this section

### Vol. VII, p. 189, sec. 4475.

**Construction and scope.**—This and the following section relating to the packing for shipment, shipment, or delivery to a vessel as stores of gunpowder or other dangerous substances, were enacted in the exercise by Congress of its constitutional power to regulate foreign and interstate commerce, and are applicable only to shipments or intended shipments on vessels engaged in such commerce. U. S. v. Giordani, (1908) 163 Fed. 773.

**Foreign private steam vessels carrying passengers from ports of United States.**—This section applies to shipments on foreign private steam vessels carrying passengers

avoids the effect of this decision. See 10 Fed. Stat. Annot. 396.

A steam ferryboat carrying passengers is a "steamer," and subject to the provisions of this section which prohibits any steamer carrying passengers from carrying certain dangerous articles as freight or stores. The Nassau, (C. C. A. 1911) 188 Fed. 46, reversing (1910) 182 Fed. 696.

from ports of the United States to any other place or country. U. S. v. Giordani, (1908) 163 Fed. 772.

**Metallic cartridges.**—The provisions of this and the following section relating to the packing and shipment of gunpowder include within their meaning metallic cartridges containing gunpowder. U. S. v. Giordani, (1908) 163 Fed. 772.

**Civil suit.**—No civil suit can be maintained in consequence of violation of R. S. secs. 4475, 4476, without a proper and specific pleading of facts which show negligence or wilful tort. Wyman v. Boston Blacking Co., (1909) 175 Fed. 834.

### Vol. VII, p. 191, sec. 4482.

It is the statutory duty of the captain to exercise ordinary care to see that the life preservers are in fit condition for use. Van

Schaick v. U. S., (C. C. A. 1908) 159 Fed. 847, 14 Ann. Cas. 456.

### Vol. VII, p. 192, sec. 4488.

The sufficiency of the equipment of a vessel with lifeboats, life rafts, and boat disengaging apparatus is to be measured by the regulations adopted pursuant to this section by the board of supervising inspectors, which regulations, under R. S. sec. 4405, 7 Fed.

Stat. Annot. 164, when approved by the Secretary of the Treasury, "have the force of law." Deslions v. La Compagnie Generale Transatlantique, (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

### Vol. VII, p. 194, sec. 4492.

**Scow furnished without charge except for expenses.**—Where a scow temporarily equipped for the purpose and in tow of a tug carried a picnic party of 350 persons without being provided with life-preservers as required by the regulations of the board of supervising in-

spectors, adopted pursuant to this section, she was not relieved from liability for the penalty thereby provided by the fact that she was furnished to the party without charge except for expenses. The Scow No. 1, (1909) 169 Fed. 717.

### Vol. VII, p. 197, sec. 4499.

**Appeal.**—A proceeding *in rem* by the United States against a vessel under this section, for the enforcement of a penalty for violation of a statutory provision, is one in

admiralty, and not a criminal proceeding, and a decree dismissing the libel is appealable. The Ben R., (1904) 134 Fed. 784, 67 C. C. A. 290.

### 1909 Supp., p. 655, sec. 14.

**Liability of tows.**—The regulations established by the Department of Commerce and Labor, under authority of this section, limiting the length of tows and of hawsers between vessels in tows in inland waters, and prescribing penalties to be imposed on the master of a towing vessel wilfully violating such regulations, while binding on tows, are not binding on the vessels in a tow acting in obedience to the orders of the master of the

tug, and they cannot be held in fault for a collision between one of their number and another vessel, on the ground alone that, following such orders, they had lengthened their hawsers beyond the prescribed limit, at a place not within the rule, and could not shorten them after reaching waters within the rule. The Manhattan, (C. C. A. 1911) 186 Fed. 329, reversing (1910) 181 Fed. 229.



## SURETY COMPANIES.

### Vol. VII, p. 200, sec. 1.

**Not different from bond of individual.**—A bail bond given by a surety company for the appearance of a defendant in a criminal case in a federal court, as authorized by this

Act, differs in no way, so far as its legal status is concerned, from the bond of an individual surety. *Ex p. Marrin*, (1908) 164 Fed. 631.

### Vol. VII, p. 202, sec. 5.

**Jurisdiction.**—The United States is the real, and not merely the nominal, plaintiff, so as to sustain the original jurisdiction of a federal Circuit Court, without regard to the amount in dispute, in a suit authorized by this section, to be brought in its name, for the use and benefit of a materialman upon the bond of a contractor for a public work, which the statute requires shall contain the specific, special obligation directly to the United States that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work. *U. S. Fidelity, etc., Co. v. U. S.*, (1907) 204 U. S. 349, 27 S. Ct. 381, 51 U. S. (L. ed.) 516, *affirming* (1904) 132 Fed. 82.

**District of suit.**—This Act authorizing suits by contractors for public work on the contractor's bond given to the United States, declares (section 5) that any surety company, surety on such a bond, may be sued in any court of the United States having jurisdiction of actions or suits on such bonds in the district in which the bond was made or guaranteed, or in the district in which the principal office of the surety company is located, and for the purposes of the act the bond should be treated as made or guaran-

teed in the district in which the office is located, to which it is returnable, or in which it is filed, or in the district in which the principal in the bond resided when it was made. It was held that where the contractor's bond for the construction of a dry dock at the navy yard at League Island, Pennsylvania, was executed in New York, was returnable to and filed in Washington, and the principal in the bond was a New York corporation, while the principal office of the surety was in the middle district of Pennsylvania, a suit on the bond was improperly instituted in the eastern district of Pennsylvania. *U. S. v. Schofield Co.*, (1910) 182 Fed. 240.

**Waiver as to district of suit.**—Conceding that a surety company which has furnished a bond for a contractor for government work is given the privilege of being sued thereon only in the district in which the bond was made, or in that where it has its principal office, by this section which provides that it may be sued in the federal courts in either of such districts, yet a company waives such privilege where it enters appearance, pleads to the merits, and takes depositions before moving to dismiss. *U. S. v. California Bridge, etc., Co.*, (1907) 152 Fed. 559.

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## TELEGRAPH, TELEPHONE, CABLE, AND ELECTRIC LINES.

### Vol. VII, p. 205, sec. 5263.

**Telephone companies not included.**—A telephone company is not within this Act, nor can a company doing both a telegraph and telephone business claim its benefit as to the lines used in the telephone business. The fact that such lines may be used for the local delivery of interstate telegraphic messages does not make them an integral part of the telegraph lines, so as to bring them within the purview of the Act. *Sunset Telephone, etc., Co. v. Pomona*, (1908) 164 Fed. 561.

**Grants of exclusive rights by railroads.**—A contract between a railroad company and a telegraph company by which the latter is granted the exclusive right of occupancy of the railroad's right of way for the maintenance of a telegraph line is void. *Georgia R., etc., Co. v. Atlantic Postal Tel. Cable Co.*, (1907) 152 Fed. 991.

**Owner of highway.**—This section does not effect the right of an abutting landowner to compensation for the burden imposed upon

the fee by the erection of a line upon a rural highway, which is a post road. *Cosgriff v. Tri-State Telephone, etc., Co.*, (1906) 15 N. D. 210, 107 N. W. 525.

**State regulation.**—This and the following sections authorizing any telegraph company which accepts its provisions to construct and maintain its lines along any military or post roads of the United States "which have been or may hereafter be declared such by law," supplemented by Act March 1, 1884, ch. 9, 23 Stat. L. 3, 5 Fed. Stat. Annot. 901, which declares that all public roads and highways while kept up and maintained as such are post routes, gives such a telegraph company the right to use any public highway, street, or alley for its lines independent of any action or consent of the state or municipal authorities; but it holds such right subject to the police power of the state and municipality to make and enforce any appropriate and reasonable regulations governing such use. *Ganz v. Ohio Postal Tel. Cable Co.*, (C. C. A. 1905) 140 Fed. 692; *Western Union Tel. Co. v. Richmond*, (1909) 178 Fed. 310.

In *Western Union Tel. Co. v. Superior Ct.*, (1911) 15 Cal. App. 679, 115 Pac. 1091, 1100, the court said: "From the principles as thus affirmed, these incontrovertible propositions flow: (1) That telegraph corporations that have accepted the restrictions and obligations prescribed as to such corporations by Congress are not primarily beholden to any state for their right to transact a telegraph business therein; that the sole source of their authority to enter any of the states or territories of the United States, where there are military and post roads and government waterways, for the purpose of doing business therein, is in the acts of the federal Congress. (2) That no state has the power, under the indicated circumstances, to exclude such corporations from the right or privilege of carrying on the business for which they are formed within its borders; that, while the state may impose upon such corporations, as it may upon all corporations of whatever kind or nature, organized and existing under the laws of another state, reasonable regulations, and to that end prescribe and require certain reasonable prerequisites to the exercise of the authority conferred on them by Congress to do business in such state, yet no state will be permitted, whether under the guise of regulation or otherwise, to enact any legislation the effect of which would or might practically be to prevent them from doing business in such state, or in effect result in an attempt on the part of such state to regulate commercial intercourse between its citizens and those of other states, or to control the transmission of all telegraphic correspondence within its own jurisdiction. In other words, any state legislation hostile to the right of such foreign telegraph corporations to do business in a state in which they are authorized to do business by Congress would be in direct conflict with the laws of Congress, and therefore void."

**Removal of poles and wires.**—Under the Ohio statute, which provides that the use of a public road by a telegraph company "shall

not incommode the public in the use of such road," a board of county commissioners, which has been given control of a pike by the state, cannot grant to a telegraph company the right to maintain its poles and wires thereon, except subject to such statutory limitation; nor will such a grant preclude it or a succeeding board from ordering a removal of such poles and wires, if at any time through changed conditions their location on the highway shall incommode the public in its use, and such action in ordering a removal will not be interfered with by the court, unless an abuse of discretion is shown. *Ganz v. Ohio Postal Tel. Cable Co.*, (C. C. A. 1905) 140 Fed. 692; *reversing* 137 Fed. 947.

**State and municipal license taxes.**—An illegal burden on the interstate business of a foreign telegraph company, as well as a tax on its property beyond the jurisdiction of the state, is imposed by the Arkansas statute (Ark. Laws 1907, p. 744), under which such company, as a condition of continuing to do a local business in the state, and of escaping the heavy penalties therein prescribed, must pay a given amount, based on all its capital stock, merely for filing its articles of incorporation with the secretary of state. *Ludwig v. Western Union Tel. Co.*, (1910) 216 U. S. 146, 30 S. Ct. 280, 54 U. S. (L. ed.) 423.

The exaction from a foreign telegraph company for the benefit of the permanent school fund, under the authority of the Kansas statute (Kan. Gen. Stat. 1901, p. 280), of a "charter fee" of a given per cent. of its entire authorized capital stock, as a condition of continuing to do local business in the state, is invalid under the commerce and due process of law clauses of the Federal Constitution, as necessarily amounting to a burden and tax on the company's interstate business and on its property located or used outside the state. *Western Union Tel. Co. v. Kansas*, (1910) 216 U. S. 1, 30 S. Ct. 190, 54 U. S. (L. ed.) 355, wherein the court said: "Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the telegraph company, as a charter fee, of a given per cent. of its authorized capital, representing, as that capital clearly does, all of its business and property, both within and outside of the state, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of the state. The express words of the statute leave no doubt as to what is the basis on which the fee specified in the state statute rests. That fee, plainly, is not based on such of the company's capital stock as represented in its local business and property in Kansas. The requirement is a given per cent. of the company's authorized capital; that is, all its capital, wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that state.

What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the state has not chosen to ascertain and declare in the statute. It strikes at the company's entire business, wherever conducted, and its property, wherever located, and, in terms, makes it a condition of the company's telegraph right to transact purely local business in Kansas that it shall contribute, for the benefit of the state school fund, a given per cent. of its whole authorized capital, representing all of its property and all its business and interests everywhere."

**Intrastate business.**—A foreign telegraph company accepting the provisions of this section, authorizing any telegraph company to construct and operate lines along post roads, etc., and engaging in business in a state, is subject to a license tax on its intrastate business. *Williams v. Talladega*, (1909) 164 Ala. 633, 51 So. 330.

**Reasonableness.**—An ordinance of a city imposing a tax on the privilege of transmitting messages by telegraph between points within the state is valid when applied to a foreign telegraph company which had accepted the provisions of this section, though a part of the business done by the company may consist in the sending of messages for the federal government as authorized by the statute, for, if government messages are transmitted at a reduced rate and it has a material effect on the company's business, the same may be taken into account in pass-

ing on the reasonableness of the tax. *Williams v. Talladega*, (1909) 164 Ala. 633, 51 So. 330.

**State taxation.**—To the same effect and following the case cited in the first paragraph of the original note. *Western Union Tel. Co. v. Trapp*, (C. C. A. 1911) 186 Fed. 114. See also *Western Union Tel. Co. v. Lakin*, (1909) 53 Wash. 326, 101 Pac. 1094.

**Taxation of franchise.**—To the same effect as the original note. *Western Union Tel. Co. v. Wright*, (C. C. A. 1910) 185 Fed. 250; *Western Union Tel. Co. v. Lakin*, (1909) 53 Wash. 326, 101 Pac. 1095. *Contra*, *Western Union Tel. Co. v. Wright*, (1908) 158 Fed. 1004; *Western Union Tel. Co. v. Omaha*, (1905) 73 Neb. 527, 103 N. W. 84.

**Injunctions.**—Where a telegraph company sought to condemn a right of way along the right of way of a railroad, and in its proposition stated that the height of its poles above the ground would not exceed the distance from the poles to the end of the nearest cross-ties, the railroad company was not entitled to an injunction restraining the prosecution of such condemnation proceedings because its right of way was already encumbered by a rival telegraph line and that the effect of complainant's line would be to seriously interfere with the railroad's business and would constitute a menace to the safety of its tracks and trains. *Georgia R., etc., Co. v. Atlantic Postal Tel. Cable Co.*, (1907) 152 Fed. 991.

## Vol. VII, p. 215, sec. 1. [*Subsidized railroad and telegraph companies, etc.*]

**Enforcement of Act.**—In a suit by a telegraph company to obtain specific performance of right of way contracts with certain railroads, it was held the defendant was not entitled to object that the contracts were unenforceable because they contained certain

provisions in violation of this Act conferring certain rights in subsidized railroad and telegraph lines on the United States, and prohibiting interference therewith, etc. *Western Union Tel. Co. v. Pittsburg, etc., R. Co.*, (1905) 137 Fed. 435.

# TERRITORIAL COURTS.

## Vol. VII, p. 231, sec. 1909.

**Habeas corpus cases.**—A determination by the Supreme Court of the territory of Arizona in a habeas corpus case as to which custodian a child of tender years shall be committed to is not appealable to the Supreme Court of the United States under this section, as a case "involving the question of personal freedom." *New York Foundling Hospital v. Gatti*, (1906) 203 U. S. 429, 27 S. Ct. 53, 51 U. S. (L. ed.) 254.

**Time for filing bonds.**—R. S. sec. 1007, 4 Fed. Stat. Annot. 618, provides that to stay process on the judgment, appellant may give security required by law within sixty days after the rendition of the judgment. Section 1012, 4 Fed. Stat. Annot. 624, makes

courts subject to the same rules prescribed by section 1007, and by section 1909 it is provided that appeals from final decisions of the Supreme Court of Arizona shall be allowed to the Supreme Court of the United States, in the same manner, and under the same regulations, as from Circuit Courts of the United States. It has been held that appellants from a decision in the Supreme Court of Arizona have sixty days after the judgment was rendered, exclusive of Sundays, to give security and suspend judgment upon an appeal to the Supreme Court of the United States. *Sandoval v. U. S. Fidelity, etc., Co.*, (1909) 12 Ariz. 348, 100 Pac. 816.

## Vol. VII, p. 235, sec. 1927.

**Interest included.**—Under this section, providing that justices of the peace in Arizona shall not have jurisdiction of any matter where the sum claimed exceeds \$300, interest is included in the sum claimed, and hence a territorial law, giving justices jurisdiction in civil actions in which the amount involved, exclusive of interest and costs, does not exceed \$300, is invalid in so far as it attempts to exclude interest from the amount in con-

troversy. *Brown v. Braun*, (1905) 9 Ariz. 254, 80 Pac. 323.

**Remitting portion of demand after suit began.**—Under this section, limiting the jurisdiction of justices of the peace in Arizona to controversies wherein the sum claimed is less than \$300, a plaintiff cannot, after the suit has been instituted, remit a portion of his demand, so as to bring it within the jurisdictional limit. *Brown v. Braun*, (1905) 9 Ariz. 254, 80 Pac. 323.

## Vol. VII, p. 238, sec. 9.

For cases under this section, see *Brown v. U. S.*, (C. C. A. 1906) 146 Fed. 975; *Young v. U. S.*, (1910) 176 Fed. 612; *Starkweather*

*r. Kemp*, (1907) 18 Okla. 28, 88 Pac. 1045; *State v. Chaney*, (1909) 23 Okla. 788, 102 Pac. 133; *Bash v. Howald*, (1910) 27 Okla. 462, 112 Pac. 1125.

## Vol. VII, p. 240, sec. 10.

For cases under this section, see *Ex p. Moran*, (1906) 203 U. S. 104, 27 S. Ct. 25, 51 U. S. (L. ed.) 105; *Hennessey First Nat. Bank v. Hesser*, (1904) 14 Okla. 115, 77 Pac.

36; *Burke v. Malaby*, (1904) 14 Okla. 650, 78 Pac. 105; *Chicago, etc., R. Co. v. Territory*, (1909) 25 Okla. 238, 105 Pac. 677.

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TERRITORIES.

## Vol. VII, p. 251, sec. 1842.

**Failure of governor to approve.**—Where the journals of the houses of the legislature showed the passage of an Act many days before the day on which the governor sent a message to the legislature stating that he had allowed the Act to become a law by limitation, without showing the day of receipt of the Act by him, the court, in the absence of any showing to the contrary, will assume

that the governor acted lawfully, and that his message implied the receipt by him of the Act more than three days prior to the message, so that the Act was valid under this section providing that any bill not returned by the governor within three days after presentation to him shall be a law as if he had signed it. *Gray v. Taylor*, (1911) 15 N. M. 742, 113 Pac. 588.

## Vol. VII, p. 254, sec. 1850.

**Implication of approval.**—Under this section providing that legislative Acts of territories "shall be submitted to Congress, and if disapproved shall be null and of no effect," where an Act has been on the statute books

for many years without any expression of disapproval by Congress, the implication is warranted that it was approved. *Whitman College v. Berryman*, (1907) 156 Fed. 112.

## Vol. VII, p. 254, sec. 1851.

**Exemption of railroad from taxation.**—An Arizona statute (Act March 16, 1891, Laws 1891, pp. 61, 63, No. 41), exempting a railroad constructed pursuant to the Act from taxation for twenty years, is not invalid, as an excess of legislative power, under this section, giving the territory legislative power

over all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. *Bennett v. Nichols*, (1905) 9 Ariz. 138, 80 Pac. 392.

For another case under this section, see *Leatherwood v. Hill*, (1906) 10 Ariz. 243, 89 Pac. 521.

## Vol. VII, p. 258, sec. 1860.

Under this section, see *Hicks v. Krigbaum*, (1910) 13 Ariz. 237, 108 Pac. 482.

## Vol. VII, p. 262, sec. 1889.

Under this section, see *Mason v. Stevens*, (1902) 16 S. D. 320, 92 N. W. 424.

## Vol. VII, p. 264, sec. 1.

**Hawaii.**—Section 56 of the Organic Act of Hawaii authorizes the creation of county and city municipalities by special Act, superseding, in respect to Hawaii, the general prohibition of Act of Congress of July 30, 1886, ch. 818. *Emmeluth v. Oahu County*, (1908) 19 Hawaii 171.

**Fencing cultivated lands.**—A territorial statute requiring the owners of cultivated lands in a certain county to protect them with fences of a prescribed kind, and making the right to recover damages from the owners of animals injuring the crops on such land depend on the maintenance of fences required by the law, is not invalid as a special law in contravention of this Act. *Sears v. Fewson*, (1909) 15 N. M. 132, 103 Pac. 268.

**Specific permission to pass local laws.**—General prohibitions in this Act against the enactment by territorial legislatures of local or special laws in certain enumerated cases, have no application where specific permission to the contrary is granted by the Organic Act applying to a particular territory. *Ponce v. Roman Catholic Apostolic Church*, (1908) 210 U. S. 290, 28 S. Ct. 737, 52 U. S. (L. ed.) 1068.

**Fees of county officers.**—In Territory v. Beaven, (1910) 15 N. M. 357, 110 Pac. 561, it appeared that county treasurers having previously been allowed, as compensation, four per cent. of the amount collected by them each year, a territorial law was passed dividing the counties into five classes, according to the amount of collections therein, the classification for each year being based on the collections for the preceding year, class A embracing counties in which the collections

were \$200,000 or more, and each succeeding class embracing counties in which the collections were an amount less than that of the preceding class. Treasurers of class A counties were allowed two per cent. on collections, and those of each succeeding class a larger per cent. than that of the preceding class. It was provided that in case the fees of a treasurer exceeded \$4,500 in any year he should not receive the excess. The Act, the effect of which was to reduce the fees of eleven of the twenty-five county treasurers of the territory, by its terms went into effect when the terms of all the treasurers expired, with a proviso that as to counties of class A it should go into effect at once. It was held that the proviso was a local and special law, contravening this Act prohibiting territories decreasing, by such a law, the fees of public officers during their term; the character of a law, as general or local and special, being determined by its effect rather than its form; there being but one county in class A, while there were four other counties in which the treasurers had received, and, till the Act went into effect, would receive, more than \$4,500 per year; and there being no such distinction—having reference to the subject-matter of the legislation, the reduction of the fees of almost half the county treasurers of the territory—between the classes of counties as to justify putting the Act in immediate effect as to class A alone.

For other cases under this section, see *Ben-nett v. Nichols*, (1905) 9 Ariz. 138, 80 Pac. 392; *Leatherwood v. Hill*, (1906) 10 Ariz. 243, 89 Pac. 521; *Duffield v. Ashurst*, (1909) 12 Ariz. 360, 100 Pac. 820.

## Vol. VII, p. 266, sec. 3.

Under this section, see *Territory v. Gutierrez*, (1904) 12 N. M. 254, 78 Pac. 139.

## Vol. VII, p. 267, sec. 4.

**School district.**—Under the provisions of this section a school district of a territory cannot become indebted in any manner or for any purpose to any amount which in the aggregate, including existing indebtedness, exceeds four per centum of the value of the taxable property within such school district, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness; and any contract entered into by its officers in violation of this section is void. *Superior Mfg. Co. v. School Dist. No. 63*, (1910) 28 Okla. 293, 114 Pac. 328.

**Effect of acceptance of supplies.**—Where the aggregate indebtedness of a school district, located in a territory, is in excess of four per centum of the value of the taxable property within such school district as shown by the last assessment for territorial and county taxes, the acceptance, retention, and use of furniture or supplies by the officers of such school district in its behalf will create no liability against the district for the value of the same. *Superior Mfg. Co. v. School Dist. No. 63*, (1910) 28 Okla. 293, 114 Pac. 328.

Vol. VII, p. 268, sec. 1. [*Issuance of bonds, etc.*]

**Two-thirds majority.**—This Act and Act New Mexico March 16, 1907 (Sess. L. 1907, p. 38, ch. 35), authorizing municipal bonds, notwithstanding the limitations on municipal indebtedness, if two-thirds of the qualified

voters as defined shall vote therefor, require a two-thirds of those actually voting only, and not a two-thirds of all the voters of the municipality. *Fabro v. Gallup*, (1909) 15 N. M. 108, 103 Pac. 271.

## Vol. VII, p. 282, sec. 6.

Under this section, see *Williams v. Wichita Fourth Nat. Bank*, (1905) 15 Okla. 477, 82 Pac. 496.

## Vol. VII, p. 286, sec. 1.

**Public lands—Texas school grant.**—The legal title to the Texas lands patented to Greer county, under the mistaken supposition that this county was Texas territory, and was, therefore, entitled to share in the grant of lands for school purposes to each county in the state, made by Texas Gen. Laws 1883, ch. 55, did not pass to the corporation sub-

sequently organized out of the same territory as Greer county, Oklahoma, by the Act of Congress of May 4, 1896, but, upon the disappearance of the *de facto* Texas county, such title vested in the state of Texas. *Greer County v. Texas*, (1905) 197 U. S. 235, 25 S. Ct. 437, 49 U. S. (L. ed.) 736.

## TIMBER LANDS AND FOREST RESERVES.

## Vol. VII, p. 290, sec. 2461.

**A sale of timber by a homestead entryman** before the completion of the requisite improvements, and before the receipt of a patent or final certificate, to carry out in good faith the acquisition and enjoyment of a homestead, even though a profit does incidentally result from the sale, is not void, under this section. *King-Ryder Lumber Co. v. Scott*, (1904) 73 Ark. 329, 84 S. W. 487.

**A settler applying for a homestead**, on making and filing the affidavit required and paying a certain sum proportionate to the amount of land applied for, acquires the right

to occupy the land, to protect it from trespass by others, and to use it for all purposes incidental to its cultivation; also to cut and remove timber when necessary for the improvement of the land and the preparation of his farm for tillage, but not to fell timber, or permit it to be done by his vendee, for purposes of speculation or profit, as such act is prohibited by, and renders him and his vendee liable to prosecution under this section. *Orrell v. Bay Mfg. Co.*, (1903) 83 Miss. 800, 38 So. 561.

## Vol. VII, p. 296, sec. 5388.

**Purchase from Indian allottee.**—Conceding that the United States, as trustee for Indian allottees, has authority to protect them from imposition and fraud in respect to their lands, it cannot recover in trover from one who in good faith and for a fair

price has purchased timber cut by an allottee from his land, where it has itself no beneficial interest in the land. *U. S. v. Paine Lumber Co.*, (1907) 206 U. S. 467, 27 S. Ct. 697, 51 U. S. (L. ed.) 1139, (1904) 154 Fed. 283.

## Vol. VII, p. 297, sec. 1.

**What lands included.**—The right to cut timber is not restricted to the particular spot or minor tract of land on which mining is being actually done, but extends to adjacent lands, they being mineral, although no mining development work has been done thereon; and whether or not a tract in question not so developed is mineral within the meaning of the statute is a question of fact, in an action to recover for timber cut, to be inferred by the jury from its surroundings and appearance, and applying to the facts their own common sense and observation. *Morgan v. U. S.*, (C. C. A. 1909) 169 Fed. 242.

The right to cut timber from public mineral lands, subject to mineral entry only, for

building, agricultural, mining, or other domestic purposes, extends to all such lands in the state or territory, without limitation to any local subdivision. *U. S. v. Edgar*, (1905) 140 Fed. 655.

To justify the cutting of timber under this Act, it is not essential to prove that the tract from which it was cut, if not developed as mining ground, presents such indications of mineral as would justify a prudent person experienced in such matters in the belief that it could be worked for mineral at a profit. *Morgan v. U. S.*, (C. C. A. 1909) 169 Fed. 242.

But the authority to cut timber from the public domain does not extend to land adjacent to lands valuable for mineral purposes;

it only includes lands known to be themselves valuable for minerals, which are the only lands excluded by the federal statutes from any but mineral entry. *U. S. v. Plowman*, (1910) 216 U. S. 372, 30 S. Ct. 299, 54 U. S. (L. ed.) 523, *reversing* (1907) 151 Fed. 1022, 81 C. C. A. 682.

One entering and occupying as a homestead public land, shown by the books of the Land Department to be subject to such entry, cannot, nor can any one claiming under him, justify the cutting and sale of timber therefrom on the ground that the land was in fact mineral, and not agricultural. *Bunker Hill, etc., Min., etc., Co. v. U. S.*, (C. C. A. 1910) 178 Fed. 914.

In an action by the United States to recover for timber taken from a tract of public land at the time covered by a homestead entry which had in fact been abandoned and was afterward relinquished, it is not a defense that the land was at the time of the trespass occupied by another, who after the relinquishment filed and perfected a homestead entry thereon. *U. S. v. Bagnell Timber Co.*, (C. C. A. 1910) 178 Fed. 795.

The use of timber taken from unsurveyed mineral land in the territory of Arizona in roasting ore at a mine in that territory, whether roasting ore be considered a part of mining or of smelting, is authorized by this section, notwithstanding a regulation of the Secretary of the Interior, promulgated under the supposed authority of that statute, that no timber can be used for smelting purposes, since the words of the statute, that the felling and use of the timber shall be "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes," cannot confer upon him the power to take from the industries designated the permission given by Congress. *U. S. v. United Verde Copper Co.*, (1905) 196 U. S. 207, 25 S. Ct. 222, 49 U. S. (L. ed.) 449, *affirming* (1903) 8 Ariz. 186, 71 Pac. 954.

The fact that timber is manufactured into lumber and sold as an article of merchandise, to be used in the state where it is cut, does not render such cutting unlawful, nor can it be made so by a regulation of the Secretary of the Interior, promulgated under the power given him by the Act to prescribe rules and regulations "for the protection of the timber and of the undergrowth growing upon said lands and for other purposes," such rules and regulations being intended merely to furnish detailed instructions as to the

manner of taking the timber to prevent waste and unnecessary destruction. *U. S. v. Rossi*, (1904) 133 Fed. 380, 66 C. C. A. 442; *U. S. v. Thayer*, (1904) 133 Fed. 1022, 66 C. C. A. 681.

While the secretary may prescribe regulations concerning the removal of timber, and his interpretation of the intent of the Act is entitled to weight, he has no power to enlarge or restrict the purposes for which timber may be used. *U. S. v. United Verde Copper Co.*, (1903) 8 Ariz. 186, 71 Pac. 954.

**Evidence.**—In an action by the United States to recover for timber cut from public lands, where the defense was that the cutting was justified under this Act, evidence is properly admitted to show the mineral character of other lands in the same vicinity, as well as of those from which the timber was taken, as tending to show the extent of the mineral district. *U. S. v. Rossi*, (1904) 133 Fed. 380, 66 C. C. A. 442; *U. S. v. Thayer*, (1904) 133 Fed. 1022, 66 C. C. A. 681.

Where defendant's right to cut and remove timber in question from the public domain was dependent on the land being mineral, and not subject to entry except for mineral entry, and there was testimony that the region had been prospected, and, though float was found over it, no mineral-bearing veins had been discovered, and that small tracts near defendant's mill were cultivated for crops, evidence that a witness cultivated to crops about three acres of ground on the flat near the creek, on which the land from which the timber in controversy was cut adjoined, and that such ground was suitable for agriculture, was admissible. *Lynch v. U. S.*, (C. C. A. 1905) 138 Fed. 535.

The burden is on the defendant in an action by the United States to recover for the value of timber cut from the public domain, in which it claimed that the cutting was justified by such statute, to show that it had complied with the rules and regulations established by the Interior Department in that behalf, and, where there was no evidence of a compliance with such rules and regulations, a verdict in favor of defendant cannot be sustained. *U. S. v. Basic Co.*, (C. C. A. 1903) 121 Fed. 504.

**Measure of damages.**—A person who cut and removed timber from public land in good faith, in the belief that he had a lawful right to do so under this Act, if not so justified, is liable in damages for the stumpage value of the timber only, and not for the manufactured value. *Morgan v. U. S.*, (C. C. A. 1909) 169 Fed. 242.

## Vol. VII, p. 301, sec. 2.

**Purpose.**—That this section was intended to meet the evasions which would be resorted to from time to time is quite manifest. Schemes, devices, and subterfuges which ingenuity could invent, were in view equally with formal contracts. *Nickell v. U. S.*, (C. C. A. 1908) 161 Fed. 706.

**Statement.**—This section does not require the appellant to make his initial state-

ment on knowledge derived solely from personal observation, and hence statements under the blank forms furnished by the Land Department that the applicant had personally examined the land applied for, and that he knew from his own personal knowledge that it was unfit for cultivation, uninhabited, etc., are improper. *Robnett v. U. S.*, (C. C. A. 1909) 169 Fed. 778.

The facts stated in an application, including the fact that the application is not made for the purpose of sale, must not only be true when made, but must also be true when the land is paid for and the applicant receives his certificate of purchase or receiver's receipt. *U. S. v. Brace*, (1907) 149 Fed. 869.

Since an application to purchase lands from the government under this act is, in effect, the inauguration of a proceeding through which land is acquired from the government, in which the government is an interested party, such act covers an agreement by a clerk in the employ of the government in a local Land Office to receive compensation for services rendered in informing an entryman when certain land belonging to the United States would be open for entry under such act, and in assisting him to obtain title thereto from the United States under such act. *U. S. v. Long*, (1911) 184 Fed. 184.

**Verification.**—While this Act does not expressly require that the verification of the application shall be upon personal knowledge only of the applicant, the intention seems to be implied, and a regulation made by the Secretary of the Interior in supposed conformity with the direction of the statute that he prescribed regulations for carrying it into effect, that the applicant shall make a sworn statement that he has personally examined the land, and from his personal knowledge it is unfit for cultivation, and valuable chiefly for its timber, is not in conflict with or in excess of the power conferred by the statute. *Ballinger v. U. S.*, (1909) 33 App. Cas. (D. C.) 302.

**Purchase on speculation.**—A contract made after the application but before the consummation of the entry, by which the money to pay for the land was to be furnished by another, and the title when acquired was to be conveyed to such other, is not unlawful under the statute, and the procuring of such contract is not criminal, and cannot be made the basis of an indictment to defraud the United States of such lands under R. S. sec. 5440. *U. S. v. Biggs*, (1907) 157 Fed. 264, *affirmed* (1909) 211 U. S. 507, 29 S. Ct. 181, 53 U. S. (L. ed.) 305.

An applicant for the purchase of land has the right after he has made his initial application and before final proof to contract to sell the title thereafter to be acquired, and the intending purchaser may lawfully advance to him the money with which to make final proof in order that he may comply with his contract. *U. S. v. Barber Lumber Co.*, (1909) 172 Fed. 948.

**Evidence.**—Where circumstantial evidence is relied on to show that entries of lands under the Timber and Stone Act were fraudulent, and made for the benefit of others than the entrymen, to whom the timber on the lands was subsequently conveyed for a consideration shown, it is competent for either party to show the value of such timber, as a circumstance bearing upon the *bona fides* of the transaction. *Olson v. U. S.*, (1904) 133 Fed. 849, 67 C. C. A. 21.

**Canceling entries.**—Suits to vacate patents for fraud are barred after six years from

the date of the patent, and not from the date of the discovery of the fraud. *U. S. v. Smith*, (1910) 181 Fed. 545.

In a suit by the United States to cancel patents to lands acquired under this Act; for fraud, on the theory that the entrymen entered the lands in fact for others than themselves, allegations showing the rules and regulations of the Interior Department prescribing interrogatories to be propounded to applicants for timber lands on final proof and concerning other acts of the entrymen without warrant of law should be stricken from the bill as impertinent, since, if the entryman made his initial declaration in good faith and no other person at that time had any direct or indirect interest in the entry, the fact that subsequent thereto he contracted to sell the land to another was no objection to his right to complete his entry and obtain a patent. *U. S. v. Kettenbach*, (1909) 175 Fed. 463.

A *bona fide* purchaser of standing timber from the holders of receivers' final receipts for the purchase price of lands entered under this act cannot, upon avoidance for the fraud of the entrymen of the patents afterwards issued, be required to account to the federal government for the timber which it has paid for and cut and removed in reliance upon its purchase. *U. S. v. Detroit Timber, etc., Co.*, (1906) 200 U. S. 321, 26 S. Ct. 282, 50 U. S. (L. ed.) 499, *affirming* (1904) 131 Fed. 668, 67 C. C. A. 1.

A purchaser from the patentees for value, and without notice of any fraud on the part of the entrymen, is a *bona fide* purchaser within the meaning of this act, and as such is entitled to protection, although such purchaser may have acquired an interest in the lands under a contract for the standing timber before the patents issued; since, by the doctrine of relation, the patents, when issued, became operative as of the date of the entries. *U. S. v. Detroit Timber, etc., Co.*, (1906) 200 U. S. 321, 26 S. Ct. 282, 50 U. S. (L. ed.) 499, *affirming* (1904) 131 Fed. 668, 67 C. C. A. 1.

A purchaser of timber lands after receivers' final receipts have issued is entitled to protection, under this Act, as a *bona fide* purchaser, against the cancellation, for the original frauds of the entrymen, of the patents afterwards issued, unless he is shown to have had actual notice of such fraud. *U. S. v. Clark*, (1906) 200 U. S. 601, 26 S. Ct. 340, 50 U. S. (L. ed.) 613, *affirmed* (C. C. A. 1905) 138 Fed. 294.

**Perjury.**—The conditions imposed on the fraudulent claimant, to wit, the pains and penalties of perjury and the forfeiture of money paid, are distinct, and not one dependent on the other, so that it was not essential that a fraudulent claimant should have been convicted of perjury before a forfeiture of the moneys paid could be imposed. *Emmons v. U. S.*, (1909) 175 Fed. 514.

An entryman having made an affidavit that he sought to purchase the land for his own benefit and not for speculation, cannot escape punishment for conspiracy on the ground that his pre-existing contract of sale relates



to the timber only. *Nickell v. U. S.*, (C. C. A. 1908) 161 Fed. 702.

The oath is false and constitutes perjury where the applicant has made an agreement to sell the land, whether written or oral; its enforceability being immaterial. *Boren v. U. S.*, (C. C. A. 1906) 144 Fed. 801.

The courts will take judicial notice of the qualification of the receiver of the Land Office to administer an oath, and hence an averment of the fact is not essential to the validity of an indictment for perjury com-

mitted by false swearing in an entry statement verified before him. *U. S. v. Eddy*, (1905) 134 Fed. 114.

But subornation of perjury cannot be based on a charge that the defendant induced an applicant for the purchase of land to falsely swear in his initial application that he had personally examined the land, and stated from personal knowledge that the same was unfit for cultivation. *Robnett v. U. S.*, (C. C. A. 1909) 169 Fed. 778.

### Vol. VII, p. 304, sec. 3.

**Speculative purpose.**—The omission in this section of any reiteration of the requirements of the statute regarding a speculative purpose on the part of the applicant, his *bona fides*, and his intent to acquire the land for himself alone is equivalent to an express declaration by Congress that these requirements shall not be exacted at the final hearing. *Williamson v. U. S.*, (1908) 207 U. S. 425, 28 S. Ct. 163, 52 U. S. (L. ed.) 278.

**Regulations.**—The authority of the Commissioner of the General Land Office under

this section to prescribe regulations to carry out the provisions of this Act, does not embrace the power to require an applicant to make oath on final hearing of his *bona fides* and of the absence of contract or agreement in respect to the title, which Congress has in that act, by express intentment, excluded from the requirements to be observed on such final hearing. *Williamson v. U. S.*, (1908) 207 U. S. 425, 28 S. Ct. 163, 52 U. S. (L. ed.) 278.

### Vol. VII, p. 304, sec. 4.

A bill by the United States against a number of corporations and individuals to recover for a joint trespass upon public lands, and the unlawful and wilful cutting and removal of timber therefrom by defendants, who are alleged to have conspired for the purpose, does not state a cause of action in equity for an accounting, because it is alleged that, by reason of the complicated relations between the defendants, complainant is unable to state the quantity of timber taken by each. *U. S. v. Bitter Root Development Co.*, (1904) 133 Fed. 274, 66 C. C. A. 652.

The United States cannot maintain a suit in equity for an accounting of the gains and profits made by defendants from the alleged unlawful and wilful cutting and removal of timber from public lands; its right of recovery being confined to damages for trespass, or damages, recoverable in an action in the

nature of trover, in an amount to be based on the value of the manufactured product. *U. S. v. Bitter Root Development Co.*, (1904) 133 Fed. 274, 66 C. C. A. 652.

A suit by the United States to recover for trespass upon public lands, and the cutting and removal of timber therefrom, does not present a case of mutual accounts, cognizable in equity, because of an allegation that complainant granted licenses to defendants to cut timber from certain other lands, and that under cover of such licenses they unlawfully and wilfully cut timber from the lands in suit; nor is such a suit maintainable on the theory of establishing a trust in property purchased with the proceeds of the timber taken, where it is not alleged that defendants are insolvent. *U. S. v. Bitter Root Development Co.*, (1904) 133 Fed. 274, 66 C. C. A. 652.

### Vol. VII, p. 305, sec. 5.

A compromise of a prosecution for cutting timber from public lands, effected by making the payment provided for by this act, is not

conclusive evidence of guilt in the party making the same. *Cox v. Cameron Lumber Co.*, (1905) 39 Wash. 562, 82 Pac. 116.

### Vol. VII, p. 312, sec. 1. [Rules and regulations.]

This provision is not unconstitutional as delegating legislative authority to the Secretary of the Interior. *U. S. v. Grimaud*, (1911) 220 U. S. 506, 31 S. Ct. 480, 55 U. S. (L. ed.) 563, *reversing* (1909) 170 Fed. 205; *Dent v. U. S.*, (1904) 8 Ariz. 413, 76 Pac. 455.

**Rule forbidding grazing and driving.**—That portion of rule 72 promulgated by the Secretary of the Interior which forbids the graz-

ing upon or driving across a forest reservation of any live stock without a permit, except as otherwise allowed by regulation, and declares that such acts shall "constitute trespass, punishable by fine and imprisonment," so far as relates to the prohibition, is within the authority conferred on the Secretary by this act. *U. S. v. Domingo*, (1907) 152 Fed. 566.

Grazing stock on a forest reserve without

the permit required by the Secretary of Agriculture under authority conferred by this section, is an offense against the United

States. U. S. v. Grimaud, (1911) 220 U. S. 506, 31 S. Ct. 480, 55 U. S. (L. ed.) 563, reversing (1909) 170 Fed. 205.

### Vol. VII, p. 314, sec. 1. [*Selection of lieu lands.*]

**Title.**—Land selected under this Act is not the subject of either a legal or an equitable title where the township from which the selection was made was not sectionized, and the selection was also liable to be defeated by prior adverse claims, or by proof that the lands were mineral in character. *Peters v. Van Horn*, (1905) 37 Wash. 550, 79 Pac. 1110.

No legal or equitable title in the land to be received in exchange is acquired until the final consummation of the exchange. *Pacific Live Stock Co. v. Isaacs*, (1908) 52 Ore. 54, 96 Pac. 460.

Where an owner of land within a forest reserve executed a deed of relinquishment it was held that the title vested in the government on the filing of the deed for record; the title not being dependent on the selection of the land granted in lieu thereof. *Territory v. Perrin*, (1905) 9 Ariz. 316, 83 Pac. 361.

**Conveyance of land.**—This Act contains nothing which either expressly or inferentially would prevent an owner who has conveyed his land to the United States from executing an instrument which would operate to pass to another such title as he might thereafter acquire to lieu lands selected by him; and a grantee in such an instrument, who

purchases and pays for the same in good faith after his grantor has made his selection, although before its approval, on such approval and the issuance of a patent, acquires the title as a *bona fide* purchaser and is entitled to protection as such. U. S. v. Hyde, (1909) 174 Fed. 175.

The tender to the Land Department by the holder of the record title to land within a forest reservation of a quitclaim deed to such land, to be exchanged for outside land under this Act does not vest title thereto in the United States until the deed is accepted and the exchange approved, nor does such tender deprive a court of jurisdiction of a suit by the United States to cancel the patent to such land for fraud; the Land Department having no power to determine such question. U. S. v. McClure, (1909) 174 Fed. 510.

**Rules and regulations.**—The Land Department has power to adopt reasonable rules and regulations for the administration of this section in so far as it authorizes the selection of public lands in lieu of lands relinquished in a forest reserve. *Roughton v. Knight*, (1911) 219 U. S. 537, 31 S. Ct. 297, 55 U. S. (L. ed.) 326, (1909) 156 Cal. 123, 103 Pac. 844.

### Vol. X, p. 406. [*Act of March 3, 1905, ch. 1495.*]

An owner of patented land in a forest reserve whose deed to the United States, made in contemplation of an exchange under the Act of June 4, 1897, was returned because not accompanied by a selection of lieu lands, as required by the regulations and practice of the Land Department, has no vested right

to the exchange which would be saved by the exception in this act, in favor of selections theretofore made, and of existing contracts with the Secretary of the Interior. *Roughton v. Knight*, (1911) 219 U. S. 537, 31 S. Ct. 297, 55 U. S. (L. ed.) 326, affirming (1909) 156 Cal. 123, 103 Pac. 844.

## TONNAGE DUTIES.

### Vol. VII, p. 318, sec. 4219.

**Vessels within section.**—The British steamship *Ferndene*, which transported coal belonging to the United States, designed for the navy, from Newport News to San Francisco, and had no other cargo, was not a vessel having on board goods, wares, and merchandise within the meaning of this section. (1907) 26 Op. Atty.-Gen. 428.

A vessel not registered in the United States is a vessel "not of the United States," within the meaning of this section, although owned by a citizen of the United States, and

on her entry from a foreign port is subject to tonnage duty at the rate of fifty cents per ton thereunder. *The Alta*, (C. C. A. 1906) 148 Fed. 663.

A foreign-built vessel, owned entirely by a citizen of the United States, and entering a port of the United States from Manila, does not enter from a "foreign port or place," and is therefore not subject to tonnage duty under this section. *The Alta*, (C. C. A. 1905) 136 Fed. 513.

## Vol. VII, p. 324, sec. 4225.

**Light money.**—Through inadvertence, no "light-money" tax was demanded of the *Tarantula*, a foreign built, American owned steam yacht, on her arrival in this country at Newport News, but the tax was assessed and collected at her next port, New York, where the master presented a bill of sale to an American owner, acknowledged before the United States consul at London. It was held that since the *Tarantula* was not a ves-

sel of the United States, and, on entering the port of Newport News, did not carry "a sea letter or other regular document issued from a custom-house of the United States, proving the vessel to be American property," as provided by R. S. sec. 4228, she therefore became liable to the "light-money" tax of fifty cents per ton, imposed by this section. (1903) 25 Op. Atty-Gen. 75.

## TRADEMARKS.

## Vol. VII, p. 329, sec. 1.

The description of a trademark for wire rope as "a red or other distinctively colored streak applied to or woven in a wire rope" is too indefinite to be the subject of registration as a trademark. *A. Leschen, etc., Rope Co. v. Broderick, etc., Rope Co.*, (1906) 201 U. S. 166, 26 S. Ct. 425, 50 U. S. (L. ed.) 710, *affirming* (C. C. A. 1904) 134 Fed. 571.

The word "Keepclean," as applied to tooth brushes, is descriptive, and is not, therefore,

a proper subject of a valid trademark. *Florence Mfg. Co. v. Dowd*, (C. C. A. 1910) 178 Fed. 73, *reversing* (1909) 171 Fed. 122.

Where a trademark had not been registered, federal jurisdiction of a suit for unfair competition is not conferred by this Act, but exists only under the rules governing ordinary suits at law or in equity. *A. B. Andrews Co. v. Puncture Proof Footwear Co.*, (1909) 168 Fed. 762.

## Vol. VII, p. 330, sec. 3.

This section prohibits the registration of a trademark so closely resembling that of another as to create mistake or confusion in the mind of the public, and certainly the public is entitled to like protection against encroachment upon a common descriptive term. *Trinidad Asphalt Mfg. Co. v. Standard Paint Co.*, (C. C. A. 1908) 163 Fed. 977.

**Use of generic name.**—It is the settled

rule that no one can appropriate as a trademark a generic name, or one descriptive of an article of trade, its qualities, ingredients, or characteristics, or any sign, word, or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth. *Trinidad Asphalt Mfg. Co. v. Standard Paint Co.*, (C. C. A. 1908) 163 Fed. 977.

## Vol. VII, p. 331, sec. 7.

Where a bill for unfair competition in the use of a trademark did not allege that the name was used or to be used on goods intended to be transported to a foreign country or in commerce with Indian tribes, the

federal Circuit Court did not acquire jurisdiction under this section. *A. B. Andrews Co. v. Puncture Proof Footwear Co.*, (1909) 168 Fed. 762.

## Vol. X, p. 408, sec. 1.

**Surname as trademark.**—This Act does not make a surname a valid trademark which did not before constitute a valid trademark. Since every man is entitled to the use of his name reasonably and honestly in every way,

and cannot be obliged to abandon or unreasonably restrict such use, a family surname is not the subject of a valid trademark as against others of the same name. *Thaddeus Davids Co. v. Davids*, (1908) 165 Fed. 792.

## Vol. X, p. 410, sec. 5.

"In actual and exclusive use," etc.—This section, when read in connection with other provisions, evidently contemplated that some marks used in commerce with foreign nations or among the several states or with the Indian tribes, other than proper or technical

trademarks, might be registered, and that such marks, when registered, should have the same exclusive nature as proper or technical trademarks, provided such marks had been "in actual and exclusive use as a trademark of the applicant or his predecessors from

whom he derived title for ten years next preceding the passage of this Act." *John T. Dyer Quarry Co. v. Schuylkill Stone Co.* (1911) 185 Fed. 557.

The purpose of the proviso was to permit the registration of marks not amounting to technical trademarks where they had been exclusively used as such for more than ten years and in which the user had thereby acquired property rights, even though within the prohibited classes, unless contrary to public policy, as containing immoral or scandalous matter, etc., and that a personal name which had been so used as a trademark for more than ten years was entitled to registration and protection thereunder. *Thaddeus Davids Co. v. Davids*, (C. C. A. 1910) 178 Fed. 801. See also *Hutchinson v. Loewy*, (C. C. A. 1908) 163 Fed. 43.

**Arbitrary or fanciful words as trademarks.**—No one can through the adoption and application of an arbitrary or fanciful word as a trademark for a certain article exclude others from using in connection with similar articles a geographical or descriptive name open to the public, on the ground that the latter name so closely resembles the former as to be calculated to mislead the purchasing public as to the origin, manufacture, or ownership of the articles sold, or for any other reason. Were it otherwise one could by indirection practically acquire a monopoly in the use of such geographical or descriptive name of which the law forbids an exclusive appropriation. *John T. Dyer Quarry Co. v. Schuylkill Stone Co.*, (1911) 185 Fed. 557.

In *American Tobacco Co. v. Polacsek*, (1909) 170 Fed. 117, it was held that the trade name "Virgin Leaf" attached to the complainant's tobacco was not synonymous with "Virginia Leaf," nor was it descriptive of the tobacco used, but was "an arbitrary fanciful name intended to denote the purity of the tobacco," and was therefore a valid trademark; and that the defendant, having used the name "Virgin Leaf" in connection with the sale of cigarettes, claiming his use

of these words to be merely by way of substitution for "Virginia Leaf," and descriptive of the tobacco of which the cigarettes were made, infringed the trademark of the complainant; and he was confined by the court to the use of the word "Virginia," instead of "Virgin." The court thus not only compelled the defendant to desist from the use of the arbitrary or fanciful name, but recognized its right to use the appropriate geographical and descriptive term.

Where complainant had used the trademark "Beats-All" attached to lead pencils since 1888, and in interstate commerce since before April 1, 1896, and on April 17, 1906, obtained registration of the mark in the Patent Office, it was held that such registration gave the words, which originally were only descriptive and not the subject of a valid trademark, a secondary meaning, indicating goods exclusively manufactured by complainant, which made the words available as a proper trademark. *American Lead Pencil Co. v. Gottlieb*, (1910) 181 Fed. 178.

While registration is made "prima facie evidence of ownership" and confers certain other benefits upon the owner of the registered trademark, it does not make a trademark either more or less exclusive than it would have been without registration. The extent of its exclusiveness is not in the least affected by registration. The same sound policy for the prevention of objectionable monopolies which will not permit one, by the use of an unregistered trademark consisting of an arbitrary or fanciful word or term, to exclude others from using a descriptive or geographical name open to the public in connection with the sale of articles similar to those to which such arbitrary or fanciful word or term has been applied, operates in all respects with equal force and effect, notwithstanding the fact that such arbitrary or fanciful word or term has been registered. *John T. Dyer Quarry Co. v. Schuylkill Stone Co.*, (1911) 185 Fed. 557.

## Vol. X, p. 412, sec. 10.

**Assignment of trademark.**—A trademark registered under this Act cannot be assigned unless the good will of the business is also transferred; and where a trader had sold a particular article under a selected name to such extent as to secure registration, an as-

signment of the trademark confers no rights on the assignee if the assignor continues to sell the same article, although under a different name. *Eiseman v. Schiffer*, (1907) 157 Fed. 473.

## Vol. X, p. 413, sec. 16.

The certificate of registration is, by this section, made *prima facie* proof of ownership of the trademark; but such proof may be overcome if it be made to appear that the applicant was not entitled to the particular trademark which he sought to appropriate. *Spiegel v. Zuckerman*, (C. C. A. 1911) 188 Fed. 63.

Where, in a prior suit for infringement of a trademark, complainants were found not to be the rightful owners thereof, and it was

determined that H. & Co. had previously used the trademark and were entitled thereto, the conclusiveness of such adjudication as between the parties and their privies is not affected by complainants' subsequent registration of the trademark in *ex parte* proceedings, notwithstanding that this section declares that registration of a trademark is itself *prima facie* evidence of ownership. *Gaines v. Rock Spring Distilling Co.*, (1910) 179 Fed. 544.

# TRADE UNIONS AND COMBINATIONS AND TRUSTS.

Vol. VII, p. 336, sec. 1.

**Explanatory note.**—Many of the notes under this section are also applicable to section 2 of this Act, as in a majority of the cases a violation of both sections is alleged.

**Validity of Act.**—The prohibitions of this Act against restraints or monopolization of trade or commerce do not exceed the authority of Congress to regulate commerce, as applied to undue restraints of interstate or foreign commerce in petroleum and its products, by contract, combination, or conspiracy, or monopolization or attempts to monopolize any part of such commerce. *Standard Oil Co. v. U. S.*, (1911) 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619, *affirming* (1909) 173 Fed. 177.

**Delegation of legislative power.**—Legislative power is not unconstitutionally delegated to the courts by the provisions of this Act prohibiting combinations in restraint of interstate or foreign trade or commerce, because the general language of these provisions leaves it to the judiciary to decide whether, in a given case, the particular acts come within the condemnation of the statute. *Standard Oil Co. v. U. S.*, (1911) 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619, *affirming* (1909) 173 Fed. 177.

**Validity of criminal provisions.**—This Act is primarily a criminal statute, prohibiting certain acts as unlawful restraints and monopolies of interstate trade and commerce and prescribing the punishment therefor, the jurisdiction conferred on Circuit Courts as courts of equity by section 4 to "prevent and restrain violations of this Act" being made dependent on the preceding criminal sections and confined to preventing the carrying out of that which is declared in the prior sections to be criminal. Therefore every decision of the courts sustaining an injunction granted under such section has necessarily determined that the preceding sections are valid, and that the things enjoined were crimes, and in view of the numerous decisions of the Supreme Court upholding such injunction the validity of the criminal sections is no longer open to question in the inferior courts. *U. S. v. American Naval Stores Co.*, (1909) 186 Fed. 592; *U. S. v. Swift*, (1911) 188 Fed. 92.

The essentials of a contract or combination or conspiracy in restraint of trade or commerce among the several states or to monopolize any part of such trade or commerce, inhibited by the Sherman Anti-Trust Law, were discussed in a charge to a grand jury in *In re Charge to Grand Jury*, (1907)

151 Fed. 834, and in *U. S. v. American Naval Stores Co.*, (1909) 172 Fed. 455.

**Construction.**—Sections 1 and 2 make illegal two different things: Section 1, combinations in restraint of interstate trade and commerce; and section 2, combinations or conspiracies to monopolize, or to attempt to monopolize, interstate trade and commerce. *Monarch Tobacco Works v. American Tobacco Co.*, (1908) 165 Fed. 775.

The words "restraint of trade," as used in this Act, should be given a meaning which will not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of commerce, the free movement of which it was the purpose of the statute to protect. *U. S. v. American Tobacco Co.*, (1911) 221 U. S. 106, 31 S. Ct. 632, 55 U. S. (L. ed.) 663, *reversing* (1908) 164 Fed. 700.

One of the purposes of the Anti-trust Act, in making illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several states, is to maintain interstate commerce on the basis of free competition, and any contract, combination, or conspiracy the purpose or direct effect of which is to restrict such free competition by way of transportation or otherwise, is in restraint of interstate commerce and unlawful. *U. S. v. Reading Co.*, (1910) 183 Fed. 427.

**"Rule of reason."**—The standard of reason which has heretofore been applied at the common law and in the United States in dealing with subjects of the character embraced by the prohibitions of sections 1, 2, of this Act, against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempts to monopolize any part of such trade or commerce, is intended to be the measure used for the purpose of determining whether, in a given case, a particular act has, or has not, brought about the wrong against which the statute provides. *Standard Oil Co. v. U. S.*, (1911) 221 U. S. 1, 31 S. Ct. 503, 55 U. S. (L. ed.) 619, *affirming* (1909) 173 Fed. 177; *U. S. v. American Tobacco Co.*, (1911) 221 U. S. 106, 21 S. Ct. 632, 55 U. S. (L. ed.) 619, *reversing* (1908) 164 Fed. 700.

In *Standard Oil Co. v. U. S.*, *supra*, the court, through Chief Justice White, said: "In substance, the propositions urged by the government are reducible to this: That the language of the statute embraces every contract, combination, etc., in restraint of trade,

and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true, because, as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the Act. To hold to the contrary would require the conclusion either that every contract, act, or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or, if this conclusion were not reached, then the contention would require it to be held that, as the statute did not define the things to which it related, and excluded resort to the only means by which the acts to which it relates could be ascertained — the light of reason — the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of restraint of trade as used in the statute, leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the Act by precise definition, but, while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute in every given case, whether any particular act or contract was within the contemplation of the statute."

**Reasonableness of restraint.**—In the *Standard Oil case* (Standard Oil Co. v. U. S., (1911) 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619), White, C. J., in *distinguishing* the *Freight Association case* and the *Joint Traffic case*, cited in the original note, said: "Both the cases involved the legality of combinations or associations of railroads engaged in interstate commerce for the purpose of controlling the conduct of the parties to the association or combination in many particulars. The association or combination was assailed in each case as being in violation of the statute. It was held that they were. It is undoubted that in the opinion in each case general language was made use of, which, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute. It is, however, also true that the nature and char-

acter of the contract or agreement in each case was fully referred to, and suggestions as to their unreasonableness pointed out in order to indicate that they were within the prohibitions of the statute. As the cases cannot, by any possible conception, be treated as authoritative without the certitude that reason was resorted to for the purpose of deciding them, it follows as a matter of course that it must have been held by the light of reason, since the conclusion could not have been otherwise reached, that the assailed contracts or agreements were within the general enumeration of the statute, and that their operation and effect brought about the restraint of trade which the statute prohibited. This being inevitable, the deduction can in reason only be this: That in the cases relied upon, it having been found that the acts complained of were within the statute, and operated to produce the injuries which the statute forbade, that resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the case relied upon, when rightly appreciated, were therefore this, and nothing more: That as considering the contracts or agreements, their necessary effect, and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts, or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts creating, as they did, a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made. But aside from reasoning, it is true to say that the cases relied upon do not, when rightly construed, sustain the doctrine contended for, is established by all of the numerous decisions of this court which have applied and enforced the Anti-Trust Act, since they all, in the very nature of things, rest upon the premise that reason was the guide by which the provisions of the Act were in every case interpreted. Indeed, intermediate the decision of the two cases, that is, after the decision in the *Freight Association case*, and before the decision in the *Joint Traffic case*, the case of *Hopkins v. U. S.*, (1898) 171 U. S. 578, 43 U. S. (L. ed.) 290, 19 S. Ct. 40, was decided, the opinion being delivered by Mr. Justice Peckham, who wrote both the opinions in the *Freight Association* and the *Joint Traffic cases*. And referring in the *Hopkins case* to the broad claim made as to the rule of interpretation announced in the *Freight Association case*, it was said (page 592): 'To treat as condemned by the Act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the Act far beyond the fair meaning of the language used. There must

be some direct and immediate effect upon interstate commerce in order to come within the Act.' And in the Joint Traffic case this statement was expressly reiterated and approved, and illustrated by example. Like limitation on the general language used in Freight Association and Joint Traffic cases is also the clear result of *Bement v. National Harrow Co.*, (1902) 186 U. S. 70, 92, 46 U. S. (L. ed.) 1058, 1069, 22 S. Ct. 747, and especially of *Cincinnati, etc., Packet Co. v. Bay*, (1906) 200 U. S. 179, 50 U. S. (L. ed.) 428, 26 S. Ct. 208. If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intentment of the law, is the direct or indirect effect of the acts involved, then, of course, the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct. This is true, because as the construction which we have deduced from the history of the Act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the Act embodies, must be applied. From this it follows, since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing, that the difference between the two is therefore only that which obtains between things which do not differ at all. If it be true that there is this identity of result between the rule intended to be applied in the Freight Association case, that is, the rule of direct and indirect, and the rule of reason which, under the statute as we construe it, should be here applied, it may be asked how was it that in the opinion in the Freight Association case much consideration was given to the subject of whether the agreement or combination which was involved in that case could be taken out of the prohibitions of the statute upon the theory of its reasonableness. The question is pertinent and must be fully and frankly met; for if it be now deemed that the Freight Association case was mistakenly decided or too broadly stated, the doctrine which it announced should be either expressly overruled or limited. The confusion which gives rise to the question results from failing to distinguish between the want of power to take a case which by its terms or the circumstances which surrounded it, considering among such circumstances the character of the parties, is plainly within the statute, out of the operation of the statute by resort to reason in effect to establish that the contract ought not to be treated as within the statute, and the duty in every case where it becomes necessary from the nature and character of the parties to decide whether it was within the statute to pass upon that question by the light of reason. This distinction, we think, serves to point out what, in its ultimate conception, was the thought underlying the reference to the rule of reason made in the Freight Association

case — especially when such reference is interpreted by the context of the opinion and in the light of the subsequent opinion in the Hopkins case and in *Cincinnati, etc., Packet Co. v. Bay*. And in order not in the slightest degree to be wanting in frankness, we say that in so far, however, as by separating the general language used in the opinions in the Freight Association and Joint Traffic cases from the context and the subject and parties with which the cases were concerned, it may be conceived that the language referred to conflicts with the construction which we give the statute, they are necessarily now limited and qualified. We see no possible escape from this conclusion if we are to adhere to the many cases decided in this court in which the anti-trust law has been applied and enforced, and if the duty to apply and enforce that law in the future is to continue to exist. The first is true, because the construction which we now give the statute does not in the slightest degree conflict with a single previous case decided concerning the anti-trust law, aside from the contention as to the Freight Association and Joint Traffic cases, and because every one of those cases applied the rule of reason for the purpose of determining whether the subject before the court was within the statute. The second is also true, since, as we have already pointed out, unaided by the light of reason it is impossible to understand how the statute may in the future be enforced and the public policy which it establishes be made efficacious."

**State and interstate commerce distinguished.** — If a contract in restraint of trade only affects products within the limits of a state, it is subject only to state laws; any remote or incidental effect on interstate commerce being insufficient to bring it within the federal law, but if, in addition, it attempts to control the disposition of the manufactured article across state lines, it then directly affects interstate commerce, and is within the prohibition of the federal Act. *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, (C. C. A. 1908) 166 Fed. 254.

*In C. H. Albers Commission Co. v. Spencer*, (1907) 205 Mo. 105, 103 S. W. 523, it was held that a contract made in Missouri to be performed there, for the sale of wheat for future delivery, was not affected by the federal Anti-trust Act, though the buyer made other purchases of wheat through Chicago agencies, the wheat to be delivered in Missouri; the latter contracts also being Missouri contracts, to be performed there.

**Direct or indirect effect of contract, etc.** — Of similar effect to the first paragraph of the original note, *John D. Park, etc., Co. v. Hartman*, (C. C. A. 1907) 153 Fed. 24; *Bigelow v. Calumet, etc., Min. Co.*, (C. C. A. 1909) 167 Fed. 721, affirming (1908) 167 Fed. 704; *Union Pac. Coal Co. v. U. S.*, (C. C. A. 1909) 173 Fed. 737; *U. S. v. Union Pac. R. Co.*, (1911) 188 Fed. 102; *Harbison-Walker Refractories Co. v. Stanton*, (1910) 227 Pa. St. 55, 75 Atl. 988.

The interference, if any, with interstate

commerce, contemplated by a contract for the sale of certain river craft, which permitted a suspension of payment of instalments of the purchase price in case of serious competition over a route between two named Ohio ports on the Ohio river, and required the vendors to withdraw from such competition for five years, was held to be insignificant to render the contract invalid under this Act, as imposing a restraint on interstate commerce. *Cincinnati, etc., Packet Co. v. Bay*, (1906) 200 U. S. 179, 26 S. Ct. 208, 50 U. S. (L. ed.) 428.

The purchase by one railroad company of a controlling interest in the stock of another, which was a competitor in the carrying of anthracite coal between the mines and New York harbor, was held not to constitute a combination in restraint of interstate commerce in such coal, or to monopolize such commerce, unlawful under this Act, where the predominating motive in the purchase was to preserve traffic arrangements which were important to the purchasing company, although its necessary incidental effect was to eliminate competition between the two roads in the coal-carrying business. *U. S. v. Reading Co.*, (1910) 183 Fed. 428.

**Sale of business and good will.**—It is well settled that the sale of a business, and the surrender of the good will pertaining to that business, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of the business, and not as a device to control commerce, is not within this Act. *Camors-McConnell Co. v. McConnell*, (1905) 140 Fed. 412, *affirmed* (C. C. A.) 140 Fed. 987; *Darius Cole Transp. Co. v. White Star Line*, (C. C. A. 1911) 186 Fed. 65; *Harbison-Walker Refractories Co. v. Stanton*, (1910) 227 Pa. St. 55, 75 Atl. 988.

But in *Monongahela River Consol. Coal, etc., Co. v. Jutte*, (1904) 210 Pa. St. 288, 59 Atl. 1088, it was held that a contract by which the owner of coal lands sold the same with an agreement not to engage in mining or shipping coal in the territory traversed by the "Monongahela, Ohio, and Mississippi rivers and their tributaries" for ten years, in so far as it affects business carried on in the territory adjacent to the Ohio and Mississippi rivers outside of Pennsylvania, is a violation of this Act.

**Immunity to witnesses.**—The right of a witness to claim his privilege against self-incrimination, afforded by U. S. Const., Fifth Amendment, when examined concerning an alleged violation of the Anti-trust Act, is taken away by the proviso to the Act of Feb. 25, 1903 (32 Stat. L. 904, ch. 755, 10 Fed. Stat. Annot. 173), that no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding, suit, or prosecution under certain named statutes, of which the Anti-trust Act is one, which furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford im-

munity from prosecution in the state courts for the offense disclosed. *Hale v. Henkel*, (1906) 201 U. S. 43, 26 S. Ct. 371, 50 U. S. (L. ed.) 652; *Nelson v. U. S.*, (1906) 201 U. S. 92, 26 S. Ct. 359, 50 U. S. (L. ed.) 673; *In re Kittle*, (1910) 180 Fed. 946.

The provision of the Act granting immunity to a witness testifying to violations of this Act is not retroactive; the constitutional guaranty being satisfied by a construction that the witness is not subject to future prosecution after giving his testimony. *In re Kittle*, (1910) 180 Fed. 946.

In *U. S. v. Swift*, (1911) 186 Fed. 1002, it appeared that the defendants were indicted in 1905 for conspiracy to monopolize interstate commerce in fresh meats, in violation of the Sherman Anti-trust Act, but an acquittal was directed, on the ground that they were immune from prosecution because of testimony given and evidence furnished by them before the Commissioner of Corporations in relation to the transactions which formed the basis for the indictments. It was held that such immunity did not extend to a subsequent prosecution for continuing the same conspiracy thereafter; nor did it obliterate the facts testified to, which, if legally competent and relevant, might be shown in the subsequent prosecution.

**Illegal contract as defense to suit.**—A recovery upon an account for goods sold and delivered by a corporation created to effectuate a combination of manufacturers of certain articles intended and having the effect directly to restrain and monopolize trade and commerce, in violation of the Anti-trust Act, cannot be had where the account is made up, within the knowledge of both buyer and seller, with direct reference to, and in execution of, the agreements which constitute the illegal combination. *Continental Wall Paper Co. v. Louis Voigt, etc., Co.*, (1909) 212 U. S. 227, 29 S. Ct. 280, 53 U. S. (L. ed.) 486, wherein Harlan, J., said, in distinguishing this case from *Connolly v. Union Sewer Pipe Co.*, (1902) 184 U. S. 540, 22 S. Ct. 431, 46 U. S. (L. ed.) 679, cited in the original note: "The present case is plainly distinguishable from the Connolly case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, nor part of nor in execution of any general plan or scheme that the law condemned. The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations, and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly case was that the plaintiff corporation, although own-



ing the pipe in question and having authority to sell and pass title to the property, was precluded by reason alone of its illegal character from having a judgment against the purchaser. We held that that defense could not be sustained, either upon the principles of the common law or under the Anti-trust Act of Congress. The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme. We state the matter in this way because the plaintiff, by its demurrer, admits, for the purposes of this case, the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up in execution of the agreements that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states. The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and pursuant to which the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the Connolly case. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground merely that the seller, which owned the goods, was an illegal combination or trust. We held that he could not, and nothing more touching that question was decided or intended to be decided in the Connolly case. The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, within the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from

the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay. In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto. Its interests must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law." See also *McConnell v. Camors-McConnell Co.*, (C. C. A. 1907) 152 Fed. 321.

In *Darius Cole Transp. Co. v. White Star Line*, (C. C. A. 1911) 186 Fed. 64, it appeared that the libellant and respondent were both owners of steamers running regularly between Detroit and Toledo, and for a number of years had operated under a pooling arrangement which gave them a monopoly. At the expiration of such arrangement libellant sold one of its boats and leased the other to respondent for a term of three years, to be run between such two points, and at the same time transferred its good will, and agreed not to engage in competition during the term. The rental reserved was more than the steamer could have earned operated independently. It was held, on the evidence, that the dominant purpose of the parties was to enable respondent to maintain its monopoly of the business, and that the lease was void as in violation of this Act, and rent could not be recovered thereon.

In order to defeat a suit to enforce a contract on the ground that its enforcement is sought to aid and facilitate the carrying out of an illegal combination in restraint of trade, it must appear that the contract is directly connected with such lawful purpose, and not merely collateral thereto. *Camors-McConnell Co. v. McConnell*, (1905) 140 Fed. 412, *affirmed* (C. C. A.) 140 Fed. 987; *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, (C. C. A. 1906) 143 Fed. 242; *Northwestern Consol. Milling Co. v. Callam*, (1910) 177 Fed. 786.

That a complainant is itself, or is a member of, a combination in violation of the federal anti-trust statute, is not a defense available in an action for the infringement of a patent, nor does it show a defect in complainant's title. *Motion Picture Patents Co. v. Laemmle*, (1910) 178 Fed. 104; *Motion Picture Patents Co. v. Ullman*, (1910) 186 Fed. 174.

In *Cincinnati, etc., Packet Co. v. Bay*, (1906) 200 U. S. 179, 26 S. Ct. 208, 50 U. S. (L. ed.) 428, it was held that a purchaser of river craft could not invoke the Anti-trust Acts to relieve him from his obliga-

tion to pay the purchase price, because of his covenant to maintain the present traffic rates, which were not declared by the contract to enter into the consideration of the sale — especially where the rates referred to primarily, if not exclusively, related to domestic and not to interstate business.

In *R. J. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co.*, (1907) 151 Fed. 819, it was held that a claim that a conveyance by one manufacturing corporation to another of all its property, including its trademarks, trade names, brands, and labels, contains a provision in violation of the anti-trust law of the United States, is not available as a defense by another manufacturer when sued for infringement or unfair competition in respect to a trademark, brand, or label, where it is shown that the same has been continuously used by the grantee as its own since a time prior to the commencement of the alleged infringement or unfair imitation.

**State laws.**—State legislatures, in the exercise of their power to deal with monopolies and combinations in restraint of trade, may provide their own methods of procedure and determine the methods and means by which their legislation may be made effective, subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. *Waters-Pierce Oil Co. v. Texas*, (1909) 212 U. S. 96, 29 S. Ct. 220, 53 U. S. (L. ed.) 417, *affirming* (1908) 48 Tex. Civ. App. 162, 106 S. W. 918.

*The Massachusetts statute* (Rev. Laws, ch. 56, sec. 1) providing that a person, firm, corporation, or association of persons, doing business in Massachusetts, shall not make it a condition of the sale of goods, wares, or merchandise, that the purchaser shall not deal in those of any person, firm, corporation, or association of persons, but that the section shall not prohibit the appointment of agents or sole agents for the sale of, nor the making of contracts for the exclusive sale of, goods, wares, or merchandise, is not repugnant to Const. U. S., art. 1, sec. 8, giving Congress power to regulate commerce, notwithstanding the enactment of the federal anti-trust law, prohibiting contracts directly affecting interstate or foreign commerce by way of restraint of trade or creation of a monopoly. *Com. v. Strauss*, (1906) 191 Mass. 545, 78 N. E. 136.

*The Missouri statutes* (Acts of March 21, 1906, ch. 117, and March 13, 1908, ch. 8), authorizing pooling by farmers, of their products, do not violate the federal Anti-trust Act, as they have no relation to interstate commerce, being confined in their operation to products grown and pooled in the state and to sales therein. *Com. v. Hodges*, (1910) 137 Ky. 233, 125 S. W. 680.

**Territorial laws.**—*The Oklahoma statute* (chapter 83, Wilson's Rev. & Ann. Stat. Okla. 1903), being an enactment of the legislative assembly of the territory of Oklahoma, passed Dec. 25, 1890, entitled "An Act to prevent combinations in restraint of trade," is not in conflict or inconsistent with this

Act. *Territory v. Long Bell Lumber Co.*, (1908) 22 Okla. 890, 99 Pac. 911; *Wagner v. Minnie Harvester Co.*, (1910) 25 Okla. 558, 106 Pac. 969.

**Form not material.**—The generic character of the prohibitions of this Act against combinations in restraint of interstate or foreign trade or commerce, and monopolization or attempts to monopolize any part thereof, covers every conceivable act which can possibly come within the spirit or purpose of the condemnation of the laws, without regard to the garb in which such acts are clothed. *Loewe v. Lawlor*, (1908) 208 U. S. 274, 28 S. Ct. 301, 52 U. S. (L. ed.) 488; *U. S. v. American Tobacco Co.*, (1911) 221 U. S. 106, 31 S. Ct. 632, 55 U. S. (L. ed.) 663, *reversing* (1908) 164 Fed. 700; *Darius Cole Transp. Co. v. White Star Line*, (C. C. A. 1911) 186 Fed. 65; *U. S. v. Dur Pont de Nemours*, (1911) 188 Fed. 127.

**Distinction between restraint of trade and restraint of competition.**—In *U. S. v. Du Pont de Nemours*, (1911) 188 Fed. 150, the court said: "There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the Anti-trust Act was passed, a definite legal signification. Not every combination in restraint of competition was in a legal sense in restraint of trade. Two men in the same town engaged in the same business as competitors may unite in a copartnership, and thereafter, as between themselves, substitute co-operation for competition. Their combination restrains competition, and if their town is located near the line between two states, and each has been trading in both states, their combination restrains competition in interstate trade. But it does not necessarily follow that such restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain 'trade or commerce among the several states.' To what extent the Anti-trust Act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated. For a dozen years, at least, it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade."

**Only undue restraints of interstate or foreign trade or commerce are prohibited by the provisions of this Act** declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of such trade or commerce, and making guilty of a misdemeanor every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of such trade or com-

merce. *Standard Oil Co. v. U. S.*, (1911) 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619, *affirming* (1909) 173 Fed. 177; *U. S. v. American Tobacco Co.*, (1911) 221 U. S. 106, 31 S. Ct. 632, 55 U. S. (L. ed.) 663, *reversing* (1908) 164 Fed. 700.

**Giving sole agency.**—A contract by which a manufacturing company, whose products are sold in interstate commerce, makes another sole agent for the sale of its products, is not in violation of this Act, as in restraint of interstate trade and commerce, its effect on such commerce, if any, being indirect and incidental. *Virtue v. Creamery Package Mfg. Co.*, (C. C. A. 1910) 179 Fed. 115.

**Effect of acquittal on subsequent prosecutions.**—A conspiracy to restrain or monopolize interstate commerce in violation of section 1 of this Act is necessarily a continuing one, and its illegality is not alone in the act of confederating or engaging in the conspiracy, but also in its continuation, so that a judgment of conviction or acquittal in a prosecution of those engaged in it is not a bar to their subsequent prosecution for continuing and carrying forward the same conspiracy thereafter, which is a new violation of the law. *U. S. v. Swift*, (1911) 186 Fed. 1002.

**A contract to strangle a threatened competition**, by preventing the construction of an immediately projected line of railway, which, if constructed, would naturally and substantially compete with an existing line for interstate traffic, is one in restraint of interstate commerce, and in violation of this Act. *U. S. v. Reading Co.*, (1910) 183 Fed. 427; *U. S. v. Union Pac. R. Co.*, (1911) 188 Fed. 102.

**One competing railroad purchasing stock of another.**—The purchase by an interstate railroad company of stock of another company operating a complete line, where it was insufficient in amount to give control of its competitor, and no attempt was made to exercise such control, did not effect a combination in restraint of interstate commerce, in violation of this Act. *U. S. v. Union Pac. R. Co.*, (1911) 188 Fed. 102.

**Competing railroads subsequently for capital stock of new line.**—Notwithstanding the federal Anti-trust Act, two parallel and competing railroad companies each continuing its individual identity, organization, and control, may subscribe for the capital stock of a newly created railroad company to build a line which opens and serves additional territory, and may contribute the necessary funds for the construction of the new line. *State v. Superior Ct.*, (1909) 51 Wash. 346, 98 Pac. 739.

**Articles sold under a trade name.**—The fact that an article of commerce is sold under a trade name or in a trade dress affords it no exemption from the common law or statutory rules against restraint of trade. *John D. Park, etc., Co. v. Hartman*, (C. C. A. 1907) 153 Fed. 24.

**Presumption from unification of control.**—The unification of power and control over certain commodities which results from combining in the hands of a holding company

the capital stock of the various corporations trading in such products, raises a presumption of an intent to exclude others from the trade, and thus centralize in the combination a perpetual control of the movement of these commodities in the channels of interstate and foreign commerce, in violation of the prohibitions of this Act against combinations in restraint of interstate or foreign trade or commerce, or monopolization or attempt to monopolize any part of such trade or commerce. *Standard Oil Co. v. U. S.*, (1911) 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619, *affirming* (1909) 173 Fed. 177.

**Combination effected by series of separate acts.**—A combination or conspiracy to monopolize or to attempt to monopolize interstate commerce, in violation of this Act, is not immune because it is carried into effect by a series of separate acts, each one of which taken alone is not objectionable, where the direct object and result of all is the perfection of a combination agreement whereby the free flow of commerce between the states, or the liberty of the trader, is obstructed. *Monarch Tobacco Works v. American Tobacco Co.*, (1908) 165 Fed. 774; *U. S. v. Reading Co.*, (1910) 183 Fed. 427.

**Boycott.**—A combination by members of a labor organization to destroy an existing interstate traffic in hats by preventing the manufacturers, through the instrumentality of a boycott, from manufacturing hats intended for transportation beyond the state, and to prevent their vendees in other states from reselling the hats so transported, and from further negotiating with the manufacturers for the purchase and transportation of such hats from the place of manufacture to the various places of destination, is a combination "in restraint of trade or commerce among the several states," within the meaning of the Anti-trust Act. *Loewe v. Lawlor*, (1908) 208 U. S. 274, 28 S. Ct. 301, 52 U. S. (L. ed.) 488; *Lawlor v. Loewe*, (C. C. A. 1911) 187 Fed. 522.

**Conspiracy to restrain trade.**—Where an indictment against a number of defendants charged them with a conspiracy among themselves and with others in restraint of interstate trade and commerce, in violation of section 1 of the Anti-trust Act, or to monopolize any part of such trade and commerce, in violation of section 2, to warrant a conviction it must be found that at least two of the defendants were parties to such a conspiracy. *U. S. v. American Naval Stores Co.*, (1909) 172 Fed. 455.

**Purchase of insolvent corporations.**—This Act does not condemn the purchase by three corporations of two insolvent corporations engaged in the same business nor in the conduct of the business thereafter by the three purchasers, especially in an effort to liquidate the indebtedness. *Northwestern Consol. Milling Co. v. Callam*, (1910) 177 Fed. 786.

**Fixing prices and terms of sale.**—A coal company engaged in mining and selling its coal is not prohibited by the Anti-trust Act, from refusing to sell its coal, from selecting its customers, from fixing the price and terms on which it will sell its products, or

from selling to different customers for different prices and on different terms. *Union Pac. Coal Co. v. U. S.*, (C. C. A. 1909) 173 Fed. 737.

**Fixing price of copyrighted books.**—Where the publishers and booksellers of the United States organized two membership associations, one known as the "American Publishers' Association," and the other as the "American Booksellers' Association," and together controlled the publication and sale of at least ninety per cent. of all copyrighted books, the objects of which were to compel owners and dealers of such books to purchase them of the members of the combination at an arbitrary price fixed by it, regardless of the actual value of the books as determined by a demand in an open market, or the condition of the books, and to compel all publishers and dealers of such books to come into the combination, be controlled by it, and sell books at prices fixed by it, regardless of the value of the books or the exigencies of the trade and situation of the seller, or be deprived of the privilege of purchasing, owning, and selling such books through a system of blacklisting, etc., the effect of which would be to cripple the business of any publisher or bookseller outside of the combination, such agreement was a violation of the Sherman anti-trust law. *Bobbs-Merrill Co. v. Straus*, (1905) 139 Fed. 155, *affirmed* (C. C. A. 1906) 147 Fed. 15, *which was affirmed in* (1908) 210 U. S. 339, 28 S. Ct. 722, 52 U. S. (L. ed.) 1086; *Mines v. Scribner*, (1906) 147 Fed. 926.

**Specification of particular kind of pavement by municipal council.**—The specification by a municipal council, in its resolutions and ordinances for street improvement, that Trinidad lake asphalt should be the material used, was held not to constitute such a direct interference with interstate commerce as to be repugnant either to the commerce clause of the Federal Constitution or to the Sherman Anti-trust Act, because this particular kind of asphalt is a product of a foreign country, and there are deposits in several of the United States from which suitable asphalt can be had. *Field v. Barber Asphalt Paving Co.*, (1904) 194 U. S. 618, 24 S. Ct. 784, 48 U. S. (L. ed.) 1042.

**Intention of parties.**—In determining whether a transaction constituted an illegal contract, combination, or conspiracy in restraint of interstate trade or commerce, or to monopolize the same in violation of the Sherman Anti-trust Act, the intention of the parties may or may not be material, depending on whether or not the necessary effect of the agreement or acts done is to directly restrain such trade or to create such monopoly. If not, the intention is important. *Bigelow v. Calumet, etc., Min. Co.*, (1908) 167 Fed. 704, *affirmed* (C. C. A. 1909) 167 Fed. 721.

**Contracts limiting communication of stock quotations.**—Contracts with telegraph companies by which a board of trade limits the communication of quotations of prices on sales of grain and provisions for future delivery, collected by it, which it might have

refrained from communicating to any one, do not effect a monopoly or amount to an attempt at monopoly, and are not contracts in restraint of trade, either under this Act or at common law. *Chicago Board of Trade v. Christie Grain, etc., Co.*, (1905) 198 U. S. 236, 25 S. Ct. 637, 49 U. S. (L. ed.) 1031.

**Combination of licorice paste manufacturers.**—A secret arrangement between two corporations which together produced about eighty-five per cent. of all the licorice paste consumed in the United States and sold to consumers throughout the country, by which they ceased competition, fixed from time to time the prices at which each should sell, and apportioned the customers between them, and also by concerted action secured contracts with their chief if not only competitors, which enabled them to control either the output of such competitors or the prices at which and the persons to whom they should sell, and in pursuance of which scheme they were enabled to and did advance the price of the article to all purchasers nearly fifty per cent. within a few months, was one directly affecting interstate commerce, and constitutes a combination and conspiracy in restraint of such commerce, and an attempt to monopolize a portion of the same, within the prohibition of the anti-trust law. *U. S. v. MacAndrews, etc., Co.*, (1906) 149 Fed. 823. See also *U. S. Tobacco Co. v. American Tobacco Co.*, (1908) 163 Fed. 701.

**Combination to manufacture article of necessity.**—A combination the sole object of which is to manufacture an article of common necessity is not, without more, a violation of this Act, prohibiting combinations in restraint of interstate commerce. *Monarch Tobacco Works v. American Tobacco Co.*, (1908) 165 Fed. 774.

**Combination of copper mining corporations.**—That one Michigan mining corporation engaged in mining and refining copper wholly within that state, by purchases of stock and obtaining proxies from other stockholders, secured voting control of a majority of the stock of another similar corporation operating adjoining mines, and purposed to use such control to place in its directory a majority from its own board of officers, all of which it had the right to do under the laws of the state, did not directly or necessarily affect interstate or foreign commerce, and such control is not of itself illegal as a combination in restraint of such trade or commerce in violation of this Act, in the absence of evidence of an unlawful intent to so use it as to bring about the prohibited restraint or monopoly, and not in a lawful way in the interest of an economical management of both companies. *Bigelow v. Calumet, etc., Min. Co.*, (C. C. A. 1909) 167 Fed. 721, *affirming* (1908) 167 Fed. 704. Compare *Bigelow v. Calumet, etc., Min. Co.*, (1907) 155 Fed. 869.

**Combination between corporation and agent.**—A combination between a corporation and its officer or agent in violation of the Anti-trust Act cannot be formed by the thoughts or acts of the officer or agent alone,

without the conscious participation in it of any other officer or agent of the corporation. *Union Pac. Coal Co. v. U. S.*, (C. C. A. 1909) 173 Fed. 737.

**Combination of drug trade associations.**—Three national associations of persons interested in the drug trade—the Proprietors' Association of America, composed of manufacturers of proprietary medicines, the National Wholesale Druggists' Association, and the National Association of Retail Druggists—joined in the adoption of a so-called "tripartite agreement," the purpose of which was to maintain the retail prices of patent or proprietary medicines, and which provided that wholesalers should refrain from selling such medicines at any price to "aggressive cutters" of prices, or brokers; an aggressive cutter being defined as a dealer who was so designated by seventy-five per cent. of the local trade at any given place. Pursuant to such concerted plan, to which all were bound, and to carry it into effect, the proprietors thereafter sold only at fixed and uniform prices to those wholesalers who agreed to maintain prices and not to sell to aggressive cutters or brokers, in accordance with a list furnished by a committee of the wholesalers' association, while the list of aggressive cutters was furnished by the secretary of the retailers' association. If a wholesaler violated such agreement, and sold to an aggressive cutter, he was at once reported, and his name added to that list, and notice of the fact to all retailers who were members, with a suggestion that they act for the protection of their interest. If he was reinstated, a second notice of that fact was sent. It was held that such concerted plan and action constituted a combination and conspiracy in restraint of interstate commerce in violation of the anti-trust law. *Jayne v. Loder*, (C. C. A. 1906) 149 Fed. 21, 9 Ann. Cas. 294.

**Combination of window glass manufacturers.**—A declaration alleged that the defendant corporation was engaged in purchasing and contracting for the purchase of window glass from the manufacturers for certain named jobbers and wholesale dealers doing business in different states, who owned practically all of defendant's stock and controlled it; that such dealers comprised over seventy-five per cent. of all those in the United States, and sold more than seventy-five per cent. of the window glass sold therein; that up to a certain date they were uncombined, and competed freely with each other and with other wholesale dealers, but that on such date the defendant entered into a combination and agreement with them and with a manufacturer who owned and operated factories in different states and manufactured seventy per cent. of all the window glass made in the United States, by which defendant and such dealers agreed to buy window glass from no other manufacturer unless at materially lower prices, and such manufacturer agreed to sell to no other dealers except at higher prices than it charged them; that such agreement further limited the quantity of window glass to be purchased by each of

such dealers to such as should be arbitrarily fixed by defendant and the manufacturer, and also gave them the power to arbitrarily fix excessive and unreasonable prices which were to be charged retail dealers, which prices such wholesale dealers agreed to observe under penalty of fines to be assessed against and paid by them; that it further restricted and limited the territory within which each of such dealers should sell to retail dealers, the object and effect of such combination and agreement being to restrain interstate commerce in window glass, to destroy competition therein, and to practically monopolize the same, especially in the better grades, which were practically all made by such manufacturer. It was held that the declaration charged a contract or combination in restraint of interstate commerce, in violation of the Anti-trust Act. *Wheeler-Stenzel Co. v. National Window Glass Jobbers Assoc.*, (C. C. A. 1907) 152 Fed. 864.

**An association of window glass jobbers,** for the purpose of appointing a common agent to make purchases of window glass for them and to distribute it among them according to contracts severally entered into by them with such agent, was not, even though one of the objects of the combination was to avoid competition among the members with each other in the market for window glass, illegal as a combination in restraint of trade, either at common law or under the Sherman Act. *Wheeler-Stenzel Co. v. American Window Glass Co.*, (1909) 202 Mass. 471, 89 N. E. 29.

**Combination of coal producers.**—In *U. S. v. Reading Co.*, (1910) 183 Fed. 427, it appeared that for many years small producers of coal in the anthracite regions of Pennsylvania had sold their product to contiguous large operators, who took it at the breakers and shipped and marketed the same through their own agencies, paying to the sellers therefor a certain percentage of tide-water prices, differing under certain contracts. During a general strike of all anthracite miners, at a conference between the producers, in order to induce the selling operators to assent to a settlement by which all miners were to receive increased pay, the purchasing companies agreed to contract with the selling producers under an agreed form of contract by which the purchaser bought the entire product of the seller's mines, to be mined and delivered as the buyer directed, which is agreed should be the seller's just proportion of all the anthracite coal which the requirements of the market might from time to time demand. The purchasers were also to pay an increased percentage based on the general average price at tide-water during the month, to be determined by an expert accountant. The making of such a contract was optional with each seller; but several were made, and the accountant made reports which were furnished to all parties interested, and also published in trade journals. It was held that such agreement did not constitute nor evidence a combination or conspiracy on the part of the purchasing companies to restrain or monopolize the sale or

control the price of coal in interstate commerce in violation of this Act, but was the legitimate outgrowth of peculiar business conditions and was to the advantage of the smaller producers by utilizing for the handling of their product the facilities and agencies of the larger companies.

**Combination of railroads.**—In 1901 the Union Pacific Railroad Company bought stock of the Southern Pacific Company, which gave it practically a controlling interest, and the United States brought suit to enjoin the voting of such stock, on the ground that its acquisition was for the purpose of suppressing competition between the two companies in interstate commerce, and of monopolizing such commerce or a part thereof, in violation of this Act. At that time the Southern Pacific Company owned and operated a steamship line between New York and New Orleans, and rail lines from the latter place to the Pacific Coast, and by way of San Francisco to Portland, Ore. It also owned and operated the line of the Central Pacific Railroad Company between San Francisco and Ogden, Utah, from which point it connected eastward with the line of the Union Pacific and also with another competing line. The main line of the Union Pacific extended from Omaha to Ogden, with a branch from Kansas City westward to a connection with the main line. It also, through subsidiary companies, owned and operated a line from a connection with its main line, to Portland, and from there operated steamship lines to the Orient and to San Francisco. For through freight for the Pacific Coast originating east of its Missouri river terminals it was dependent on other roads, with which it there connected, and practically all of such freight for San Francisco was forwarded from Ogden over the Central Pacific line, 800 miles long, for which the Southern Pacific received about four-tenths of all the freight from Omaha or Kansas City westward. The rail and water line of the Union Pacific from Ogden to San Francisco by way of Portland was 1,700 miles long, its steamer service was irregular and the amount of freight sent that way was negligible. The two companies were competitors to a small extent for Oriental business, for business from the Atlantic seaboard to Portland and vicinity, and also through branches and connecting lines to and from other common points; but the total amount of such competitive business done by the Southern Pacific during the year ending in 1901 amounted to only 0.88 per cent. of its entire tonnage, and that done by the Union Pacific but 3.10 per cent. of its entire tonnage. While the Union Pacific maintained agents in the east to solicit business, it was chiefly from connecting carriers, and it received little more in freights for such business than did the Southern Pacific. It was held that the two roads were not substantial competitors for interstate or foreign business, in such sense that the purchase of the stock by the Union Pacific, for the purpose of giving it an assured connection with San Francisco, which it could control, constituted a direct restraint upon such commerce, in violation

of the Act. *U. S. v. Union Pac. R. Co.*, (1911) 188 Fed. 104.

The Union Pacific Railroad Company, through a subsidiary company, had projected and partly built a line of road between Salt Lake City and Los Angeles, when a controversy arose over a portion of the right of way through the mountains, between that company and another, which also desired to build a road between the same points, which was finally settled by an agreement to unite and build a road in which each party should own a half interest, with a further agreement respecting rates on through business. The Union Pacific Company at that time owned a controlling interest in the Southern Pacific Company, which owned and operated a line through Los Angeles to San Francisco, and one from there to Ogden, near Salt Lake City. It was held that the new line, which was direct, and much more serviceable and convenient for the public, was not a natural competitor of the Southern Pacific Company, with respect to business between Los Angeles and Salt Lake City, in such sense as to constitute the agreement under which it was built a combination in restraint of interstate commerce, in violation of section 1, nor was it unlawful thereunder on the ground that it prevented the building of two lines instead of one, it appearing that there was but one practicable route through the mountains, over which it was not feasible to construct two lines, nor because of the minor and incidental provisions relating to the exchange of business. *U. S. v. Union Pac. R. Co.*, (1911) 188 Fed. 104.

The purchase by one railroad company of the stock of another by issuing and exchanging its own stock therefor, both roads being at the time carriers of anthracite coal from Pennsylvania to New York harbor, but chiefly from different localities, was held not to constitute a combination in restraint of interstate commerce in such coal, unlawful under this section, it appearing that the main object of the consolidation was the betterment of the terminal facilities of both roads at New York city and harbor, which were largely improved thereby to the benefit of the public, and that their competition in the coal carrying business was slight, and the effect, if any, on such competition incidental. *U. S. v. Reading Co.*, (1910) 183 Fed. 427.

**Combination of powder manufacturers.**—In 1872 seven of the largest manufacturers of powder and other explosives in the United States organized what was called the "Gunpowder Trade Association," which, at its meetings and through committees, fixed prices which the constituent members were required to observe under penalty of fines. It also apportioned territory between its members, authorized the cutting of prices in particular localities in order to drive competitors out of the market or force them to come into the association, and apportioned the losses, if any, from such price cutting, between the members. Subsequently other companies were taken into the association, until there were seventeen members; and it

was continued with some changes in the fundamental agreement, but none in its purposes or methods, until 1902. At that time E. I. Du Pont de Nemours & Co., then the most influential member of the association, passed under a new management, was reorganized into the E. I. Du Pont de Nemours Company, and its controlling stockholders and officers inaugurated the policy of acquiring the assets of other corporations and vesting ownership of their plants and the control of their business in their own company. So successfully was this policy carried out, by the use of the methods of the association, that within five years such company had acquired the stock of and caused to be dissolved sixty-four corporations engaged in the manufacture of powder and other explosives, and controlled from sixty-four to 100 per cent. of the trade of the United States in the different kinds of explosives sold, and also, directly or through subsidiary corporations, as stockholders, controlled all of the other members of the association, which was then dissolved. It was held that the formation of such a corporation and its subsidiaries and the adoption of the new policy was merely the continuance in a different form of the illegal association, and that it constituted a combination in restraint of interstate commerce and to monopolize a part of the same which was unlawful under the Anti-trust Act. *U. S. v. Du Pont de Nemours*, (1911) 188 Fed. 127.

**Combination of packing houses.**—An indictment alleging facts which show that the defendants control three extensive packing concerns doing an interstate business and controlling the larger part of the business in the states in which they operate; that they have combined together in a plan to eliminate competition between such concerns by an agreement not to bid against each other for live stock, but to bid exactly the same amounts for like grades; and by fixing a uniform selling price to be charged by each, and appropriating among themselves the total business done according to the financial interest of each—charges a contract combination or conspiracy in restraint of interstate commerce in violation of this section. *U. S. v. Swift*, (1911) 188 Fed. 92.

**A combination of shipowners to prevent competition between members by maintaining uniform freight rates in South African trade, and to eliminate the possibility of competition with other lines by requiring shippers to pay forfeit money in case they patronized other lines, constituted a combination in restraint of competition and foreign commerce, in contravention of the federal anti-trust statute.** *Thomsen v. Union Castle Mail Steamship Co.*, (C. C. A. 1908) 166 Fed. 251.

**Organization of brokerage company by mercantile jobbers.**—The organization by a number of mercantile jobbers located in the same city of a brokerage company of which they owned the stock, and the purchase of merchandise required by them from manufacturers and jobbers in other states through such company instead of through other brokers previously patronized, although there

was no agreement binding them to do so, and the use of their influence to extend its business, did not constitute a combination or conspiracy in restraint of interstate trade or commerce, or to monopolize the same, in violation of sections 1 and 2, but was a legitimate and lawful business enterprise. *Arkansas Brokerage Co. v. Dunn*, (C. C. A. 1909) 173 Fed. 899.

**Corner of cotton market.**—Since the operation of a scheme to corner the cotton market and thereby raise the price of cotton for the purpose of compelling a settlement by short speculators at an abnormally high price does not directly affect or restrain interstate commerce, there being no direct relation between prices and such commerce, an indictment alleging a conspiracy to run a cotton corner without any alleged intent to obstruct interstate commerce did not charge a violation of Sherman Anti-Trust Act. *U. S. v. Patten*, (1911) 187 Fed. 664.

**Jurisdiction of federal courts.**—A suit based on an alleged violation of Sherman Anti-trust Act, whereby direct and special injuries are inflicted on and threatened to the complainants, is one arising under a law of the United States of which a federal court has jurisdiction regardless of the citizenship of the parties. *Mannington v. Hocking Valley R. Co.*, (1910) 183 Fed. 133.

**Indictment—Definiteness and certainty.**—An indictment for a combination in restraint of interstate commerce in violation of this section, between defendants as representatives of three different packing concerns, which charges that each concern was represented by certain individuals, each one of whom was authorized to act for the others of his "group" and that the word "group" as used therein is intended to apply to any or all of the members of the particular group, is sufficiently specific where it charges that acts were done by a particular group, without averring that each particular member of such group individually took part therein. *U. S. v. Swift*, (1911) 188 Fed. 92. See also *U. S. v. American Naval Stores Co.*, (1909) 186 Fed. 592.

**Duplicity.**—An indictment charging a combination in restraint of interstate commerce is not bad for duplicity because it charges and enumerates different means adopted or different things done to accomplish the object of the combination. *U. S. v. Swift*, (1911) 188 Fed. 92.

**Allegation that acts constitute contract combination or conspiracy.**—An indictment which charges acts constituting a contract, combination, or conspiracy in restraint of interstate commerce in violation of section 1 is good whether such acts are alleged to constitute a contract, combination, or conspiracy. *U. S. v. Swift*, (1911) 188 Fed. 92.

**Charging officers of corporation as individuals.**—An indictment for a combination in restraint of interstate commerce in violation of section 1, which charges that the defendants were officers of certain corporations which they managed and controlled, directing the corporate action, and that the groups of defendants representing the several corporations combined together to do the illegal acts,

sufficiently charges the defendants as individuals. *U. S. v. Swift*, (1911) 188 Fed. 92.

**Overt acts.**—Congress by this Act having employed the words "conspiracy" and "conspire" without words of limitation, in creating offenses affecting interstate commerce, did not provide, as in the general conspiracy statute (R. S. sec. 5440, 2 Fed. Stat. Annot. 247), that overt acts shall be necessary to complete the offense, and hence counts in an indictment for conspiracy to monopolize interstate trade and commerce in violation of the anti-trust law are not demurrable for failure to allege overt acts, since the unlawful agreement, and not the overt acts, constitutes the crime of conspiracy at common law. *U. S. v. Patten*, (1911) 187 Fed. 664.

**Joinder of defendants.**—In an indictment under the anti-trust law, the offenses thereunder being made misdemeanors, all who aid in their commission may be charged as principals, and a corporation and its officers, who personally participate in committing the same, may be joined as defendants, although their acts may have been separate and not done at the same time. *U. S. v. MacAndrews, etc., Co.*, (1906) 149 Fed. 823.

**Subpoena duces tecum.**—The protection against unreasonable searches and seizures afforded by U. S. Const., 4th Amend., cannot ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers in obedience to a subpoena duces tecum issued in aid of an investigation by a grand jury of an alleged violation of the Anti-trust Act by such corporation. *Hale*

*v. Henkel*, (1906) 201 U. S. 43, 26 S. Ct. 371, 50 U. S. (L. ed.) 652.

**Scope of subpoena.**—A corporation charged with a violation of this Act is entitled to immunity under U. S. Const., 4th Amend., from such an unreasonable search and seizure as the compulsory production before a grand jury, under a subpoena duces tecum, of all understandings, contracts, or correspondence between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different states. *Hale v. Henkel*, (1906) 201 U. S. 43, 26 S. Ct. 371, 50 U. S. (L. ed.) 652. See also *In re American Sugar Refining Co.*, (1910) 178 Fed. 108.

**Limitations.**—A conspiracy to restrain or monopolize trade, in violation of the Sherman Act, by obtaining control of a competitor through a pledge of the majority of its stock to secure a loan to a stockholder, and then voting to suspend business until further order of the board of directors, was held to continue, so far as the statute of limitations was concerned, so long as any further action was taken in furtherance of the conspiracy. *U. S. v. Kissel*, (1910) 218 U. S. 801, 31 S. Ct. 124, 54 U. S. (L. ed.) 1168.

For other cases under this section, see *Fonotopia Limited v. Bradley*, (1909) 171 Fed. 957; *Getz v. Federal Salt Co.*, (1905) 147 Cal. 115, 81 Pac. 416.

## Vol. VII, p. 340, sec. 2.

**Additional notes.**—Many of the notes under section 1, *supra*, are also applicable to this section, as in a majority of the cases a violation of both sections is alleged.

**Trade and commerce are monopolized within this Act,** when, as a result of efforts to that end, a few persons acting together obtain power to control the price of a commodity moving in interstate commerce, though such power is not exercised, its existence being sufficient. *U. S. v. Patten*, (1911) 187 Fed. 664.

**Monopoly need not be complete.**—It is not necessary that restraint of interstate trade and commerce should be so complete as to amount to total destruction in order to constitute a violation of this Act. *U. S. v. MacAndrews, etc., Co.*, (1906) 149 Fed. 823; *Monarch Tobacco Works v. American Tobacco Co.*, (1908) 165 Fed. 774.

**The size of a business alone does not constitute a "monopoly"** in restraint of interstate commerce, in violation of section 2, but to render a combination illegal thereunder it must intentionally and necessarily prevent other persons from engaging in such business, thereby stifling competition. *U. S. v. American Naval Stores Co.*, (1909) 172 Fed. 455; *U. S. v. Reading Co.*, (1910) 183 Fed. 427.

**A mere agreement to monopolize the manufacture of an article of commerce is not pro-**

hibited, but in order to be within the Act, the contract, combination, or conspiracy must be in itself in restraint of trade or commerce among the several states or with foreign nations, or, if a monopoly or attempted monopoly or combination or conspiracy to monopolize, it must be of some part of the trade or commerce among the several states or foreign nations. *U. S. Tobacco Co. v. American Tobacco Co.*, (1908) 163 Fed. 701.

**Individual acts.**—An indictment against operators of a cotton corner for alleged violation of the Sherman Anti-trust Law charged that defendants had conspired to monopolize a part of the trade and commerce among the several states by becoming members of and engaging in an unlawful combination in the form of an agreement by which they were severally to purchase cotton to such an extent that, together, they would have enough to enable them to control the price of such cotton, and severally to demand arbitrary, excessive, and monopolistic prices for the same on the sale thereof by them respectively to spinners and manufacturers other than such conspirators. It was held that since no monopoly exists when individuals, each acting for himself, own large quantities of a commodity, the indictment was fatally defective as alleging only a scheme to demand monopolistic prices as the



result of individual as distinguished from collective power. *U. S. v. Patten*, (1911) 187 Fed. 664.

**Sale only to exclusive purchasers.**—A corporation engaged in the manufacture and sale of pottery in a sister state, and member of a trust, contracted to sell and deliver pottery to a domestic corporation. The prices to be paid were regulated by the trust. The contract required the buyer, before being entitled to stipulated premiums, to confine its purchases of such goods for a period of one year to the seller, but there was no agreement whereby it forfeited any right on its failure to do so. It was held that the contract was not in restraint of trade, and was not in violation of the Sherman Anti-trust Act. *Moroney Hardware Co. v. Goodwin Pottery Co.*, (Tex. 1909) 120 S. W. 1088.

**Contracts and licenses as to patented articles.**—A sale or license of a patented article, with a covenant not to compete, made as an ordinary incident to enhance the value of the thing conveyed, is not within this Act. *Blount Mfg. Co. v. Yale, etc., Mfg. Co.*, (1909) 166 Fed. 555.

Use of a patented invention cannot be had except on the inventor's terms, and the requirement that a licensee join other licensees in a combination or pool to control the prices and output of an innocuous patented article is not a violation of the Sherman Anti-trust Act. Patented articles, unless and until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states within the meaning of this Act, because they are not articles in which the people are entitled to freedom of trade. *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, (C. C. A. 1907) 154 Fed. 358.

Since the public, by licenses to manufacture patented automobile tires, only secures the right to purchase the tires after they have been manufactured and offered for sale, and has no right to have the competition between the different licensees continued, a modification of the licenses between the owner of the patent and the various licensees regulating the manufacture and sale of such tires was not objectionable as a restraint of trade, in violation of this Act. *Goshen Rubber Works v. Single Tube Automobile, etc., Tire Co.*, (C. C. A. 1908) 166 Fed. 431.

A contract recited that the plaintiff, who was the patentee of an invention relating to brake beams, for the consideration of \$10,000 to be paid him, had assigned to the defendant, which was a corporation engaged in the manufacture of brake beams, a certain patent and a pending application for a second, and provided that the plaintiff during the life of the patent should not become connected with any company manufacturing or selling brake beams in the United States, either as officer, employee, or shareholder, but reserved to him the right to terminate such part of the contract at any time by refunding the consideration paid him by defendant. It was held that such agreement to remain out of the brake-beam business did

not render the contract unlawful as one in restraint of trade and competition or creating a monopoly, and that plaintiff could maintain an action thereon to recover the stipulated consideration. *American Brake Beam Co. v. Pungs*, (C. C. A. 1905) 141 Fed. 923.

In *Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co.*, (C. C. A. 1907) 154 Fed. 365, it appeared that the complainant, which was the owner of a number of patents relating to pneumatic straw stackers, granted licenses to manufacturers of threshing machines by which they were given the right to use any or all inventions covered by such patents, and were required to sell stackers made thereunder at a stated price, and to pay complainant a royalty on each stacker so made and sold. They were also given the right to use the inventions covered by any other patents relating to the art which should thereafter be acquired by complainant, and it did afterward acquire the ownership of practically all patents relating to such stackers. It was held that such contracts were not in restraint of competition and in violation of the Sherman Anti-trust Act, but were within complainant's right under the patent laws, although all of the manufacturers of threshing machines in the United States became licensees, there being no right in the public to free competition in articles covered by patents.

Contracts between manufacturers of liquid door checks under various patents, by which each agreed to restrict its own trade in the article of his own invention not as an incident to a grant of rights under patents, but to enhance the price by the removal of competition, and which constituted a general plan to regulate and control the business of dealing in such checks sold in interstate commerce, the plan comprehending the maintenance of price, the pooling of profits, the elimination of competition, and restraint of improvements, constituted a violation of the Sherman Anti-trust Act, and were therefore unenforceable. *Blount Mfg. Co. v. Yale, etc., Mfg. Co.*, (1909) 166 Fed. 555.

**Contracts regarding sale of proprietary medicines.**—A restraint of trade which would be unlawful as to other manufactured articles cannot be justified because the article in question is a proprietary medicine made under a secret formula. *Dr. Miles Medical Co. v. John D. Park, etc., Co.*, (1911) 220 U. S. 373, 31 S. Ct. 376, 55 U. S. (L. ed.) 502.

Contracts between a manufacturer and all dealers whom he permits to sell his products, comprising most of the dealers in similar articles throughout the country, who fix the price for all sales, whether at wholesale or retail, operate as a restraint of trade, unlawful both at common law and as to interstate commerce, under the Anti-trust Act, even though such products may be proprietary medicine made under secret formulae. *Dr. Miles Medical Co. v. John D. Park, etc., Co.*, (1911) 220 U. S. 373, 31 S. Ct. 376, 55 U. S. (L. ed.) 502, *affirming* (C. C. A. 1908) 164 Fed. 803. *Compare* *Jayne v. Loder*, (C. C. A. 1906) 149 Fed. 21, 9 Ann. Cas.

294; *Dr. Miles Medical Co. v. Jaynes Drug Co.*, (1906) 149 Fed. 838.

The exemption from the common-law rule against monopoly and restraint of trade, and the provisions of the federal Anti-trust Act, which has been extended to contracts affecting the sale and resale, the use or the price of articles made under a patent, or productions covered by a copyright, does not extend also to articles made under a secret process or medicine compounded under a private formula. *John D. Park, etc., Co. v. Hartman* (C. C. A. 1907) 153 Fed. 24.

The owner of a secret process or formula is not protected by law in his secret, but he may protect himself by contract against its disclosure by one to whom it is communicated in confidence, or restrict its use by such person, and such contracts are not in restraint of trade because of the character of the property right in the secret which would be destroyed by its disclosure, and because it is not itself an article of commerce, but such considerations do not apply to contracts for the sale of the manufactured product which do not involve a disclosure of the secret, and such contracts are within the rules against restraint of trade. *John D. Park, etc., Co. v. Hartman*, (C. C. A. 1907) 153 Fed. 24.

**Monopoly of oil business.**—The combination of the stocks of the various corporations trading in petroleum and its products in the hands of a holding company, with the intent to exclude others from the trade, and thus centralize in the combination the perpetual control of the movement of these commodities in the channels of interstate and foreign commerce, was held to constitute a violation of the prohibitions of this Act. *Standard Oil Co. v. U. S.*, (1910) 221 U. S. 1, 31 S. Ct. 503, 55 U. S. (L. ed.) 619, *affirming* (1909) 173 Fed. 177.

**Monopoly of tobacco business.**—The acquisition of dominion and control over the tobacco trade by a principal and accessory or subsidiary corporations as the result of purchasing numerous competitors, in many cases closing out the business when acquired, and of obtaining stock control of other competitors, as well as of concerns manufacturing the elements essential to the successful manufacture of tobacco products, brought about in many cases after a ruinous trade war, the parties in interest uniformly covenanting not to engage in the tobacco business, and the former business often continuing ostensibly as an independent concern, was held to violate the prohibitions of this Act against combinations in restraint of trade or commerce, or monopolization or attempts to monopolize any part thereof, whether looked at from the point of view of stock ownership, or from the standpoint of the principal and accessory or subsidiary corporations, viewed independently, including certain foreign corporations in so far as, by contracts made by them, they became co-operators in the combination. *U. S. v. American Tobacco Co.*, (1910) 221 U. S. 106, 31 S. Ct. 632, 55 U. S. (L. ed.) 663, *reversing* (1908) 164 Fed. 700.

**Monopoly of sugar refining.**—In Pennsylvania Sugar Refining Co. *v.* American Sugar

Refining Co., (C. C. A. 1908) 166 Fed. 254, it appeared that the plaintiff alleged that having been engaged in the purchase of raw sugar in different states, and in the transportation thereof to Pennsylvania, where it manufactured the same into refined sugar and sold it in interstate commerce, it suspended business during the Spanish war, and enlarged its refinery, preparing and intending to resume business, when defendants conspired to prevent it from engaging in business, and accomplished this result by inducing plaintiff's majority stockholder to accept a loan, pledging his stock as collateral with voting power, by which defendant elected new directors, who voted that plaintiff should do no business; that the object of such conspiracy was to prevent plaintiff from engaging in business in competition with defendant. It was held that the conspiracy alleged directly operated not alone on the manufacture of sugar within the state of Pennsylvania, but on interstate commerce in the transportation and delivery of both the raw material and the manufactured product, and was, therefore, within the federal Anti-trust Act.

**Monopoly of milk business over particular railroad.**—In *Delaware, etc., R. Co. v. Kutter*, (1906) 147 Fed. 51, 77 C. C. A. 315, it appeared that the defendant railroad company entered into a contract with plaintiff for a term of years to build up, develop, and conduct the business of the transportation of milk on its line of road. The plaintiff was to have full charge of such business and was to receive as compensation a percentage of the freights earned therein. It was provided that he should charge rates not in excess of those charged by competitive roads, and should be granted the exclusive privilege of transporting milk over defendant's lines, "so far as it was permitted to do so by law." In the execution of the contract all rates were made by defendant, and plaintiff was not given a monopoly of the milk traffic. It was held that such contract was not in violation of the Anti-trust Act.

**Indictment.**—Since a conspiracy to monopolize is a conspiracy to create a monopoly, an indictment for conspiracy to monopolize interstate trade and commerce in cotton in violation of the Sherman Anti-trust Law, was insufficient where it failed to show that the conspiracy, if successfully carried out, would have resulted in a monopoly. *U. S. v. Patten*, (1911) 187 Fed. 664.

**Duplicity.**—Under this section monopolizing and attempting to monopolize commerce are separate offenses and cannot be included in one count of an indictment. *U. S. v. American Naval Stores Co.*, (1909) 186 Fed. 592.

**Joinder of defendants.**—A number of defendants may be charged jointly under this section with the crime of attempting to monopolize a part of interstate commerce. *U. S. v. MacAndrews, etc., Co.*, (1906) 149 Fed. 823.

**Sufficiency of evidence.**—See *U. S. v. Reading Co.*, (1910) 183 Fed. 427.

## Vol. VII, p. 344, sec. 3.

**Scope of section.**—This section, prohibiting combinations or conspiracies in restraint of trade or commerce in any territory of the United States, is not limited to combinations and conspiracies which operate in restraint of the trade of substantially an entire territory, but apply as well to a combination and conspiracy in restraint of trade and commerce in a single city in a territory. *Tribolet v. U. S.*, (1908) 11 *Ariz.* 436, 95 *Pac.* 85.

The words "combination or conspiracy" as used in this section are synonymous, and hence an indictment alleging that defendants entered into a "combination or conspiracy" in restraint of trade was not duplicitous as alleging two distinct offenses. *Tribolet v. U. S.*, (1908) 11 *Ariz.* 436, 95 *Pac.* 85.

**Must be two or more persons or corporations.**—"The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination." *Per* Sanborn, J., in *Union Pac. Coal Co. v. U. S.*, (1909) 173 *Fed.* 737, 97 *C. C. A.* 578. In a prosecution for violation of section 3, it was held that a conspiracy between two corporations cannot be formed by the acts and thoughts of one person acting as the agent of both corporations. *Houston-Hart Lumber Co. v. Neal*, (N. M. 1911) 113 *Pac.* 621.

**Liability of officers of corporation.**—Where the defendant and H. entered into a combination and conspiracy in restraint of trade to control the meat business in Phoenix, *Ariz.*, and for this purpose organized a corporation, the fact that the defendant acted merely as an officer and stockholder in such corporation, and that the corporation was held not guilty, was held not to prevent the defendant's conviction for violating this Act. *Tribolet v. U. S.*, (1908) 11 *Ariz.* 436, 95 *Pac.* 85.

**Combination of brewing companies.**—A combination between several brewing companies forming a Brewers' Association, entered into for the purpose of preventing competition in the manufacture and sale of their product, fixing the price and controlling the disposition of the same to retail dealers, providing that its members shall not sell such product at prices fixed by themselves nor below prices fixed by the association, and al-

lotting the business of selling the same among them, and prohibiting any of them from selling to customers allotted to another, is a trust or conspiracy in restraint of trade within this section, and an attempt to coerce another company to enter the trust and obey the regulations is an invasion of private right, as well as inimical to the interests of the public; and the purposes and practices of such a combination or conspiracy are equally violative of the common law, of which the third section of the statute is declaratory. *Leonard v. Abner-Drury Brewing Co.*, (1905) 25 *App. Cas.* (D. C.) 161.

**Indictment.**—The object of a combination or conspiracy in restraint of trade being unlawful both at common law and by statute, an indictment therefor was not objectionable for failure to allege the means by which the combination or conspiracy was to be accomplished. *Tribolet v. U. S.*, (1908) 11 *Ariz.* 436, 95 *Pac.* 85. See also *U. S. v. Virginia-Carolina Chemical Co.*, (1908) 163 *Fed.* 66.

**Defects in form.**—Where an indictment for combination or conspiracy in restraint of trade in violation of this section was uncertain as to some of its allegations, owing to the fact that the offense was first charged in the language of the statute, and the purposes and objects of the conspiracy were not fully stated until after the overt acts were described, the defect was one of form and not of substance, not prejudicial to defendant, and therefore immaterial under R. S. sec. 1025, 2 *Fed. Stat. Annot.* 340, providing that no indictment shall be quashed for a non-prejudicial defect or form. *Tribolet v. U. S.*, (1908) 11 *Ariz.* 436, 95 *Pac.* 85.

**Service of process on nonresident corporation.**—Upon an indictment for conspiracy in restraint of trade under this section, the court has power, by virtue of R. S. sec. 716, 4 *Fed. Stat. Annot.* 498, which authorizes such courts to issue all writs "necessary for the exercise of their respective jurisdictions," to issue process to another state to bring before it corporation defendants who are citizens of such state and cannot be found or served in the state or district of the indictment. *U. S. v. Virginia-Carolina Chemical Co.*, (1908) 163 *Fed.* 66.

## Vol. VII, p. 344, sec. 4.

**Jurisdiction and service of process.**—The presence of one of the defendants in the federal district in which suit by the United States under this section is brought to restrain violations of this Act gives the Circuit Court jurisdiction, and justifies it in making an order under section 5, for the service of process upon all the other defendants, wherever they may be found. *Standard Oil Co. v. U. S.*, (1911) 221 *U. S.* 1, 31 *S. Ct.* 503, 55 *U. S.* (L. ed.) 619, *affirming* (1909) 173 *Fed.* 177.

**Parties.**—A private party, who has sustained special injury by a violation of the federal Anti-trust Act, may sue in a federal

court for injunction under the general equity jurisdiction of the court, where, by reason of diversity of citizenship of the parties, the court has jurisdiction of the suit. *Bigelow v. Calumet, etc.*, *Min. Co.*, (1907) 155 *Fed.* 869.

To a suit under this section to restrain a violation of this Act by corporations alleged to constitute a combination in restraint of or to monopolize interstate commerce, mortgagees of such corporations are not necessary parties, but may be brought in if it appears that their interests will be affected by the decree. *U. S. v. Du Pont de Nemours*, (1911) 188 *Fed.* 127.

A minority stockholder in a corporation, who is not an officer and takes no part in the management of its business, is not subject to a suit for injunction under this section, because the corporation may be a party to a contract or combination to restrain or monopolize interstate commerce. *U. S. v. Du Pont de Nemours*, (1911) 188 Fed. 127.

**Pleadings.**—A proceeding cannot be sustained to set aside or restrain a sale of a corporation's assets to another company under the Anti-trust Act, unless it appears that the sale is in furtherance of an intent, and is alleged with proper details, in violation of the statute. *Binney v. Cumberland Ely Copper Co.*, (1910) 183 Fed. 650.

**Evidence,** whether documentary or oral, sought to be elicited from witnesses summoned in an action brought by the United States to enjoin an alleged conspiracy by manufacturers of paper to suppress competition, in violation of this Act, by creating a general selling and distributing agent, is material, where it would tend to establish the manner in which such agent executed its functions. *Nelson v. U. S.*, (1906) 201 U. S. 92, 26 S. Ct. 358, 50 U. S. (L. ed.) 673.

**Combinations** may be enjoined if the objects of the association are such as to violate this Act. *Monarch Tobacco Works v. American Tobacco Co.*, (1908) 165 Fed. 774.

**Dissolution of combination.**—Where an existing combination in corporate form has been adjudged unlawful, as in violation of Anti-trust Act, and to have monopolized and to be monopolizing a large part of the interstate trade in a particular commodity, it is the duty of the court, under the power conferred by this section, not only to enjoin further violation of the Act, but to render its decree effective by dissolving the illegal combination. *U. S. v. Du Pont de Nemours*, (1911) 188 Fed. 127.

**Injunction pending final dissolution.**—Pending the working out of a plan for dissolving a combination found to control the tobacco industry in violation of the Anti-trust Act, and for re-creating out of the elements composing it a condition which would not be repugnant to the prohibitions of the Act, it was held that each and all of such elements should be restrained from doing any act which might further extend or enlarge the power of the combination by any means or device whatsoever. *U. S. v. American Tobacco Co.*, (1911) 221 U. S. 106, 31 S. Ct. 632, 55 U. S. (L. ed.) 663, reversing (1908) 164 Fed. 700.

**Injunction after withdrawal from combination.**—A member of a combination in restraint of interstate commerce, in violation of this Act, who has in good faith withdrawn from such combination, is not subject to a suit for injunction under section 4; nor, if such member is a corporation, is the fact that a minority part of its stock is owned by members of the combination sufficient to sustain such a suit, in the absence of proof that such ownership is employed to aid the combination. *U. S. v. Du Pont de Nemours*, (1911) 188 Fed. 127.

The purchase by an interstate railroad

company of a majority of the stock of another company operating a competing line affords no ground for the granting of an injunction under this section, where such stock was sold prior to the suit. *U. S. v. Union Pac. R. Co.*, (1911) 188 Fed. 104.

**Hearing on manner of dissolution.**—To give effective force to a decree of the federal Supreme Court adjudging that a combination controlling the tobacco industry offended against this Act, the court below was directed to hear the parties, by evidence or otherwise, as it might deem proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination, and of re-creating, out of the elements composing it, a new condition which would not be repugnant to the law. *U. S. v. American Tobacco Co.*, (1911) 221 U. S. 106, 31 S. Ct. 632, 55 U. S. (L. ed.) 663, reversing (1908) 164 Fed. 700.

**Receivers.**—A receiver will not, in the first instance, be appointed to take charge of the assets and property of a combination controlling a particular industry, in violation of this Act, for the purpose of preventing a continued violation of the law, and thus working out, by a sale of the property of the combination or otherwise, a condition which will be repugnant to the prohibitions of the Act, since the extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent persons. *U. S. v. American Tobacco Co.*, (1911) 221 U. S. 106, 31 S. Ct. 632, 55 U. S. (L. ed.) 663, reversing (1908) 164 Fed. 700.

**Time for compliance with decree of dissolution.**—In *Standard Oil Co. v. U. S.*, (1911) 221 U. S. 1, 31 S. Ct. 503, 55 U. S. (L. ed.) 619, affirming (1909) 173 Fed. 177, it was held that the magnitude of the interests involved and their complexity required that six months be given in which to execute a decree for the dissolution of a holding company controlling the oil industry in violation of the Anti-trust Act, and for the transfer back to the stockholders of the subsidiary corporations of the stock which had been turned over to the holding company in exchange for its own stock.

In *U. S. v. American Tobacco Co.*, (1911) 221 U. S. 106, 31 S. Ct. 632, 55 U. S. (L. ed.) 663, reversing (1908) 164 Fed. 700, it was held that six months, with a possible extension of sixty days, should be given in which to work out a plan for dissolving a combination found to control the tobacco industry, in violation of the Anti-trust Act, and re-creating out of the elements composing it a condition which would not be repugnant to the prohibitions of the Act.

**Effect of dissolution.**—Power to make normal and lawful contracts or agreements is not taken from the stockholders of the subsidiary corporations, or the corporations themselves, by a decree for the dissolution of a holding company found to offend against the Anti-trust Act, which enjoins such stockholders and corporations from in any way conspiring to violate the statute, or from

monopolizing or attempting to monopolize in virtue of their stock ownership, and prohibits all agreements between them tending to produce or bring about further violations of the statute, but such decree merely restrains them from, by any device whatever, re-creating, directly or indirectly, the illegal combination which the decree dissolves. *Standard Oil Co. v. U. S.*, (1911) 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619, *affirming* (1909) 173 Fed. 177.

**Extent of relief.**—The relief to be granted where a combination has been found to violate the prohibitions of this Act against combinations in restraint of interstate or foreign trade or commerce, and monopolization or attempts to monopolize any part thereof, should be dictated by the duty of giving complete and efficacious effect to such prohibitions, the accomplishment of this result with as little injury as possible to the interests of the general public, and a proper regard for the vast interests of private property which may have become vested in many persons as the result of the acquisition of stock or securities of the combination without any guilty knowledge or intent. *U. S. v. American Tobacco Co.*, (1911) 221 U. S. 106, 31 S. Ct. 632, 55 U. S. (L. ed.) 663, *reversed* (1908) 164 Fed. 700.

The possible serious injury to the public

from an absolute cessation of interstate commerce in petroleum and its products by the agencies embraced in a holding company controlling the oil industry, in violation of the Anti-trust Act, required that upon dissolving the holding company, the subsidiary corporations should not be enjoined from carrying on interstate commerce until the dissolution of the combination should be effected in accordance with the decree, by the transfer back to the stockholders of the subsidiary corporations of the stock which had been turned over to the holding company in exchange for its own stock. *Standard Oil Co. v. U. S.*, (1911) 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619, *affirming* (1909) 173 Fed. 177.

The injury which might be inflicted upon the public by staying interstate commerce in tobacco and its products by a combination controlling the tobacco industry in violation of the Anti-trust Act was held to forbid the allowance, in the first instance, of a permanent injunction restraining the combination as a whole, and all the individuals and corporations which form a part of or co-operate in it in any manner or form, from continuing to engage in interstate commerce until the illegal situation is cured. *U. S. v. American Tobacco Co.*, (1911) 221 U. S. 106, 31 S. Ct. 632, 55 U. S. (L. ed.) 663, *reversing* (1908) 164 Fed. 700.

## Vol. VII, p. 345, sec. 7.

**Who may sue.**—Under the express terms of section 7, one injured in business or property by another through a combination or conspiracy to restrain or monopolize interstate trade may sue for his damages. *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assoc.*, (C. C. A. 1907) 152 Fed. 864; *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, (1910) 180 Fed. 160.

**Stockholders.**—This section does not give a right of action to a stockholder or creditor of a corporation by reason of a combination or conspiracy alleged to have been in violation of the Act and to have caused the bankruptcy of the corporation resulting in the loss of plaintiff's stock or debt; the right of action in such case being in the corporation or its trustee in bankruptcy. *Loeb v. Eastman Kodak Co.*, (C. C. A. 1910) 183 Fed. 704.

In *Ames v. American Telephone, etc., Co.*, (1909) 166 Fed. 820, the declaration alleged that the T. Telegraph Co., in which the plaintiff was a stockholder, was organized to operate an independent system throughout the United States, after which the defendant company secured control of the T. Company by the purchase of its stock, to prevent competition in interstate telephone traffic, which it had planned to carry on. The defendant since so managed the T. Company as not to develop its business, but to prevent it from doing business, and suppressed competition, until the T. Company was forced into the hands of a receiver. By such control the defendant had monopolized interstate telephone commerce, and thereby rendered worthless

plaintiff's stock in the T. Company, which prior thereto had been worth fifteen dollars a share. On demurrer it was held an injury to the corporation, and not to the stockholders of the T. Company, and that the plaintiff could not therefore sue in his own name to recover treble damages under this section.

**Municipal corporation.**—The action for threefold damages for injury to "business or property" authorized by this section may be maintained by a municipal corporation against the foreign corporate members of a combination forbidden by this Act, where the municipality was led, by reason of the illegal combination, to purchase from a corporation at an excessive price the iron pipe needed for its waterworks system. *Chattanooga Foundry, etc., Works v. Atlanta*, (1906) 203 U. S. 390, 27 S. Ct. 65, 51 U. S. (L. ed.) 241.

**Pleading.**—Where a complaint, under this section, to recover treble damages for a combination in restraint of foreign commerce, alleged that plaintiffs were coerced by defendants' unlawful combination to pay a sum in addition to a reasonable freight rate, which was held subject to forfeiture in case plaintiffs shipped by other lines or their consignees received freight by other lines, and also contained general allegations of damage, it sufficiently alleged that plaintiffs had suffered damage by a violation of the Act. *Thomsen v. Union Castle Mail Steamship Co.*, (C. C. A. 1908) 166 Fed. 251.

In an action under this section to recover damages for an alleged unlawful conspiracy

or combination in restraint of interstate trade and commerce, owing to the complicated nature of the case and the numerous elements which may enter into such a conspiracy, the plaintiff must be given liberal latitude in his pleading, and matter will not be stricken from his complaint on motion under a state statute as "irrelevant and redundant," unless it is clearly so; but matter which is manifestly purely evidentiary will be stricken out. *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, (1910) 178 Fed. 117.

A petition to recover threefold damages for injury to the plaintiff's business in interstate and foreign commerce, under this section, states a cause of action, where it alleges that the plaintiff was a manufacturer of tobacco which it sold in interstate and foreign commerce, and facts showing that the defendants conspired to render its business unprofitable and ruin and destroy the same through competing corporations, which they secretly controlled, by enticing away its workmen, by compelling it to pay more than the normal price for leaf tobacco, and to adopt unnecessary and expensive means to sell its products, and that such conspiracy was carried out to the damage of plaintiff in a sum stated; such acts constituting both a conspiracy to restrain interstate commerce and an attempt to monopolize the same, in violation of sections 1 and 2 of the Act. *People's Tobacco Co. v. American Tobacco Co.*, (C. C. A. 1909) 170 Fed. 396.

For other cases dealing with the sufficiency of the pleadings under this section, see *Loewe v. Lawlor*, (1905) 142 Fed. 216; *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assoc.*, (C. C. A. 1907) 152 Fed. 864; *Monarch Tobacco Works v. American Tobacco Co.*, (1908) 165 Fed. 774; *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, (C. C. A. 1908) 166 Fed. 254; *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, (1910) 180 Fed. 160; *Hale v. O'Connor Coal, etc., Co.*, (1908) 181 Fed. 267; *Meeker v. Lehigh Valley R. Co.*, (C. C. A. 1910) 183 Fed. 548.

*Using language of statute.* — In an action under this section, to recover damages for injury alleged to have been caused to plaintiff by reason of contracts made by defendant in restraint of trade or commerce among the several states or with foreign nations, and an attempt by the defendant to monopolize such trade or commerce, or a part thereof, in violation of said Act, it is not sufficient to frame the declaration in the language of the statute, but the nature and substance of the contracts relied upon, and the substantial facts alleged to constitute an attempt at monopoly, must be pleaded to enable the court to determine whether they are in violation of the statute, and to enable the defense to properly prepare to meet the charge. *Cilley v. United Shoe Mach. Co.*, (1907) 152 Fed. 726.

*Definiteness and certainty.* — A declaration in an action brought under section 7 of this Act, to recover damages for a violation of section 1 of the Act, was held bad for indefiniteness and uncertainty in describing the

alleged combination and conspiracy entered into by defendant and the acts done which resulted in damage to plaintiff. *Rice v. Standard Oil Co.*, (1905) 134 Fed. 464.

*Duplicity.* — Section 1 of this Act makes a distinction between a contract and a combination or conspiracy in restraint of trade, and a declaration in a suit based on section 7, to recover damages resulting to plaintiff from a violation of such provision, which alleges in a single count that defendant entered into a "contract, combination, and conspiracy" in restraint of trade, is bad for duplicity. *Rice v. Standard Oil Co.*, (1905) 134 Fed. 464.

*Joinder of members of separate combinations.* — See *Jayne v. Loder*, (C. C. A. 1906) 149 Fed. 21, 9 Ann. Cas. 294.

*Measure of damages.* — Where as a result of conspiracy or combination in restraint of interstate commerce, prohibited by this Act, a person is injured by being compelled to pay a higher price for any article affected thereby than he would otherwise be compelled to pay, he may recover treble the amount of the damages sustained. *Monarch Tobacco Works v. American Tobacco Co.*, (1908) 165 Fed. 774.

*Jury trial.* — An action by a shipper, authorized by this section, to recover treble damages to his business and property by reason of a conspiracy and combination by interstate carriers to charge excessive and unlawful rates for the shipment of coal from the mines to tide water, was an action at law as to which the parties were entitled to a jury trial. *Meeker v. Lehigh Valley R. Co.*, (1908) 162 Fed. 354.

In an action to charge certain defendants, as members of various local unions of a labor organization, with liability for acts of agents of the organization on the ground of a combination in restraint of interstate commerce in violation of section 1, where there was conflicting testimony as to their knowledge of such acts and other evidence from which inferences must be drawn, it was held that question of liability was for the jury, and that it was error to withdraw such question from them and to submit only the question of damages. *Lawlor v. Loewe*, (C. C. A. 1911) 187 Fed. 522.

*Damages for excessive or unreasonable railroad rates.* — This Act does not give any right of action for damages sustained by the payment of excessive, unjust, or unreasonable rates of interstate carriers, such relief being provided for by the Interstate Commerce Act. *Meeker v. Lehigh Valley R. Co.*, (1908) 162 Fed. 354.

*Evidence.* — In an action by a manufacturer doing an interstate business against members of a labor organization to charge them with liability under this section, one of the violations of the Act charged being that the defendants combined to prevent customers of plaintiff in other states from buying his goods by means of threats or boycott, etc., testimony of the plaintiff's salesmen that customers told them of such threats, made by persons claiming to represent defendant organization, was incompetent as hearsay.

*Lawlor v. Loewe*, (C. C. A. 1911) 187 Fed. 522.

In *Virtue v. Creamery Package Mfg. Co.*, (C. C. A. 1910) 179 Fed. 115, the evidence was held to be insufficient to establish a combination or conspiracy in restraint of interstate trade or commerce between two defendants, each of whom brought a suit against plaintiff for infringement of a different patent, which would sustain an action by plaintiff for treble damages under this section.

**Limitation.**—The limitation of five years prescribed by R. S. sec. 1047, 3 Fed. Stat. Annot. 100, for any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply to the action for the threefold damages for injury to "business or property," authorized by this section. *Chattanooga Foundry, etc., Works v. Atlanta*, (1906) 203 U. S. 390, 27 S. Ct. 65, 51 U. S. (L. ed.) 241.

The ten years limitation prescribed by the Tenn. Code, sec. 2776, for "all other cases not expressly provided for," rather than the one year limitation prescribed by section 2772 for "statute penalties," or the three years limitation prescribed by section 2773 for injuries to personal or real property, was held to govern an action for threefold damages for injury to "business or property" brought in the federal courts sitting in Tennessee, under the Anti-trust Act, in which the right of recovery was based on the excessive price for iron water pipe which a municipality was led to pay by reason of an illegal arrangement between the members of a trust or combination formed in violation of that Act. *Chattanooga Foundry, etc., Works v. Atlanta*, (1906) 203 U. S. 390, 27 S. Ct. 65, 51 U. S. (L. ed.) 241.

**Liability of members of labor union.**—Members of a labor organization to destroy an existing interstate traffic in hats, by preventing the manufacturers, through the instrumentality of a boycott, from manufacturing hats intended for transportation beyond the state, and to prevent their vendees in other states from reselling the hats so transported, and from further negotiating with the manufacturers for the purchase and transportation of such hats from the place of manufacture to the various places of destination, were held to be liable for the threefold damages which, under this section, may be recovered by those injured in business or property by violations of the Act, although a negligible amount of interstate business was affected in carrying out the combination, and although the members of the combination were not themselves engaged in interstate commerce. *Loewe v. Lawlor*, (1908) 208 U. S. 301, 28 S. Ct. 301, 52 U. S. (L. ed.) 488.

**Necessity for injury to existing business.**—In order to state a cause of action for damages for conspiracy in restraint of interstate commerce under the federal Anti-trust Act, it is not necessary to allege injury to an existing business, though it is necessary to state facts showing an intention and preparedness to engage in business, it being as unlawful to prevent a person from engaging

in business as it is to drive one out of business. *Thomsen v. Union Castle Mail Steamship Co.*, (C. C. A. 1908) 166 Fed. 251; *American Banana Co. v. United Fruit Co.*, (1908) 166 Fed. 261, *affirmed* (1909) 213 U. S. 347, 29 S. Ct. 511, 53 U. S. (L. ed.) 826.

Where the plaintiff company, in a suit to recover treble damages under this section, alleged that it had been engaged in interstate commerce, but had temporarily ceased business and enlarged its refinery at large expense, and prepared and intended to resume business as before, but had been prevented from doing so by defendant's alleged acts, the complaint was not demurrable as showing that plaintiff was not engaged in business and had no established business to injure at the time of the conspiracy. *Pennsylvania Sugar Refining Co. v. Americau Sugar Refining Co.*, (C. C. A. 1908) 166 Fed. 254.

**Defendant's prior acts and conduct.**—In an action for damages to plaintiff by the defendant's alleged combination to monopolize or attempt to monopolize interstate commerce in tobacco, defendant's acts and conduct prior to plaintiff's organization and entering the business were immaterial as *res inter alios acta*. *Monarch Tobacco Works v. American Tobacco Co.*, (1908) 165 Fed. 774.

**Necessary showing.**—It is only necessary to support an action under such section that complainant's business or property has been in some way injured by reason of defendant's illegal scheme. *Monarch Tobacco Works v. American Tobacco Co.*, (1908) 165 Fed. 774.

**Reasonableness.**—In an action to recover treble damages caused by an unlawful combination in restraint of foreign commerce, in violation of the federal anti-trust statute, whether the restraint of trade caused by the combination was reasonable or unreasonable held to be immaterial. *Thomsen v. Union Castle Mail Steamship Co.*, (C. C. A. 1908) 166 Fed. 251; *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, (1910) 180 Fed. 160. These cases must be considered as overruled by *Standard Oil Co. v. U. S.*, (1911) 221 U. S. 1, 31 S. Ct. 502, 55 U. S. (L. ed.) 619.

**Place of combination.**—Where a combination in restraint of foreign commerce, in violation of the federal Anti-trust Act, was put in operation in the United States and affected her foreign commerce, it was not material to a suit by a person injured thereby that it was formed in a foreign country. *Thomsen v. Union Castle Mail Steamship Co.*, (C. C. A. 1908) 166 Fed. 252.

Acts done by a domestic corporation outside the United States, which largely depended for their efficiency upon the co-operation, in a conspiracy to drive a rival out of business, of soldiers and officials in Costa Rica, acting under governmental sanction, in territory over which that state exercises a *de facto* sovereignty, could not be made the basis of the action to recover threefold damages authorized by this section, on behalf of those injured in their business by reason of violations of this Act. *American Banana*

*Co. v. United Fruit Co.*, (1909) 213 U. S. 347, 29 S. Ct. 511, 53 U. S. (L. ed.) 826.

**Production of books by corporation.**—An action to recover treble damages under this section is penal in character, but such fact

does not preclude the court from requiring the defendant, when a corporation, to produce books or writing under R. S. sec. 724, 3 Fed. Stat. Annot. 2. *American Banana Co. v. United Fruit Co.*, (1907) 153 Fed. 943.

## TREASURY DEPARTMENT.

### Vol. VII, p. 367, sec. 245.

**Duties of assistant secretaries.**—Under this section the Secretary of the Treasury is authorized to prescribe the duties to be performed by the assistant secretaries; and under section 161 R. S. the first assistant is required, "in case of the death, resignation, or absence of the head of any department," to perform his duties, etc. It is clear from

these provisions of the Revised Statutes that the Secretary of the Treasury can require the assistant secretary "to ascertain, determine, and declare" the net amount of the bounties which Germany paid on sugars, and to fix the amount to be collected on importations from that country. *Franklin Sugar Refining Co. v. U. S.*, (1910) 178 Fed. 743.

### Vol. VII, p. 384, sec. 8.

The authority conferred upon the Comptroller of the Treasury by this section to decide questions involving payments to be made from the Treasury is complete; but the Act does not establish a rule which is universal and without exception. Congress did not, by this enactment, intend to shorten the reach of sections 354 and 356 of the Revised Statutes, or to repeal those sections *pro tanto*. (1904) 25 Op. Atty.-Gen. 301.

Generally speaking, the decision of the Comptroller of the Treasury is conclusive in cases involving the application of an appropriation and the expenditure of public moneys, and governs the auditing officers and himself in passing accounts under this section. (1908) 26 Op. Atty.-Gen. 609.

## TREATIES.

### Vol. VII, p. 420, art. VIII.

**Suit to restrain an association from using name of Austria-Hungarian emperor on advertising matter.**—Under the Austrian treaty of June 27, 1871, providing that consuls-general, consuls, vice-consuls, and consular agents of the two countries, in the exercise of their duties, may apply to the authorities within their district for the protection of the rights of their countrymen, it was held that the imperial and royal consul of Austria-Hungary was entitled to maintain a suit in the federal courts to restrain a Pennsylvania

beneficial association from using the name of the Austria-Hungarian emperor as a part of its corporate name, and his portrait as a part of its advertising literature, for the false and fraudulent purpose of inducing subjects of the emperor resident in the United States to believe that the association is conducted under the customs of their home country, and that their emperor was identified with and a patron thereof. *Von Thodorovich v. Franz Josef Beneficial Assoc.*, (1907) 154 Fed. 911.

### Vol. VII, p. 427, art. I.

**Forgery.**—This article authorizing extradition of persons charged with forgery or utterance of forged papers was applicable where it appeared that written instruments had been falsely uttered by accused for fraud

and deceit, and that the instruments were of such a description that they might defraud or deceive if issued with such intent. *Ex p. Zentner*, (1910) 188 Fed. 344.



## Vol. VII, p. 479, art. VI.

**Effect of subsequent treaties.**—The treaty with China of 1868, as amended by the treaty of 1880, was in part suspended by the terms of the treaty of 1894 for a period of ten years, at the end of which time (China hav-

ing given notice of its final termination), the treaty obligations between the United States and that empire were the same as they were immediately before the taking effect of that treaty. (1904) 25 Op. Atty.-Gen. 137.

## Vol. VII, p. 484, art. II.

The "additional period" of one year provided by this article, beyond the period in which a registered Chinese laborer is required to return to this country, is only for

such time as the disability therein mentioned continues, the extreme limit of such extension under any circumstances being one year. (1903) 25 Op. Atty.-Gen. 48.

## Vol. VII, p. 518, art. II.

**Time of taking effect of treaty.**—The treaty between Cuba and the United States, signed Dec. 11, 1902, did not go into effect until Dec. 27, 1903, the date proclaimed by the President, and imports from Cuba entered prior to that date were not entitled to the twenty per cent. reduction provided

for therein from the duties imposed by Tariff Act July 24, 1897, ch. 11, 30 Stat. L. 151, 2 Fed. Stat. Annot. 391. *M. J. Dalton Co. v. U. S.*, (1907) 151 Fed. 143; *U. S. v. M. J. Dalton Co.*, (1907) 151 Fed. 144. *Contra Franklin Sugar Refining Co. v. U. S.*, (1906) 144 Fed. 563.

## Vol. VII, p. 519, art. VIII.

**"Other countries"**—**Philippine Islands.**—The Philippine Islands are not "another country" within the meaning of the provision of this article that the rates of duty granted to Cuba by that treaty, being a reduction of twenty per cent. from the rates prescribed by the Tariff Act of July 24, 1897,

30 Stat. L. 151, ch. 11, 2 Fed. Stat. Annot. 391, or any tariff laws subsequently enacted, shall continue preferential in respect to all like imports from other countries. *Faber v. U. S.*, (1911) 221 U. S. 649, 31 S. Ct. 659, 55 U. S. (L. ed.) 897.

## Vol. VII, p. 560, art. XIII.

**Extent of powers conferred on consuls.**—This article, which gives the consular officers of each country exclusive power to determine differences between the captains and crews of vessels of their own nation, and prohibits the courts of the other country from interfering therein, does not expressly or by implication grant privileges or confer powers which exempt a German vessel employing seamen in a port of this country from the obligation to observe the restrictive provisions of section

24 of the Act of Dec. 21, 1898, ch. 28, 30 Stat. L. 763, 6 Fed. Stat. Annot. 871. *The Neck*, (1905) 138 Fed. 144.

**Jurisdiction of admiralty courts.**—This article does not deprive the admiralty courts of the United States of jurisdiction to determine the rights of an American seaman who enters and leaves the service of a German vessel within this country. *The Neck*, (1905) 138 Fed. 144; *The Baker*, (1907) 157 Fed. 485.

## Vol. VII, p. 576, article the second.

**State pilotage laws.**—*Olsen v. Smith*, (1904) 195 U. S. 332, 25 S. Ct. 52, 49 U. S. (L. ed.) 224, affirming the case set out in the original note.

## Vol. VII, p. 584, art. X.

**Sufficiency of complaint.**—Under this article a complaint for the arrest and examination of an alleged offender is not required to set out the offense with the particularity of an indictment, but is sufficient if it conforms to the requirements of a preliminary com-

plaint under the local law where the accused is found. *In re Herskovitz*, (1901) 136 Fed. 713.

For other notes, see under this title, vol. 7, p. 604, art. III.

## Vol. VII, p. 603, art. I, par. 4.

**Participation in fraud by agent or trustee.**—Persons surrendered by Canada to the United States, under paragraphs 4 and 10 of

this article, to be tried for the crime of "participation in fraud by an agent or trustee," were tried for such crime where the indict-

ment charged them with conspiracy with a disbursing officer of the government to defraud the United States by presenting false and fraudulent claims to such officer and by his allowance and payment of the same from public money in his hands, the acts and transactions charged and proved before the extradition commissioner and under the indictment being the same. *Greene v. U. S.*, (C. C. A. 1907) 154 Fed. 401.

**Description of offense.**—An indictment charging a conspiracy to defraud the United

States, between an officer and agent of the government and his codefendants, which sets out facts showing a corrupt agreement between the defendants and overt acts by means of which the purpose of such agreement was effected and the government defrauded, charges fraud by an agent and participation therein by the other defendants, within the meaning of clauses 4 and 10 of this article, and is sufficient to warrant their extradition for trial thereunder. *U. S. v. Greene*, (1906) 146 Fed. 766.

### Vol. VII, p. 604, art. III.

**Trial for offense committed after extradition.**—Immunity from trial for offense committed by a person after his extradition, until he has been afforded an opportunity to return to the country whence he was extradited, was not given by the provisions of the treaties with Great Britain of Aug. 9, 1842, and July 12, 1889. *Collins v. O'Neil*, (1909) 214 U. S. 113, 29 S. Ct. 575, 53 U. S. (L. ed.) 933 (*affirming* (1907) 151 Cal. 340, 90 Pac. 827, 91 Pac. 397), wherein the court said: "The question then is, Does either the treaty or convention, by express provision or by inference, provide for a return of the criminal to the surrendering country after his surrender, and after a subsequent commission of a crime in the country to which he was surrendered? To ask the question is to answer it. The plaintiff in error contends for the treaty right to leave the country, notwithstanding his commission of the subsequent crime. This we cannot assent to. It is impossible to conceive of representatives of two civilized countries solemnly entering into a treaty of extradition, and therein providing that a criminal surrendered according to demand, for a crime that he has committed, if, subsequently to his surrender, he is guilty of murder or treason or other crime, is nevertheless to have the right guaranteed to him to return unmolested to the country which surrendered him. We can imagine no country, by treaty, as desirous of exacting such a condition of surrender, or any country as willing to accept it. When a treaty or statute contains a provision that the party surrendered shall be tried for no other offense until he has had an opportunity to leave the country, the meaning of such a provision is perfectly plain, and must receive a reasonable and sensible construction. The party proceeded against must not be tried for any other offense existing at the time when he was extradited (whether, at the time of such extradition, it had or had not been discovered), until he shall have had a reasonable time to return to the country from which he was taken, after his trial or other termination of the proceeding. That such privilege should be accorded to one who commits a

crime after his surrender to a demanding government lacks all semblance of reason or sense."

**Punishment under prior conviction of other offense than that for which extradited.**—The omission of the words "or be punished" from the provision of this article that no person extradited "shall be triable or be tried" for any crime or offense committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had opportunity of returning to the country from which he was surrendered, does not justify the imprisonment, upon a former conviction for another and different offense, of a person extradited from Canada for an offense against the United States, until he has had an opportunity to return to Canada—especially where extradition had been refused for the other offense, since this omission is inadequate to overcome the positive provisions of R. S. secs. 5272, 5275, 3 Fed. Stat. Annot. 77, 78, and the otherwise manifest scope and object of the treaty, and the earlier Ashburton treaty of 1842, 7 Fed. Stat. Annot. 582, which are to limit imprisonment as well as the trial to the crime for which extradition has been demanded and granted. *Johnson v. Browne*, (1907) 205 U. S. 309, 27 S. Ct. 539, 51 U. S. (L. ed.) 816.

**Prosecution for subsequent offense before trial for offense for which extradited.**—An extradited person is given no right to have the trial of the offense for which he was extradited brought to a conclusion before he can be tried for an offense subsequently committed by the provisions of the treaties with Great Britain of Aug. 9, 1842, and July 12, 1889, under which he is entitled to a reasonable time to return to the country whence he was extradited before he can be tried for another offense committed prior to his extradition. *Collins v. O'Neil*, (1909) 214 U. S. 113, 29 S. Ct. 575, 53 U. S. (L. ed.) 933, *affirming* (1907) 151 Cal. 340, 90 Pac. 827, 91 Pac. 397.

**For other notes**, see under this title, vol. 7, p. 584, art. X.

### Vol. VII, p. 654, art. I.

**Judicial determination of treaty.**—In *Ex p. Charlton*, (1911) 185 Fed. 880, it was held that the court may not declare that this

treaty between the United States and Italy is abrogated merely because Italy refuses to surrender its subjects committing crimes in

the United States and then fleeing to Italy, where the United States has dealt with the treaty as subsisting, and has honored the requisition of the Italian government for the surrender of its citizens.

**Sufficiency of evidence.**—This article which provides for extradition from one country to the other of persons charged with crime in the demanding country, "provided that this shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed," does not warrant the return to Italy of a person there charged with murder, where the only

evidence presented of his connection with the offense is hearsay. *Ex p. Fudera*, (1908) 162 Fed. 591.

**Citizens and subjects of contracting parties.**—The word "persons" in this treaty, providing for the surrender of persons charged with enumerated crimes, is sufficiently broad to embrace citizens and subjects of the contracting parties, and a citizen of the United States who while in Italy commits an offense, and who then flees to the United States, is within the treaty and may be extradited thereunder, though Italy has always construed the word so as not to include its citizens and subjects. *Ex p. Charlton*, (1911) 185 Fed. 880.

### Vol. VII, p. 654, art. II, par. VII.

**Necessary proof.**—To warrant the extradition of a person to Italy under this section, which provides for the extradition of persons charged with "the embezzlement of public moneys committed within the jurisdiction of either party by public officers or depositors," where the accused was charged

with having as treasurer of a hospital embezzled its funds, it was held that the proof must show that the hospital was a public institution, that the accused, as its treasurer, was a public officer or depositor, and that the money taken was public money. *Ex p. Ronchi*, (1908) 164 Fed. 288.

### Vol. VII, p. 656, art. III.

**Construction.**—This article provides that the citizens of each of the contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed on the natives, and article 23 declares that the citizens of each party shall have free access to the courts in order to maintain and defend their own rights without any other conditions, restrictions, or taxes than such as are imposed on the natives, etc. It has been held that such sections do not create in Italian subjects not resident in the United States any new or substantial rights of person or property to be enforced in the United States; their purpose, so far as they con-

cern rights of person or property of non-resident Italians, being limited to the prevention of invidious discriminations in favor of citizens of the United States and against subjects of Italy, with respect to the enjoyment or enforcement in the United States of privileges and rights of person and property, arising and existing wholly independently of such provisions. *Fulco v. Schuylkill Stone Co.*, (C. C. A. 1909) 169 Fed. 98.

This article does not require a state to give the nonresident alien relatives of an Italian subject a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety. *Maiorano v. Baltimore, etc., R. Co.*, (1909) 213 U. S. 268, 29 S. Ct. 424, 53 U. S. (L. ed.) 792.

### Vol. VII, p. 659, art. XXIII.

**Construction.**—See under this title, vol. 7, p. 656, art. III.

### Vol. VII, p. 664, art. I.

**Citizens and subjects of contracting parties.**—See under this title, vol. 7, p. 654, art. I.

### Vol. VII, p. 749, art. II.

**Failure to define exact boundary.**—Failure to define the exact boundary of the Isthmian or Panama canal zone in this treaty with the Republic of Panama, does not affect the title of the United States, where description is sufficient for identification, and the boundaries have been practically identified by the concurrent action of the two nations alone interested. *Wilson v. Shaw*, (1907) 204 U. S. 24, 27 S. Ct. 233, 51 U. S. (L. ed.) 351.

**Failure to use technical terms of conveyancing.**—The title of the United States to the Isthmian or Panama canal zone under this treaty is no less perfect because of the omission from that treaty of some of the technical terms used in ordinary conveyances of real estate. *Wilson v. Shaw*, (1907) 204 U. S. 24, 27 S. Ct. 233, 51 U. S. (L. ed.) 351.

## Vol. VII, p. 768, art. I.

**Right of alien creditors.**—The right of citizens of Prussia under this treaty to attend to their affairs in the United States, and for that purpose to enjoy the same security and protection as natives in the country wherein they reside, is not violated by the refusal of a state court, on grounds of public policy, to apply the doctrine of comity so as to subject by attachment, to the payment of an indebtedness due a German corporation

from a German subject, a fund within the state to which one of its own citizens asserts a claim, where the effect of judgment in favor of the corporation would be to remove the fund to a foreign country, there to be administered in favor of the foreign creditors. *Disconto Gesellschaft v. Umbreit*, (1908) 206 U. S. 570, 28 S. Ct. 337, 52 U. S. (L. ed.) 625.

## Vol. VII, p. 778, art. IX.

**Proceedings for surrender of deserter — right to proceeds of forfeited recognizance.**—In *Tucker v. U. S.*, (C. C. A. 1907) 157 Fed. 386, it appeared that on demand of a Russian vice-consul process was issued by a United States commissioner, upon which a deserter from a Russian naval vessel was arrested and detained in prison for surrender to the vice-consul or master of the vessel, in accordance with the requirement of article 9 of this treaty, which provides that such assistance shall be rendered by either country to the other in such cases on proper demand and at the cost of the party making the demand. The person so held was discharged on a writ of habeas corpus by the District Court, on the ground that he was not a deserter within

the meaning of the treaty, but, on an appeal being taken, such court required him to enter into a recognizance with a surety to appear and abide the judgment of the higher court. The judgment of the District Court was finally reversed by the Supreme Court, and, the defendant failing to appear, suit was brought by the United States on the recognizance, and the amount of the penalty therein was paid into court by the surety. It was held that the recognizance was not taken for the benefit of the vice-consul of the Russian government, and that the court had no power under the treaty or any rule of comity to award the amount recovered thereon to him in reimbursement for costs expended in the proceedings.

## Vol. VII, p. 815, art. III.

**Obligations of reincorporated municipality.**—The present city of Manila, reincorporated by the Philippine Commission with substantially the same municipal powers, area, and inhabitants as the Spanish municipality of the same name, is liable upon mu-

nicipal obligations incurred prior to the cession of the Philippine Islands by the treaty of Paris of Dec. 10, 1898, to the United States. *Vilas v. Manila*, (1911) 220 U. S. 345, 31 S. Ct. 416, 55 U. S. (L. ed.) 491.

## Vol. VII, p. 817, art. VIII.

**Public property belonging to the city of Manila as a municipal corporation cannot be regarded as having passed to the United States under the cession by Spain of the Philippine Islands for a cash consideration, under the treaty of Paris, of all "buildings, wharves, barracks, forts, structures, public highways, and other immovable property which, in conformity with law, belong to the public domain, and as such belongs to the Crown of Spain," especially in view of the further stipulation protecting and safeguarding the property and property rights of municipal corporations precisely as were those individuals.** *Vilas v. Manila*, (1911) 220 U. S. 345, 31 S. Ct. 416, 55 U. S. (L. ed.) 491.

**Office of solicitor of the courts of first instance.**—The protection accorded to the property or rights of private individuals by this treaty does not extend to the office of solicitor of the courts of first instance of the capital of Porto Rico, lawfully purchased in perpetuity, prior to the occupancy of Porto Rico by the military authorities of the United States, and the cession of that island to the

United States. *Alvarez y Sanchez v. U. S.*, (1910) 216 U. S. 167, 30 S. Ct. 361, 54 U. S. (L. ed.) 432.

**An hereditary franchise, granted by the Spanish Crown and appurtenant to the office of "alguacil mayor" of Havana, giving the exclusive right of slaughtering cattle in the city of Havana, was held to constitute private property, within the protection of this treaty, of which the owner could not lawfully be deprived without compensation by the military governor.** *O'Reilly de Camara v. Brooke*, (1905) 135 Fed. 384.

**The Roman Catholic church in Porto Rico must be regarded as a legal personality, with capacity to sue and to take and hold property, in view of the law and history of the Roman Empire, of Spain, and Porto Rico down to the time of the cession to the United States, and of the recognition accorded to it as an ecclesiastical body by this treaty, and by the law of nations.** *Ponce v. Roman Catholic Apostolic Church*, (1908) 210 U. S. 296, 28 S. Ct. 737, 52 U. S. (L. ed.) 1068.

Vol. VII, p. 834, art. XIII.

**Jurisdiction of courts taken away.** — In *Ex p. Anderson*, (1910) 184 Fed. 114, the second paragraph of this article was held to govern in all matters of difference between the captain of a Norwegian vessel lying in a port of the United States, or the officer then in command of the vessel, and a member of the crew, relating to a matter of the ship's discipline, whether the occurrences complained

of took place on the vessel or on the wharf at which she lay, and that where all parties concerned were citizens of Norway, and the affair was not of such seriousness as to disturb the public peace, the local courts were without jurisdiction to arrest and detain officers of the ship on warrants issued at the instance of a seaman whether before or after his discharge from the vessel.

Vol. VII, p. 875, art. 4 bis.

**Effect of treaty.** — By the convention concluded at Brussels Dec. 14, 1900, by the International Conference for the Protection of Industrial Property, at which the United States was represented, it was among other things ordained: "Art. 4 bis. Patents applied for in the different contracting states by persons admitted to the benefit of the convention under the terms of articles 2 and 3, shall be independent of the patents obtained for the same invention in the other states, adherents or nonadherents to the Union. This provision shall apply to patents existing at the time of its going into effect. The same rule applies in the case of adhesion of new states to patents already existing on

both sides at the time of the adhesion." This convention was ratified by the Senate March 7, 1901, and proclaimed by the President to go into effect Sept. 14, 1902, 32 Stat. L. 1936. It has been held that such treaty was self-executing, and the effect of its ratification was a complete doing away with the interdependence of foreign and domestic patents, and of the limitation imposed on the term of domestic patents for inventions previously patented in foreign countries by R. S. sec. 4887, 5 Fed. Stat. Annot. 468, prior to its amendment in 1897. *Hennebique Constr. Co. v. Myers*, (C. C. A. 1909) 172 Fed. 869.

## WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

Vol. VII, p. 960, sec. 1117.

A minor cannot lawfully be enlisted in any branch of the military or naval service without the consent of his parents, and one who has so enlisted by misrepresenting his age will be discharged by writ of habeas corpus at suit of his parents. *Ex p. Houghton*, (1904) 129 Fed. 239.

In *Ex p. Lewkowitz*, (1908) 163 Fed. 646, it was said: "It is well settled that an enlistment in the army by a minor without his parents' consent is valid as to the minor, although voidable, under section 1117 of the U. S. R. S., on the application of the parent. *In re Morrissey*, (1890) 137 U. S. 157, 11 S. Ct. 57, 34 U. S. (L. ed.) 644; *In re Miller*, (1902) 114 Fed. 838, 52 C. C. A. 472. As the enlistment is valid as to the minor, any military offense committed by him after or in connection with his enlistment may be punished; and the fact that he enlisted without his parents' consent, or that, after the military authorities have instituted proceedings against him, his parent has instituted legal proceedings for his release, does not deprive the military authorities of the power

to punish. *In re Scott*, (1906) 144 Fed. 79, 75 C. C. A. 237; *Moore v. U. S.*, (C. C. A. 1908) 159 Fed. 701; *In re Dowd*, (1898) 90 Fed. 718; *In re Carver*, (1906) 142 Fed. 623."

The marine corps of the United States is not a part of the navy, and enlistments therein are not governed by the statutes relating to enlistments in the navy, but by regulations prescribed by the Secretary of the Navy, under whose government and control such corps is primarily placed; and such officer, having prescribed in the published regulations of his department that "the regulations for the recruiting service of the army shall be applied to the recruiting service of the marine corps, as far as practicable," the enlistment of minors therein is governed by the statutory provisions relating to army enlistments, and no person under the age of twenty-one years can lawfully enlist without the consent of his parents or guardians, as required by this section. *McCalla v. Facet*, (C. C. A. 1906) 144 Fed. 61.

## Vol. VII, p. 998, sec. 3.

Errors and injustice done in the proceedings before the examining board convened under the authority of this section, which resulted in the discharge of an officer with one year's pay, by an order made by the President in the exercise of his reserved power to review the proceedings and decisions of such board, cannot be corrected by the courts on certiorari. *Reaves v. Ainsworth*, (1911) 219 U. S. 296, 31 S. Ct. 230, 55 U. S. (L. ed.) 225.

Due process of law. — A proceeding under this section which resulted in the discharge of an officer with one year's pay, by order of

the President, was not had without jurisdiction, and hence without due process of law, because the board had previously made an order that such officer was then physically incapacitated for service from disability contracted in line of duty, but had a reasonable hope of recovery, and that he could not with safety proceed with his examination, since such order was merely provisional, and not a final decision, which, under the law, would have entitled him to be retired with three-quarters pay for life. *Reaves v. Ainsworth*, (1911) 219 U. S. 296, 31 S. Ct. 230, 55 U. S. (L. ed.) 225.

## Vol. VII, p. 1013, sec. 1229.

A cadet in the United States Military Academy at West Point is not an officer in the army, within the meaning of this section. *Hartigan v. U. S.*, (1905) 198 U. S. 169, 25 S. Ct. 204, 49 U. S. (L. ed.) 434.

The act of the governor of a state in relieving an officer of the National Guard of his command, does not constitute a removal of the officer from his office, within the meaning of this section. *State v. Jelks*, (1903) 138 Ala. 115, 35 So. 60.

## Vol. VII, p. 1017, sec. 1242.

This section is not a criminal statute. It simply prohibits the disposition of the military stores of the United States, except as they are issued to soldiers in the service of the United States. *U. S. v. Smith*, (1907) 156 Fed. 859. See also *Ontai v. U. S.*, (C. C. A. 1911) 188 Fed. 310.

Retention of title by government. — This section, taken in connection with section 3748, makes it clear that in supplying the recruit with an equipment suitable and necessary for

the discharge of his military duties the government has been very careful to retain title to the same. It would seem to be public property, whether it remains in depot or is put in the possession of the individual soldier. The circumstance that, when his term expires, he is allowed to retain such articles of clothing as he has then in use, does not change the character of his holding while he is in the service of the government. *Lobosco v. U. S.*, (C. C. A. 1911) 183 Fed. 742.

## Vol. VII, p. 1038, sec. 1262.

The "pay proper" on which the percentage of increased pay to an army officer serving in the Philippine Islands is to be computed, under Acts of May 26, 1900, and March 2, 1901, includes the longevity pay to

which he is entitled under this section, as well as the minimum pay prescribed by section 1261. *U. S. v. Mills*, (1905) 197 U. S. 223, 25 S. Ct. 434, 49 U. S. (L. ed.) 732.

## Vol. VII, p. 1070, sec. 1.

A constable may arrest a deserter in any part of the state without a warrant. *State v. Pritchett*, (1909) 219 Mo. 696, 119 S. W. 386.

## Vol. VII, p. 1073, sec. 1. [Act of March 2, 1901.]

Refusal to answer on advice of counsel. — Where a civilian subpoenaed was advised by competent counsel that certain questions asked of him with reference to a publication concerning an army rifle contest, if answered, might subject him to a civil or criminal prosecution for libel, and for this reason he refused to answer on advice of counsel, and not from any evil intent or with legal malice,

his refusal did not constitute a violation of such Act. *U. S. v. Praeger*, (1907) 149 Fed. 474.

Waiver of jury trial. — In a proceeding to punish a civilian for refusal to testify before a general military court-martial under this Act, the parties may waive a jury by written stipulation. *U. S. v. Praeger*, (1907) 149 Fed. 474.

# WATERS.

Vol. VII, p. 1090, sec. 2339.

**Reason for statute.**—This and the following section (R. S. secs. 2339 and 2340) do not contemplate that the privilege of appropriating water or the right to occupy outside land for the purpose of its conveyance to the land of the appropriator should be unrestricted. The reason for the law was the necessity for the use of water upon the land which existed in the sections of country to which its provisions were intended to be applicable. Those sections, without the right to use water upon them, taken from the public domain, would have remained a wilderness. Where the water must be brought from a distance, unless the appropriator could convey it over the intervening land, the privilege would be useless. The rights recognized by the statute therefore spring from necessity, and the necessity is common to all the settlers in the neighborhood; so that, in order that others may not suffer injury, the rights of the appropriator, both as to water and right of way, are limited by his needs. *Bogolino v. Giorgetta*, (1904) 20 Colo. App. 338, 78 Pac. 612.

**Who may appropriate.**—One who completes a ditch across public lands for irrigation purposes, and who is in possession thereof at the time another makes his homestead entry on the lands, acquires a right of way across the lands, and the homesteader takes his homestead subject to such right of way. *Cottonwood Ditch Co. v. Thom*, (1909) 39 Mont. 115, 101 Pac. 825.

An appropriation of water by "squatter's right," not recognized by the laws of the state, the decisions of its courts, nor the general, well-recognized or widely respected custom therein, does not, by virtue of this section, give to the settler who has appropriated water in that way for a less period than ten years an exclusive right as against other settlers upon the same stream. *Meng v. Coffee*, (1903) 67 Neb. 500, 93 N. W. 713.

But a settler who so appropriates water, and afterwards duly enters and receives a patent to the land from the government, may, as against other patentees from the government upon the same stream, count the time during which he appropriated the water as a mere squatter in making out the statutory period of prescription. *Meng v. Coffee*, (1903) 67 Neb. 500, 93 N. W. 713.

**What waters may be appropriated.**—This section does not authorize one person to go on the private property of another to make an appropriation except by condemnation proceedings; the general government having merely authorized the prospective appropriator to go on the public domain for that pur-

pose. *Prentice v. McKay*, (1909) 38 Mont. 114, 98 Pac. 1081.

It can make no difference that the waters collecting and forming what is known as a spring are seepage and percolating waters, rather than from a well-defined subterranean stream, so long as such waters gravitate to and collect at a certain and definite point and there constitute a volume of water known and designated as a spring. In either case such waters found upon the public domain, when subject to location and appropriation for any useful or beneficial purposes under the state statutes, are protected and reserved from future disposition under this section. *Le Quime v. Chambers*, (1908) 15 Idaho 405, 98 Pac. 415.

As long as land belongs to the United States as a part of the public domain, the water flowing over the same in nonnavigable streams is subject to appropriation for the purposes recognized and acknowledged by the local laws, customs, or decisions of the courts; and the mere fact that a stream traversing such public lands may border at some point or for some space on a specific territory reserved by the government for some particular governmental use or purpose will not of itself destroy the public character of its waters, which remain subject to appropriation the same as though the reserve had not been created, unless by the creation thereof there was a competent reservation of the waters also for use in connection therewith. *U. S. v. Conrad Invest. Co.*, (1907) 156 Fed. 123.

In an action involving an alleged appropriation of certain springs, it appeared that certain so-called "springs" occupied a space of about one-half an acre, and that during a portion of the year about ten acres were marshy, and a witness testified that the springs rested right on the brow of a drop-off; that there was quite a bit of water standing around in the springs, and it looked as if there might be five or six springs; but the evidence showed that there was no stream leading into them, and that the water therefrom formed no channel or stream in leaving, though during a portion of the wet season some of the water would flow down for a short distance on the side hill, where it would disappear in the soil. It was held that the pools of water were not live springs, and that they constituted nothing more than a bog occasioned by seepage water. *Dickey v. Madox*, (1908) 48 Wash. 411, 93 Pac. 1090.

**Reserved lands.**—The creation by the government of an Indian reservation on the public lands bordering on a nonnavigable stream operates as a reservation of so much

of the waters of such stream as may be required by the proper needs of the government for use on the reservation for the benefit of the Indians thereon; but any surplus remains subject to appropriation by others in accordance with the local laws and customs, and such right includes the right to erect necessary dams, although they may rest in part on the lands of the reservation. *U. S. v. Conrad Invest. Co.*, (1907) 156 Fed. 123.

**Priority of appropriation.** — The broad principle which underlies the relative rights of appropriators from the same stream is, that whoever is first in time is first in right, and the fact that the stream the waters of which are appropriated is interstate and nonnavigable does not affect the rule. *Bean v. Morris*, (C. C. A. 1908) 159 Fed. 651.

One who by prior appropriation has acquired a right to the waters of a stream flowing through the public lands, for irrigation purposes, is protected in such right, as against subsequent appropriators, although the latter withdrew the water within a different state. *Morris v. Bean*, (1903) 123 Fed. 618.

One who has acquired a right to the use of water from a stream flowing through the public land, for domestic or irrigation purposes, in accordance with the laws of the state, is protected therein; and the jurisdiction of a federal court to determine the conflicting rights of parties is not affected by the fact that their lands and their points of diversion of the water are in different states. *Anderson v. Bassman*, (1905) 140 Fed. 14.

Where the water rights under which plaintiffs claimed title were located prior to any settlement on the lands by defendant's grantors, the plaintiffs are entitled to priority. *Driskill v. Rebbe*, (1908) 22 S. D. 242, 117 N. W. 135.

Where plaintiff posted notices of appropriation of water flowing from certain artesian wells on the public domain, and thereafter proceeded within sixty days to construct her ditches, etc., which work she prosecuted continuously until enjoined, her rights to the water flowing from the wells were prior to those acquired by a locator of the land as a homestead after the posting of the notices. *De Wolfskill v. Smith*, (1907) 5 Cal. App. 175, 89 Pac. 1001.

Where L. enters upon a tract of land claimed and held by I. as a homestead entry, and appropriates and diverts the waters of a spring thereon, and conveys the same by means of a pipe to other lands, and thereafter I.'s homestead entry is canceled and C. enters the land as a homestead, the latter takes the same subject to the burden and servitude of L.'s water appropriation and easement, and under the statute of this state and this section such water right and easement will be protected by the courts. *Le Quime v. Chambers*, (1908) 15 Idaho 405, 98 Pac. 415.

Where an irrigation company built its canal on government land after plaintiff had filed his homestead entry on it, but before patent was issued to him, the patent was not subject to the rights of the company. *Atkin-*

*son v. Washington Irrigation Co.*, (1906) 44 Wash. 75, 86 Pac. 1123.

An adverse use of the waters of a stream to give a right to such use by prescription as against another user must have been to the detriment of the latter, and continued with his acquiescence during the full period of the statute of limitations under a claim of right. So long as there was such quantity of water in a stream that the use of a portion of it by defendants did not deprive plaintiffs of the quantity to which they were entitled, or so long as, when the quantity became insufficient, plaintiffs forcibly prevented its use by defendants, the statute did not run against an action by plaintiffs to establish a priority of right. *Anderson v. Bassman*, (1905) 140 Fed. 14.

**Rights acquired by appropriation.** — The rights which one may acquire in government land for conducting and storing water, and subject to which the patentee shall take the land, spring from necessity only. *Boglino v. Giorgetta*, (1904) 20 Colo. App. 338, 78 Pac. 612.

This section does not create rights, but is a recognition by Congress of a pre-existing right of possession, constituting a valid claim to its continuance. *Mohl v. Lamar Canal Co.*, (1904) 128 Fed. 776.

Vested rights in public lands to a right of way for ditches, canals, or reservoirs, for water purposes, are not acquired until the actual completion of the work, so that the water can be applied to beneficial use. *U. S. v. Rickey Land, etc., Co.*, (1908) 164 Fed. 496.

One who has constructed upon the vacant public lands of the United States a system of reservoirs and ditches for the distribution of water appropriated by him for irrigation purposes, and has secured the approval of his plan and appropriation by the state board of irrigation, and was using his said reservoirs and ditches for the storage and distribution of such waters before said lands are entered, has a vested and accrued right within the meaning of sections 2339 and 2340 of the Revised Statutes of the United States. *Rasmussen v. Blust*, (1909) 85 Neb. 198, 122 N. W. 862.

Rights acquired under this section are not forfeited by failure to comply with the Act of March 3, 1891, secs. 18, 20, 6 Fed. Stat. Annot. 508-510, granting the right of way to canal and ditch companies for irrigation purposes. *Cottonwood Ditch Co. v. Thom*, (1909) 39 Mont. 121, 104 Pac. 281.

The federal Supreme Court will assume, in the absence of state legislation to the contrary, that prior appropriators of the waters of an interstate stream at a point in Wyoming could acquire rights as against junior appropriators of the waters of the same stream in Montana, enforceable in the latter state. *Bean v. Morris*, (1911) 221 U. S. 485, 31 S. Ct. 703, 55 U. S. (L. ed.) 821.

Where defendants had acquired a right of way for an irrigation ditch across certain land, when it was unoccupied public land of the United States, as authorized by this statute, they had no right by reason of such case-



ment, after plaintiff acquired title to the land and without his consent, to construct an additional ditch on a different line varying one to twenty feet distant from the line of the old ditch. *Vestal v. Young*, (1905) 147 Cal. 715, 82 Pac. 381.

**Extent and purposes of appropriation.**—Appropriation of considerable quantities of water in seasons when that may be done without sensible injury to lower owners does not give a prescriptive right to divert the whole stream in dry seasons. *Meng v. Coffee*, (1903) 67 Neb. 500, 93 N. W. 713.

**Diversion in another state.**—In California the common-law rule of riparian rights, and not that of prior appropriation, governs the right to use water from a stream for purposes of irrigation, each riparian owner having the right to make a reasonable use of a reasonable quantity of water on his land. In

Nevada the rule of priority of appropriation governs without reference to whether or not the lands are riparian. Riparian owners of lands on a stream in California and appropriators of waters for irrigation purposes from the same stream lower down in Nevada are equally protected in the rights given them by the laws of the respective states, both subject to the limitation that a reasonable quantity of water only for the beneficial use to which it was devoted should be taken; that it should be economically distributed, and the surplus unused returned to the stream; and where the quantity of water in the stream was at times insufficient even for the users in California they would be restrained from diverting water from the stream during such part of the time as would give to the lower users in Nevada their just share. *Anderson v. Basaman*, (1905) 140 Fed. 14.

### Vol. VII, p. 1098, sec. 1.

**Condemnation.**—In a proceeding by the United States to condemn land for reservoir purposes under this Act, whether a more feasible plan of irrigation than the one adopted might be devised, or some other site selected for the reservoir, is immaterial; the determination of the proper government authorities being conclusive. *U. S. v. Burley*, (1909) 172 Fed. 615.

**Private land.**—This Act contemplates the irrigation of private as well as government

land. *Burley v. U. S.*, (C. C. A. 1910) 179 Fed. 1.

**State laws.**—This Act not only recognizes the constitution and laws of the state providing for the appropriation of its waters and the reclamation of its arid lands, but it requires that the Secretary of the Interior, in carrying out the provisions of the Act, shall proceed in conformity with such laws. *Burley v. U. S.*, (C. C. A. 1910) 179 Fed. 1.

### Vol. VII, p. 1099, sec. 3.

**Withdrawals.**—This section provides for two classes of withdrawals, and the exception of homestead entry from the second has no application to the first; withdrawals and reservations thereunder being, from the necessity of the case, absolute. *U. S. v. Hanson*, (C. C. A. 1909) 167 Fed. 881.

Withdrawals under the first clause are not

subject to location for mining purposes, being reserved for government use, while lands withdrawn under the second clause are disposed of only for homesteads, and as all lands open to homestead entry are subject to mining location, lands withdrawn under the second clause are so subject. *Loney v. Scott*, (Ore. 1910) 112 Pac. 172.

### Vol. VII, p. 1099, sec. 4.

The secretary may establish rules regulating the use of the withdrawn lands while not needed for the purpose for which they are reserved, and may lease them for grazing and limit the number of animals to be grazed thereon; the revenue derived from the leases going into the reclamation fund provided by the Act. *Clyde v. Cummings*, (1909) 35 Utah 461, 101 Pac. 106.

**Charges.**—The Secretary of the Interior, being authorized to tax and determine the charges, was authorized to divide the same into two parts, one for construction, and the other for maintenance and operation; and hence he was authorized to impose reasonable assessments on land irrigated prior to the time when payment of the major portion of the cost of construction had been made, and

the works passed under management of the owners of the irrigated land. *U. S. v. Cantrall*, (1910) 176 Fed. 949.

Where, by a contract between the United States and landowners tributary to a federal irrigation system, such landowners agreed to pay to the United States the charges duly levied against their lands for the construction and maintenance of the system, they were only liable for such reasonable charges as the government was authorized to collect, proportionate to their share of the cost of maintaining and operating the system, and not such as might be arbitrarily fixed in advance by such secretary or other governmental officer. *U. S. v. Cantrall*, (1910) 176 Fed. 949.

## WITNESSES.

### Vol. VII, p. 1116, sec. 858.

This section was amended by the Act of June 29, 1906, ch. 3608, 34 Stat. L. 618. See 1909 Supp., p. 709, and the annotation thereof, *infra*, this Supplement.

This statute is a remedial one, intended to remove technical disqualification in the common-law rules of evidence and to promote the fair administration of justice, and to be liberally construed. It is a complete abolition of the rule of exclusion under the common law in all of the courts of the United States. By it interested parties, except those named in the proviso, are placed upon a footing of equality with all other witnesses, so that they may testify for themselves and be compelled to testify for others. *Huntington Nat. Bank v. Huntington Distilling Co.*, (1907) 152 Fed. 240.

**Effect of statute.**—This section leaves the witness subject to the common-law rule of having his testimony weighed by the jury in the light of his interest in the case, and to what extent that interest may affect his credibility. *Denver City Tramway Co. v. Norton*, (C. C. A. 1905) 141 Fed. 599.

It does not render a witness incompetent merely because he may have an interest in a question at issue, where he is not a party to the suit. *British, etc., Mortg. Co. v. Worrill*, (1909) 168 Fed. 120.

It makes a party to the suit competent to testify unless the other party is an executor, administrator, or guardian. The courts have no authority to add others to the exception; nor can this be done by state legislation. *Miller v. Steele*, (C. C. A. 1907) 153 Fed. 714.

It has been further held that the competency of parties as witnesses in the federal courts depends upon the Acts of Congress as codified in this section. It is not derived from the statutes of any state, and is not

subject to the condition and qualifications imposed by the state laws, nor is it subject to other exceptions and qualifications imposed by such state laws. *Huntington Nat. Bank v. Huntington Distilling Co.*, (1907) 152 Fed. 240.

**Admissibility of evidence.**—This section relates only to the competency of the witnesses, and not to the admissibility of evidence. *Downs v. Wall*, (C. C. A. 1910) 176 Fed. 657.

This section does not apply to criminal cases tried in the federal courts, where the competency of witnesses is to be determined by the law of the state in which the court is held as it existed when the courts of the United States were established by the Judiciary Act of 1789. *U. S. v. Hughes*, (1892) 175 Fed. 238.

**State laws.**—In a proceeding in a federal court, the competency of a witness to testify to a transaction with a deceased person which is covered by this section is to be governed by this section, and not by the statutes of the state. *Smith v. Au Gres Tp.*, (C. C. A. 1906) 150 Fed. 257.

**Action against legatee.**—This section does not incapacitate a plaintiff from testifying in an action against a legatee for services rendered testator. *Miller v. Steele*, (C. C. A. 1907) 153 Fed. 714.

The proviso of this section applies only to parties to the record, and does not exclude parties interested in a suit but not parties to the record. *British, etc., Mortg. Co. v. Worrill*, (1909) 168 Fed. 120.

A bankrupt's trustee being privy with him, a witness was entitled to testify after the death of the bankrupt to admissions made by the bankrupt concerning his estate while he was yet owner thereof. *Smith v. Au Gres Tp.*, (C. C. A. 1906) 150 Fed. 257.

### Vol. VII, p. 1121, sec. 876.

**Number of witnesses limited.**—It is within the discretion of the trial court to limit the number of defendant's witnesses to be so subpoenaed to four on each particular point named in defendant's *præcipe*. *O'Hara v. U. S.*, (C. C. A. 1904) 129 Fed. 551.

**In criminal cases.**—This section does not authorize either a district judge or a United States commissioner to summon a witness in a criminal case beyond the state

to appear at a preliminary hearing before the commissioner, such hearing not being one of the stages of the case before the court. *U. S. v. Stern*, (1910) 177 Fed. 479.

**Distance.**—The process of the court will not issue to compel a witness to travel a greater distance than 100 miles to attend the trial of a cause. *Blood v. Morrin*, (1905) 140 Fed. 918.

### Vol. VII, p. 1122, sec. 877.

**Number of names on one subpoena.**—The names of as many witnesses in the same cause as convenience of service will permit are to be included in one subpoena, requiring

the witnesses to attend and testify generally, *i. e.*, either before the grand jury or petit jury, or both. *In re Shaw*, (1909) 172 Fed. 520.

## Vol. VII, p. 1127, sec. 850.

**Officers in the military service.**— This section includes officers in the military service, and when the United States recovers a judgment it is entitled to have included therein as costs the necessary expenses of such witnesses in lieu of mileage and *per diem*, and it is immaterial whether the distance traveled was more or less than 100 miles. *U. S. v. National Surety Co.*, (1909) 168 Fed. 314.

**Expenses of government employees.**— The United States, when the prevailing party in a suit in the federal court, is entitled to tax as costs the necessary expenses of a salaried employee taken away from his place of business to attend as a witness for the government, regardless of the distance traveled by him. *U. S. v. Southern Pac. Co.*, (1909) 172 Fed. 909.

## Vol. VII, p. 1128, sec. 4906.

**Subpoena duces tecum.**— To the same effect as the original note. *In re Outcalt*, (1906) 149 Fed. 228.

## 1909 Supp., p. 708, sec. 858.

**Equity suits.**— This statute applies as well to suits in equity as to actions at law. *Rowland v. Biesecker*, (1910) 181 Fed. 128.

**Patent infringement suit by assignee of owner since deceased.**— Under this section construed in connection with the New York statute (Code Civ. Proc. N. Y., sec. 829) it

has been held that the testimony of a defendant in a patent infringement suit brought in that state by an assignee, as to personal transactions between himself and the complainant's assignor, since deceased, is incompetent. *Rowland v. Biesecker*, (C. C. A. 1911) 185 Fed. 515.



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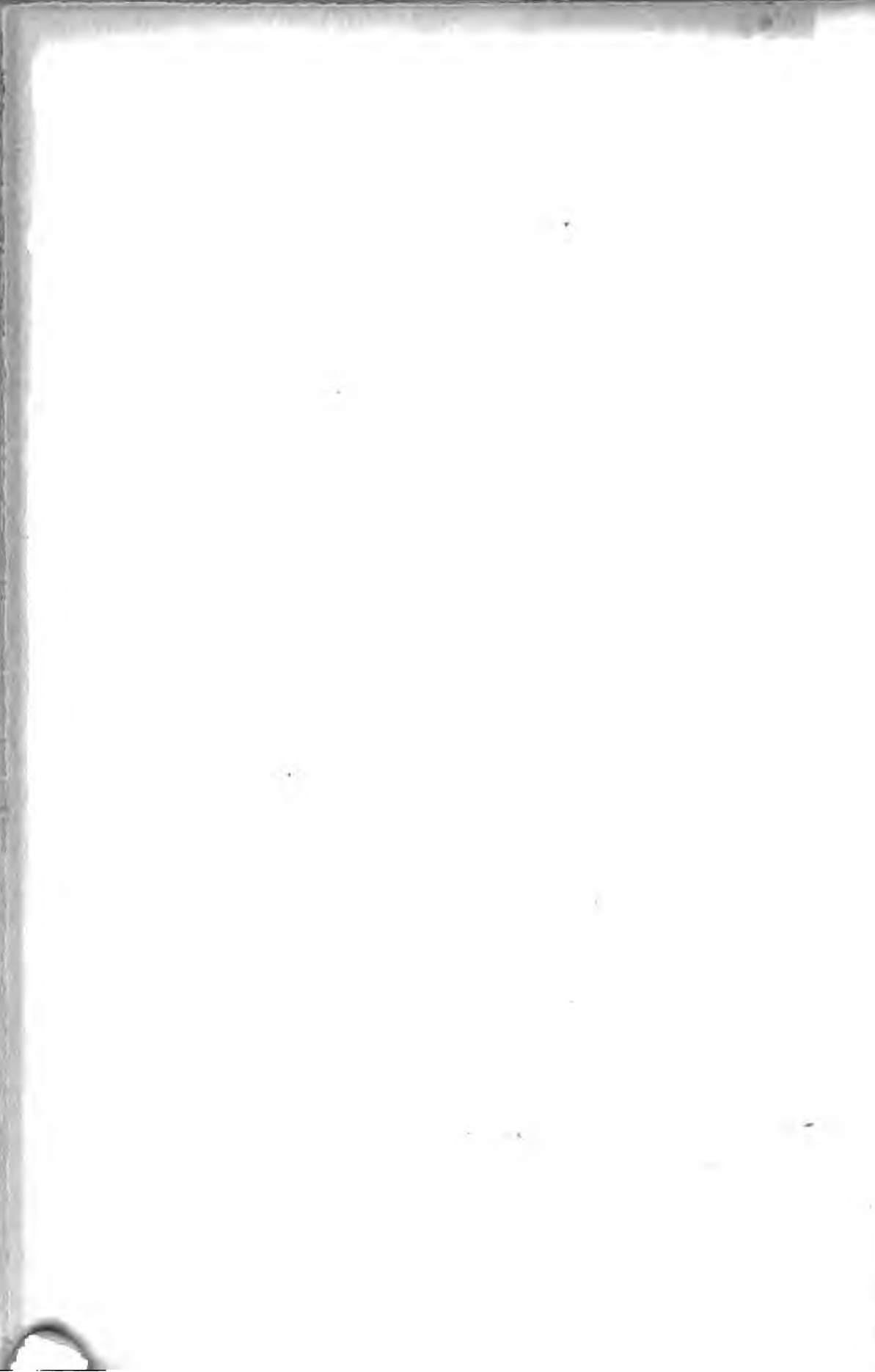
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